

**Gordon v 476 Broadway Realty Corp.**

2014 NY Slip Op 31291(U)

May 19, 2014

Supreme Court, New York County

Docket Number: 103951/12

Judge: Debra A. James

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Plaintiffs are the owners of record of shares of stock and a proprietary lease of apartment 10R in the subject building (lease), located at 476 Broadway, New York, New York. 476 Broadway is the cooperative corporation that owns the building. Defendant Board of Managers of 476 Broadway Condominium (Condo) is the owner of the exterior walls of the building. In response to plaintiffs' complaints of leaks in their apartment, Condo performed a waterproofing project on the exterior of the building at the 10<sup>th</sup> and 11<sup>th</sup> floors. 476 Broadway claims to have paid for 60% of the \$600,000 cost of this project. Plaintiffs refused to pay maintenance and assessments relating to the costs of waterproofing, and, according to defendants, refused 476 Broadway access to their apartment for the purpose of performing water spray testing on the exteriors in order to troubleshoot the leaking problem, and to preserve the warranty for the waterproofing work performed. Defendants contend that, without the testing, the waterproofing project could not be completed. They also contend that as 476 Broadway was denied access, the complained of leaks could not be corroborated.

Plaintiffs aver that defendants' failure to remedy the ongoing leakage problem in their apartment, led them to refuse to make maintenance and other payments.

After such refusal, 476 Broadway commenced a nonpayment proceeding in Housing Court, New York County, Index No. L&T.

79897/11, in which 476 Broadway sought recovery of past due payments, as well as access to the apartment. By Order dated February 27, 2012, the Housing Court granted 476 Broadway's order to show cause to compel plaintiffs to provide it access on February 28, 2012 and on six additional days thereafter in order to perform the water spray testing. However, on May 8, 2012, the Housing Court judge refused to sign an order compelling plaintiffs to provide additional access as of May 14, 2012, ordering that the access issue be determined at

trial on May 23, 2012. This is without prejudice to petitioner raising lack of access issues that have occurred since the court's decision as a defense to a warranty of habitability issues raised by resp[ondents] at trial.

476 Broadway thereafter discontinued the Housing Court proceeding and held a meeting at which the shareholders elected by 94.25% of the votes cast in favor of terminating plaintiffs' tenancy. Such meeting was held in accordance with a notice that 476 Broadway sent to plaintiffs alleging objectionable conduct on plaintiffs' part for denying access. 476 Broadway claims that the eviction accords with the terms of the lease, specifically § 31(f).

Plaintiffs state that 476 Broadway's actions in holding the shareholders' meeting and voting for eviction were motivated by 476 Broadway's frustration in not achieving the total relief it had sought in Housing Court. They contend that they had "cured"

their objectionable conduct and complied with 476 Broadway's demands. Despite their efforts to cooperate with 476 Broadway, plaintiffs state that they were subjected to the shareholders' proceeding which they claim was brought in bad faith and without cause.

Plaintiffs seek declaratory and injunctive relief from the determination of the shareholders' proceeding, i.e. a declaration that termination of plaintiffs' proprietary lease was illegal and an injunction barring 476 Broadway from enforcing the termination. In addition, plaintiffs seek an abatement of maintenance payments made by them to 476 Broadway, and compensation for damages to their personalty arising from the leakage in their apartment and defendants' alleged negligence in its failed efforts to remedy the problem.

In their answer, defendants assert several counterclaims, including an entitlement to judgment of immediate possession of plaintiffs' apartment and a declaratory judgment that 476 Broadway is entitled to payments by plaintiffs with respect to maintenance and assessment costs, as well as damages for fraud and other alleged misconduct on the part of plaintiffs.

476 Broadway moves for summary judgment on its first counterclaim, which seeks a judgment of possession of the subject apartment. 476 Broadway contends that there are no issues of fact precluding the granting of this motion.

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476 Broadway contends that its decision to terminate plaintiffs' lease was proper pursuant to the business judgment rule. 476 Broadway argues that its action was within the scope of its authority. Section 31 (f) of the lease, which concerns special shareholders' meetings, provides that the offending shareholder be given notice of the meeting and an opportunity to be heard. Here, 476 Broadway notified plaintiffs of the meeting and invited them with their counsel to attend the meeting. Pursuant to section 31 (f) of the lease, upon an affirmative vote of 75% or more of the shareholders, a tenancy could be terminated on the ground of objectionable conduct. 476 Broadway states that a vote of over 75% of the shareholders affirmed the termination of plaintiffs' lease on the aforesaid ground.

As the gravamen of the charge of objectionable conduct, 476 Broadway claims that the lease required plaintiffs to provide access sought by defendants and to refrain from engaging in conduct harmful to other tenants. 476 Broadway contends that it made an effort to settle the access dispute between the parties months before it called the shareholders' meeting. It insists that plaintiffs violated the terms of the lease, which required them to provide access to defendants for the water spraying testing. It also insists that plaintiffs' excuses for not providing access were unfounded and that the conditions they demanded in exchange for access were made in bad faith.

476 Broadway maintains that it was only after the shareholders made their decision to terminate the lease that plaintiffs allowed agents of Israel Berger and Associates (Berger), the firm employed to undertake the water testing, to enter plaintiffs' apartment in November 2012. It is undisputed that at that time the firm had total access to the apartment. Berger concluded, after its work was completed, that the leakage problem was caused by plaintiffs as a result of the initial renovation work conducted by plaintiffs during which the waterproofing layer was removed from their apartment walls in 2000. 476 Broadway contends that plaintiffs denied access to the apartment so that the leakage complaints could not be corroborated. 476 Broadway alleges that plaintiffs' persistent and disingenuous refusal to allow access constituted objectionable conduct.

476 Broadway states that the subject decision should be enforced because it was made in order to further the cooperative's business purposes and it was not made in bad faith. 476 Broadway disputes and denies plaintiffs' contentions that the shareholders' meeting was held as retaliation when 476 Broadway failed to obtain the appropriate relief in the Housing Court.

Next, 476 Broadway seeks dismissal of plaintiffs' second, third, fourth, seventh, eighth and ninth affirmative defenses to its counterclaims on the ground that such defenses are pled in a

conclusory manner and are fatally deficient. Plaintiffs' affirmative defenses are: 476 Broadway is not proceeding in good faith and is not entitled to the defense of the business judgment rule (second); the notice of termination was not properly served (third); the shareholders' meeting was not properly noticed (fourth); any damages suffered by defendants are due to the negligence of defendant Condo (seventh); defendants' claims are barred by the statute of limitations (eighth); and plaintiffs are prejudiced by laches (ninth). 476 Broadway asserts that these defenses are insufficient as alleged, and are based, in part, upon information and belief, which violates CPLR 3013 with respect to the requisite particularity of statements in pleadings.

In opposition, plaintiffs argue that there are issues of fact as to the respective conduct of the parties. They contend that the as they did allow defendants access to their apartment, there is no basis for the determination of objectionable conduct on their part. In terms of their cross motion, they seek leave to amend their reply to the counterclaim to add a new affirmative defense, i.e. that any allegedly objectionable conduct has been corrected and that they are entitled to a cure pursuant to section 753 (4) of the Real Property Actions and Proceedings Law (RPAPL). As they complied with defendants' demands for access, plaintiffs assert that there was no reason for 476 Broadway to

hold the special shareholders' meeting. Plaintiffs note that, while courts usually defer to the proceeding and judgments of entities like 476 Broadway under the business judgment rule, courts will make an exception where there is a showing of bad faith. Plaintiffs maintain that through its actions, prior to and during the shareholders' meeting, 476 Broadway has arguably demonstrated bad faith, raising an issue of fact which would preclude summary judgment.

In addition to cross-moving for leave to add its affirmative defense of a "cure," claiming that there is no evidence of prejudice which would prevent such an amendment, plaintiffs move for dismissal of defendants' second, fourth and fifth counterclaims. The second counterclaim seeks an injunction directing plaintiffs to restore a waterproofing layer to the interior of their brick walls. The fourth counterclaims alleges fraud relating to the removal of the layer. The fifth counterclaim alleges equitable estoppel relating to the removal of the layer. Plaintiffs argue that several of the counterclaims are based on allegations that plaintiffs removed the waterproofing layer between 1998 and 2000. They state that these events occurred over six years ago, and, therefore, the counterclaims are barred by the statute of limitations. Moreover, plaintiffs state that defendants cannot rely on the date of discovery exception to the statute of limitations,

because defendants' papers include an affidavit from their superintendent attesting that he witnessed the removal of the waterproofing layer, precluding any claim of being deceived.

Plaintiffs seek dismissal of the first counterclaim for ejection on the ground that it lacks merit. They state that defendants have no right to have the termination of the subject lease enacted.

In reply to plaintiffs' response to its motion, 476 Broadway provides affidavits submitted by Berger in order to confirm that the leakage problem was caused by plaintiffs through their earlier renovation work in their apartment, to wit:

waterproofing coat on the brick...had been removed...[n]o replacement waterproofing layer had been applied. The new finishing materials which had been installed in the renovation designed and overseen by Dean/Wolf in 1999...provided no waterproofing protection to Apartment 10R to replace the materials that had been removed.

Berger completed a written report of its site visits, with similar conclusions, which is dated December 13, 2012 and is attached to the supporting affidavit and affirmation of defendants' original motion papers. 476 Broadway also submits the affidavit of the superintendent who asserts that he observed that the waterproofing layer was being removed and warned plaintiff Anthony Gordon at that time of the renovation that it was improvident to remove the waterproofing protection and that water leaks would occur.

476 Broadway argues that this court cannot grant a "cure " for plaintiffs when they are willfully in default of other lease obligations. 476 Broadway claims that in addition to their denying reasonable access, plaintiffs have failed to replace windows and repair their walls in violation of the lease.

476 Broadway contends that since plaintiffs have not responded to its motion to dismiss most of plaintiffs' affirmative defenses, these defenses should be dismissed. 476 Broadway finally states that the first counterclaim should be granted because the decision to terminate plaintiffs' lease is valid pursuant to the terms of the lease, and that plaintiffs have failed to demonstrate 476 Broadway's bad faith.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." Birnbaum v Hyman, 43 AD3d 374, 375 (1<sup>st</sup> Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].'" People v Grasso, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." Flores v

City of New York, 29 AD3d 356, 358 (1<sup>st</sup> Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." Id.

476 Broadway seeks summary judgment on its counterclaim for holding over by plaintiffs. 476 Broadway seeks to enforce the termination of plaintiffs' lease, arguing that the shareholders' vote to terminate the lease was a legitimate action, as a matter of the business judgment rule. Plaintiffs oppose the vote as a decision based on bad faith.

The Court of Appeals has ruled that "the business judgment rule provides that a court shall defer to a cooperative board's determination 'so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith.'" 40 W. 67<sup>th</sup> St. v Pullman, 100 NY2d 147, 153 (2003), quoting Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538 (1990).

In its papers, 476 Broadway cites 40 W. 67<sup>th</sup> St. v Pullman, where a cooperative corporation called a special shareholders' meeting pursuant to a lease provision which provided for termination of a shareholder's tenancy by a super-majority vote, if the shareholders found that a shareholder engaged in objectionable conduct, making his or her tenancy undesirable.

The Court of Appeals held that application of the business judgment rule was appropriate in order to balance the competing interests of a cooperative's need to protect the interest of the entire co-op community against the potential of abuse by a board's arbitrary decision making. The Court of Appeals concluded that the offending shareholder's objectionable conduct must be proved with competent evidence, and that courts would uphold the decisions of said shareholders in deference to the business judgment rule in the absence of a showing of bad faith.

Courts have likened bad faith to corporate abuse of power through arbitrary and malicious decision making, favoritism and discrimination. See Levandusky 75 NY2d at 536. Plaintiffs refer to retaliation as a prime motive in 476 Broadway's actions against them. When 476 Broadway was unable to obtain relief from the Housing Court, where the eviction of plaintiffs was sought due to nonpayment, plaintiffs allege that 476 Broadway brought about the shareholders' meeting as an end run around that proceeding. Defendants counter that their attorney sent an e-mail to plaintiffs' attorney on February 24, 2012 advising her that upon plaintiffs' continued denial of access to the defendants, the defendants reserved their right to call a special meeting to consider a resolution to terminate the lease, which correspondence was sent prior to both the date that the Housing Court judge directed plaintiffs to provide access and the date

that the same judge declined to sign the show cause order wherein defendants sought to compel plaintiffs to provide additional access. The notice of objectionable conduct issued to plaintiffs on May 11, 2012, which was the subject of the shareholders' meeting, did not cite plaintiffs' nonpayment of maintenance and other costs, but comprised plaintiff's interference in the cooperative's work process, including harassment of workers, along with plaintiffs' alleged failure to provide access to the subject apartment.

Plaintiffs' main defense is that they have reasonably cooperated with 476 Broadway and provided access to the apartment, and were negotiating with 476 Broadway for additional days of access when, on March 27, 2012, 476 Broadway's contractor walked off the premises. Plaintiffs also claim that for the subsequent seven weeks, 476 Broadway made no effort to seek access.

Plaintiffs assert that at that time they agreed to allow 476 Broadway access to the apartment on May 7, 2012. They state that the next day, 476 Broadway sought an ex parte order to show cause in Housing Court demanding access. It was this order that the Housing Court judge declined to sign. Plaintiffs argue that since that date and that of the shareholders' meeting, they were willing to allow access, though they also wanted reassurances of safety and a guarantee that their apartment would be restored to

its prior condition afterwards. Plaintiffs claim that their demands were reasonable and 476 Broadway's failure to gain access was mainly attributable to 476 Broadway's constant delays.

476 Broadway contends that plaintiffs insisted on attaching conditions to providing access, which were either unreasonable or not obligatory pursuant to the lease. Such demands included alternative housing for plaintiffs during the course of the testing, and the moving and storing of plaintiffs' personal property. Later, plaintiffs demanded that the work procedure in their apartment be videotaped. 476 Broadway claims that plaintiffs went on a month long vacation in July 2012, while earlier asserting that the testing would interfere with their ability to live in the apartment. 476 Broadway contends that plaintiffs' vacation delayed efforts to complete the waterproofing job.

476 Broadway maintains that only after the notice to terminate the lease was in effect, in October 2012, did Berger receive unconditional access to the apartment, which access was continued by stipulation dated December 4, 2012 of the parties in this matter. Berger subsequently found that the leakage was largely due to plaintiffs' renovation project. 476 Broadway states Berger also found leakage problem resolved, and that in effect, the delays in gaining access were unnecessary and wasteful.

While this court acknowledges that there are disputed facts concerning which party was responsible for which delays with respect to the access issue, it does not find evidence of bad faith on 476 Broadway's part. Plaintiffs claim that 476 Broadway's actions are retaliatory, but the lease provides the cooperative with a right to access. Section 25 of the lease provides, in part:

The Lessor and its agents and their authorized workmen shall be permitted to visit, examine, or enter the Loft . . . at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the Building or to cure any default by the Lessee and to remove such portions of the walls, floors and ceilings of the Loft . . . as may be required for any such purpose, but the Lessor shall thereafter restore the Loft . . . to its proper and usual condition at Lessor's expense if such repairs are the obligation of Lessor . . . .

476 Broadway's contractual obligation was to restore the apartment to its prior condition after whatever work was to be performed there. 476 Broadway has no obligation in the lease to provide alternative housing or other measures requested by plaintiffs as a condition for acquiring access.

Plaintiffs do not dispute the right of the cooperative to order a shareholders' meeting pursuant to section 31 of the lease. 476 Broadway has shown that plaintiffs were given notice of this meeting, and that they were present, with their counsel, at the meeting. The ground for the meeting, plaintiffs' unreasonable and prolonged refusal to provide access to the

cooperative, was subject to discussion and plaintiffs had their opportunity to present their position. The vote to terminate the lease was in accordance with section 31 (f) of the lease. There was competent evidence of plaintiffs' objectionable conduct to sustain such a vote.

In the absence of sufficient proof of a retaliatory motive behind 476 Broadway's determination, this court must defer to 476 Broadway's decision under the business judgment rule. Even if it was responsible for some delays, 476 Broadway's conduct was not so extreme or disreputable as to represent bad faith, or to raise a material issue of fact with respect to bad faith. Nor do plaintiffs raise an issue of fact with respect to retaliatory eviction pursuant to RPL § 223-b(1) since the defense the plaintiffs asserted to the non payment proceeding cannot be said to be a complaint to a designated agency of the government to which 476 Broadway is presumed to have retaliated in issuing the notice pursuant to § 31(f) of the lease within six months after such non payment proceeding was discontinued. Nor does the court find that the decisions of plaintiffs to withhold the maintenance fees and to deny reasonable access constitute good faith actions to secure or enforce their rights under the lease with respect to the warranty of habitability.

The court shall grant summary judgment to 476 Broadway on its first counterclaim.

The court will also grant the motion to dismiss the second, third, fourth, seventh, eighth and ninth affirmative defenses, as plaintiffs have failed to address any of the grounds for dismissal in their opposition papers.

Plaintiffs' cross motion seeks leave to amend the reply to assert a cure pursuant to RPAPL § 753 (4). This section provides:

In the event that such proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a ten day stay of issuance of the warrant, during which time the respondent may correct such breach.

This section is applicable to proceedings where a party seeks to repossess property occupied for dwelling purposes. It allows the court to stay the issuance of a warrant of eviction against a tenant, providing time for a tenant to correct any violation of a lease provision. Plaintiffs argue that they had been willing to provide access to 476 Broadway, which meant that they could not be held to have violated any lease provisions, and that they are therefore entitled to a cure pursuant to RPAPL § 753(4).

The court holds RPAPL 753 (4) does not create a defense or cause of action, and is not the proper subject of a motion to amend a pleading. Instead, upon application of the respondent (here plaintiffs), RPAPL § 753 (4) authorizes the court in its discretion to stay the time for a tenant to cure a default under a notice to cure. However, the court agrees with 476 Broadway

that upon the facts at bar, the shareholders determined to proceed pursuant to paragraph 31(f) of the lease, wherein by a super majority they were authorized to evict plaintiffs for objectionable conduct. Under that section, 476 Broadway was not required to serve a notice to cure, and consistent with the controlling authority of Pullman, supra, at 157, the only question for the court is whether 476 Broadway action was taken for the purposes of the cooperative, within the scope of its authority and in good faith. The court must defer to 476 Broadway in that it used its business judgment and determined not to proceed pursuant to § 31(e) of the lease, which required that the Lessor give thirty day written notice to plaintiffs to cure a default under the lease. As 476 Broadway determined to proceed under § 31(f), which does not require that 476 Broadway give plaintiffs any notice to cure, the court has no discretion to stay the time to cure given that there is no time period to be extended. As for the contention of plaintiffs that the May 11, 2012 notice sent pursuant to § 31(f) of the lease provided a cure period, there is no dispute in the record that plaintiffs did not provide access by May 18, 2012, the date specified in the notice, but instead chose to continue to negotiate until the shareholders' meeting held four months thereafter, at which the cooperators voted almost unanimously to terminate the lease.

As for the equities of a stay pursuant to CPLR 2201 (see

326-330 East 55<sup>th</sup> Street Assoc v Sofizade, 191 Misc2d 329, 332 [App Term, 1<sup>st</sup> Dept 2002]), the court is unable to fashion any just terms upon which to grant a stay of the eviction, given the imbroglio of the relationship between the parties over the past three years. 476 Broadway concedes that plaintiffs will not lose their investment in the apartment as the lease requires that their stock certificates with respect to the apartment be sold. 476 Broadway states that it will seek the fair market price of the apartment and not proceed by auction, and affirms that plaintiffs are entitled to the balance of the proceeds of the sales after deduction of any outstanding maintenance fees, costs of sale and attorneys' fees incurred by 476 Broadway in this litigation. See Pullman, supra, at 127.

Though the court shall deny the motion of plaintiffs to the extent that they seek to amend the reply pursuant to RPAPL § 753(4), given that the family of plaintiffs include two minor children the court shall grant plaintiffs leave to move pursuant to RPAPL § 753(1).

The court shall dismiss the second, fourth and fifth counterclaims. These counterclaims involve the alleged removal and concealment of a waterproofing layer which occurred in 1998 or 2000. As plaintiffs contend, the allegations underlying the counterclaims, which occurred over six years ago, sound in breach of lease and are barred under the applicable period of

limitations. See CPLR 213 (1); see also, Kaufman v Cohen, 307 AD2d 113, 117 (1<sup>st</sup> Dept 2003). Moreover, 476 Broadway has failed to address these counterclaims in its opposition papers.

To the extent that the cross motion of plaintiffs seeks to summary dismissal of the sixth counterclaim for expenses, including attorneys' fees, plaintiffs have not come forward with prima facie evidence justifying such relief.

Accordingly, it is

ORDERED that the part of summary judgment cross motion of plaintiffs Anthony Gordon and Martina Gordon which seeks to dismiss the first and sixth counterclaims in the answer is denied and that the part of defendant 476 Broadway Realty Corp.'s motion which seeks summary judgment on its first counterclaim is granted, and is further

ORDERED that on the first counterclaim the defendant 476 Broadway Realty Corp. is granted a judgment of immediate possession of Apartment 10R; and it is further

ORDERED that the part of defendant 476 Broadway Realty Corp.'s motion which seeks to dismiss plaintiffs Anthony Gordon and Martina Gordon's first, second, third, fourth, seventh, eighth and ninth affirmative defenses to the counterclaims is granted; and it is further

ORDERED that the part of plaintiff Anthony Gordon and Martina Gordon's summary judgment motion which seeks to dismiss

the second, fourth and fifth counterclaims in the answer is granted; and it is further

ORDERED that the part of plaintiffs Anthony Gordon and Martina Gordon's motion which seeks leave to amend their reply and/or a stay pursuant to RPAPL § 753(4) is denied, without prejudice to a motion for a stay pursuant to RPAPL § 753(1) within thirty day of service of a copy of this order with notice of entry.

This is the decision and order of the court.

Dated: May 19, 2014

ENTER:

**FILED**

MAY 21 2014

*Debra A. James*  
J.S.C.  
**DEBRA A. JAMES**

COUNTY CLERK'S OFFICE  
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