

Tsui v Chou
2014 NY Slip Op 31812(U)
July 7, 2014
Supreme Court, New York County
Docket Number: 652840/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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WINNIE TSUI, GINYEE CHU, DARREN JACKSON, :
HUY BUI, DIMPLE BHATT, TANVA NANTAKWANG, :
LILA HEYMANN, LIN CHOY CHEUNG, JEANNIE :
CHOY JIN CHEUNG, KIM PING LAM, JAMAL :
ABDELNOUR, MARINA ABDELNOUR, JING TUN, :
CHONG FO TUN, HAROLD KIM, JESSICA :
ROSENRAICH and MARIE-HELENE ATTWOOD, all :
Derivatively on Behalf of All Unit Owners of the :
EMPIRE CONDOMINIUM, :
:

Plaintiffs, :

-against- :

KATHERINE CHOU, ROBERT CHOU, and CHOU :
MANAGEMENT CO., INC., :

Defendants. :

and :

THE BOARD OF MANAGERS OF EMPIRE :
CONDOMINIUM, RITA CHOU, IRENE TAM, YUH :
HU CHEN, SEAN LEFKOVITS, MAURA BURK, ALIA :
AVIDAN, EURUM HASNAIN, JEISOHN FIALA, :
CLAUDIA RICCIARDI, RAPHAELLA RICCIARDI, and :
JOHN AND JANE DOES 1-5, :

Necessary Party :
Defendants. :

-----X

MELVIN L. SCHWEITZER, J.:

Plaintiffs are unit owners in Empire Condominium who are bringing a derivative action against Katherine Chou, Robert Chou, and the Condominium's property manager, Chou Management Co., Inc. The Amended Complaint asserts five causes of action: trespass on plaintiffs' property, the imposition of a constructive trust as necessary to prevent unjust

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DECISION AND ORDER

Motion Sequence No. 002

enrichment, breach of fiduciary duty, breach of contract, and an award of attorneys' fees. The focal point of the Amended Complaint is a claim against Katherine Chou arising out of certain "concealed" construction activity that took place seventeen years ago, in 1997, involving the four seventh floor units owned by Katherine Chou. Plaintiffs allege that the construction work on these units was unauthorized and involved trespasses onto Condominium property. The Amended Complaint uses these seventeen year-old construction activities as a spring board for a diverse set of claims: (i) removal of Chou Management as property manager; (ii) an accounting; (iii) money damages; and (iv) a constructive trust. At the time plaintiffs filed their Original Complaint, plaintiffs filed four Notices of Pendency against the four units owned by Katherine Chou on the top floor of Empire Condominium.

Background

Prior to filing the Original Complaint, on or about July 24, 2013, plaintiffs served a demand on the Board of Managers (July 24 Demand), requesting that the Board commence legal action against the Chous in connection with the construction of the seventh floor units. On August 29, 2013, Robert Chou, Katherine Chou, and Rita Chou served a separate demand on all Board Members (August 29 Demand), requesting a special meeting to discuss and consider the pending litigation. In response to these demands, a special meeting of the Board took place on October 18, 2013 (October 18 Meeting). At the time of the October 18 Meeting, plaintiff Winnie Tsui, necessary party defendants Irene Tam and Yuh Hu Chen, and individual defendants Katherine Chou, Robert Chou, and Rita Chou composed the Condominium's six-member Board of Managers. The Board reviewed the allegations in the Original Complaint and considered the derivative lawsuit brought by Winnie Tsui and other owners of Empire Condominiums. With the exception of Winnie Tsui who was absent, the non-Chou Board

members then unanimously voted to reject plaintiffs' claims and decided not to pursue any lawsuit.

Following the Board's decision to reject any action on the allegations presented at the October 18 Meeting, plaintiffs withdrew the Original Complaint and filed the Amended Complaint, the subject of the present motion. The Amended Complaint asserts the same five causes of action and contains the same factual allegations as the Original Complaint, rejected by the Board of Managers at the special meeting held in October.

Plaintiffs argue that the Board's decision to reject their demand is not protected by the business judgment rule because the Board is composed of interested parties. In the alternative, plaintiffs plead demand futility asserting that, "the Chou's control and dominance over the Board has rendered futile any further attempt to gain objective Board review of this suit, and has rendered the notion of an 'independent' Board business judgment as impossibility." Defendants argue that the facts pleaded by the plaintiffs are insufficient to support a finding of a non-independent Board and therefore the business judgment rule protects the Board's decision from further review, necessitating the dismissal of the Amended Complaint. Given that plaintiffs have offered no factual support to justify departing from application of the business judgment rule, the court grants defendants' motion to dismiss the Amended Complaint.

Discussion

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai*

Hosp. Ctr., 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Derivative Action

By bringing these derivative claims, plaintiffs acknowledge that the decision to initiate legal action regarding the alleged use of the Common Elements is one for Board determination. *Cohen v Board of Managers of 22 Perry Street Condominium*, 278 AD2d 147 (1st Dept 2000). These claims can only stand, therefore, if the plaintiffs can establish the right to displace the Board and act on behalf of the Condominium as whole. Unit owners in a condominium must abide by the criteria in Section 626(c) of the BCL, requiring those seeking to bring a derivative claims to first attempt to have the Board initiate the action. Plaintiffs complied with this requirement when they served the Board with the July 24 Demand.

Once the Board responds to the demand, the Board's decision is entitled to the presumption of the business judgment rule. The business judgment rule precludes judicial inquiry into business decisions made by an informed Board, in good faith, and with the belief that the action taken was in the best interest of the company. This applies even when the Board's decision turns out to be unwise. *Jones v Surrey Cooperative Apartments*, 263 AD2d 33 (1st Dept 1999). In *Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530 (1990), the Court of Appeals applied the business judgment rule to a cooperative board, holding that as long as the Board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the Board's.

Exceptions to the application of the business judgment rule exist for claims of fraud, self-dealing, or misconduct by board members, but only where a factual basis exists to support

such a claim. *Simpson v Berkley Owner's Corp.*, 213 AD2d 207. Plaintiffs personal attacks on Robert Chou are insufficient to support a claim of fraud and have no relation to the conduct of those members who voted in the October 18 Meeting.

The court may therefore only inquire as to the disinterested nature of the members who rejected the demand, and as to the procedures taken to investigate the claims presented to them to determine if the Board's decision was informed and made in good faith. *Auerbach v Bennett*, 47 NY2d 619, 623-24 (1979). Plaintiffs claim that the Board is composed of interested members and the business judgment rule should not apply to the Board's decision from the October 18 Meeting. For this to be true, plaintiffs must show that Tam and Chen were interested parties because the Chous themselves did not participate in the vote. Plaintiffs have offered only conclusory statements that the non-Chou Board members are interested or non-independent. Winnie Tsui's "impression based on personal observation that [the non-Chou Board members] fear [Robert Chou] and not want to be on his bad side" does not provide enough factual support that Tam and Chen are interested parties and that their votes were influenced by Robert Chou.

Tsui further alleges that Tam was able to do certain renovations without permits, and had assistance in repairing water leaks, whereas other owners had to obtain permits for similar repairs. These allegations of minor perks extended to Tam are far from sufficient to show that she was under the control of Robert Chou when casting her vote. The minutes of the special meeting held on October 18 also establish that the board did engage in meaningful deliberations regarding the proposed lawsuit. Meeting minutes show that each allegation was discussed and the rejection of plaintiffs' demand was done in good faith with thorough deliberation.

Allegations that the Board is improperly constituted are not supported by evidence in the record. The requirements hold that residential Board members must be unit owners; they do not

require, as Tsui maintains, that the members live in the building. With regard to Robert Chou's challenged position on the Board, the minutes of the October 18 Meeting establish that he is properly serving on the Board as Katherine Chou's representative. Katherine Chou owns both residential and professional units, and has chosen to serve as a Board member to represent her interests on the residential side while Robert Chou serves as her representative for the professional unit.

There is no evidence that the Board is composed of interested parties, acted in bad faith, or acted outside of the scope of its authority. Plaintiffs' efforts to create a demand futility claim ignores that the two independent Board members declined to authorize any legal action on the allegations contained in the Original Complaint. The business judgment rule shields the Board's decision from further inquiry. As a result, plaintiffs lack standing to pursue this derivative action.

Notices of Pendency

The plaintiffs' Notices of Pendency have no support in law or the facts here and are vacated.

Conclusion

For the foregoing reasons, the court grants defendants' motion to dismiss and vacates the four Notices of Pendency.

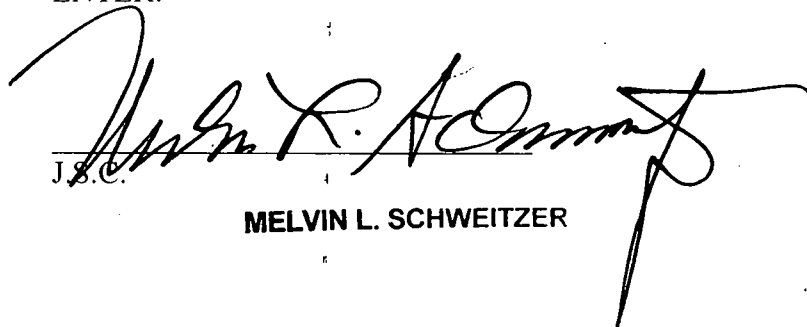
Accordingly, it is

ORDERED that defendants' motion to dismiss is granted; and it is further

ORDERED that the Notices of Pendency are vacated.

Dated: July 7, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER