Goldstein v Bass
2014 NY Slip Op 33784(U)
October 16, 2014
Supreme Court, New York County
Docket Number: 654007/12
Judge: Melvin L. Schweitzer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

Abby F. Goldstein

-v-

Robert Bass et al

INDEX NO. 654007/12

MOTION DATE

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 to dismiss the complaint is GRANTED per the attached Decision and Order.

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

Dated: October 16, 2014

MELVIN L. SCHWEITZER J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [X] GRANTED [ ] DENIED [ ] 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: IAS PART 45

ABBEY F. GOLDSTEIN, derivatively on behalf of ACROPOLIS GARDENS REALTY CORP.,	:	
Plaintiff,	:	Index No. 654007/12
-against-	:	DECISION AND ORDER
ROBERT BASS, DEBRA VAZQUEZ, BRIAN MCNAMARA, ANTOINE MARZOUKA, MICHAEL ROBERT, STEVE OSMAN, ALBERT OSMAN, METROPOLITAN PACIFIC PROPERTIES INC., MEYER LIEBER, MICHAEL LEIFER, ASTORIA-ATLAS LLC, CALIX REALTY HOLDINGS LLC and ACROPOLIS GARDENS REALTY CORP. (Nominal Defendant),	:	Motion Sequence Nos. 001 and 002
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Motion Sequence Nos. 001 and 002 are consolidated for disposition and are disposed of in accordance with the following decision and order.

Defendants Michael Leifer, Astoria-Atlas LLC and Calix Realty Holdings LLC move for an order, pursuant to CPLR 3211 (a) (1) and (7) dismissing the complaint (motion sequence no. 001). Defendants Robert Bass, Debra Vazquez, Brian McNamara, Antoine Marzouka, Michael Robert, Steve Osman, Metropolitan Pacific Properties, Inc., and Meyer Lieber move for dismissal pursuant to New York Business Corporation Law (BCL) § 626 (c), CPLR 3211 (a) (7) and CPLR 3212 (c).

In this shareholder's derivative action, brought on behalf of Acropolis Gardens Realty Corp. (Acropolis), a residential cooperative corporation, plaintiff alleges that the members of Acropolis' board, defendants Bass, Vazquez, McNamara, Marzouka, and Robert (Board

Defendants), its managing agent, accountant, and purchasers of a number of units in the cooperative, breached their fiduciary duty, or aided and abetted such breaches, committed fraud, corporate waste, and gross mismanagement. The claims are based on allegations of financial improprieties resulting in Acropolis being in a precarious financial state, including making below market sales to various parties, such as the managing agent and contractors, failure to hold elections and meetings, and failure to grant access to records. Defendants seek dismissal, asserting that plaintiff failed to meet the demand requirement for a derivative action, the claims are barred by the business judgment rule, and the claims fail to state a claim.

Background

Nominal defendant Acropolis, a New York residential cooperative, is comprised of 617 residential units located in Astoria, New York, which has its principal offices located at 21-7 33rd Street, Astoria, NY (complaint, ¶¶ 3, 24). The Board Defendants are shareholders of Acropolis, reside in the cooperative's buildings, and have been board members for a number of years (*id.*, ¶¶ 4-8). Acropolis' managing agent is defendant Metropolitan Pacific Properties, Inc. (Metpac), which is operated by its principal, defendant Steve Osman (Osman) (*id.*, ¶¶ 9, 11). Defendant Meyer Lieber (Lieber) is a certified public accountant, and has been retained by Acropolis for over ten years to prepare Acropolis' audited financial statements, and file its tax returns (*id.*, ¶ 2). Defendant Michael Leifer is the principal of co-defendants Astoria-Atlas LLC (Astoria-Atlas) and Calix Realty Holdings LLC (Calix) (*id.*, ¶ 13), both of which purchased apartments in the cooperative's buildings from Acropolis' wholly-owned subsidiary Acropolis Holdings LLC (Holdings).

On March 28, 2006, defendant Marzouka purchased unit 5D at 21-57 33rd Street from Holdings for $25,000, which allegedly was far below fair market value. Subsequently, he was appointed as a member of the Board of Directors by other board members (*id.*, ¶¶ 49-52). Plaintiff alleges that defendants Osman, Metpac, and Bass have refused access to Acropolis' business records so that he has been unable to discover the circumstances of this transfer (*id.*, ¶ 52).

In June 2009, Astoria-Atlas purchased 19 apartments in the cooperative's buildings from Holdings for a price of $1 million, with a per unit price of about $50,000 (*id.*, ¶ 28). This transfer was made allegedly without disclosure in the minutes of any Board of Director's meeting or to shareholders until after the fact, without an appraisal, without marketing, and at a price allegedly far below fair value (*id.*, ¶¶ 28-33).

In December 2009, Calix purchased 24 apartments from Holdings for $1.2 million, a per-unit price of approximately $50,000 (*id.*, ¶ 34). Again, the sale was made allegedly without disclosure in the board minutes or to shareholders until after the fact, no appraisal or marketing, and at a price below actual value (*id.*, ¶¶ 35-39). Plaintiff alleges that the sales were made to ensure that the units would be owned by a loyal shareholder who would support the board, Osman and Metpac (*id.*, ¶¶ 42, 44).

Plaintiff alleges that in 2009, the Board Defendants caused Acropolis to excessively compensate Metpac and Osman by entering into a non-cancelable contract for Metpac's services for a 10-year period at a cost of $288,000 per year, which allegedly is above what is fair and reasonable (*id.*, ¶¶ 53-62, 108-111).

In September 2009, the Board Defendants approved the sale by Holdings of 27 units to Monarch Holdings, LLC (Monarch), an entity formed by Osman, at a per unit price of $50,000. This price was too low, not negotiated, the sale occurred without an appraisal or marketing, and the comparable sale used was not appropriate. The sale was not reported to shareholders or on financial statements, the transfer was not reported to New York City, and taxes on the transfer were not paid (*id.*, ¶¶ 63-84). In June 2012, the transfer was recorded with the New York City online registry, and then 23 of those units were transferred to defendant Albert Osman, and four were sold to an investor, Aeon Capital for $720,000, a profit of $520,000 (*id.*, ¶¶ 84-87).

On August 16, 2012, Osman, with the knowledge and approval of the Board Defendants, transferred 20 Acropolis units owned by Holdings to Aeon Capital for $50,000 per unit (*id.*, ¶¶ 88-90).

Plaintiff alleges that Acropolis has been transformed from a viable entity with over 300 units in reserve to one on the brink of financial disaster, with no funds in reserve and less than 25 units which it still holds remaining (*id.*, ¶¶ 91-92). He further alleges that units owned by Acropolis have been transferred to private contractors as payment, contractors are not being paid timely, the cooperative has bills payable of over $990,809.00, with no reserve fund. He alleges that it has suffered judgments for unpaid fuel bills and employee benefit contributions, has a cash balance on the 2011 financial statement that is misleading, and increased its long term debt which it used to cover operating expenses (*id.*, ¶¶ 93-106).

The complaint asserts that the Board Defendants had failed to have a shareholder meeting for 11 years, and then called one, with the minimum notice required, at 6 p.m. and at a location that was remote from the cooperative in order to reduce shareholder turnout (*id.*, ¶¶ 112-119).

Plaintiff claims that he repeatedly asked for but never received the shareholder address list (*id.*, ¶ 117). He asserts that the failure to provide the mailing addresses, or to hold meetings, and the manner in which the meeting was called, all contributed to the inability of the shareholders to elect individuals of their choosing and to obtain access to information to which each shareholder is entitled (*id.*, ¶ 118). He further claims that defendants failed to distribute yearly financial statements, failed to give him access to the cooperative's books and records, and failed to provide a safe and secure environment for residents (*id.*, ¶¶ 120-132).

With regard to the financial statements, plaintiff alleges that Lieber failed to properly and honestly audit Acropolis' records, by listing apartment sales as ordinary income, failing to provide a statement of cash flows, failing to include the activities of Acropolis' subsidiary, Holdings, failing to report transactions between Osman and Holdings, and failing to report the transfer of units to contractors for payment (*id.*, ¶¶ 133-134).

Based on these allegations, plaintiff asserts 10 derivative causes of action. The first and second claims, asserted against the Board Defendants, Osman, Metpac, and Lieber, assert that defendants breached their fiduciary duties and aided and abetted such breach respectively. The third cause of action, against defendants Leifer, Astoria-Atlas, Calix, and Albert Osman, also is for aiding and abetting breach of fiduciary duty. The fourth claim against the Board Defendants alleges that they made material misrepresentations of fact and omitted material facts in the financial statements in order to induce shareholders to rely and to engender the false notion that Acropolis was in a better financial position than it was. The fifth and sixth claims against the Board Defendants are for corporate waste and gross mismanagement. The seventh cause of action against Osman, Albert Osman, Leifer, Marzouka, Astoria-Atlas and Calix for unjust

enrichment, alleges that defendants paid insufficient consideration for apartment units. The eighth claim seeks a permanent injunction, and the ninth claim seeks an accounting. The tenth cause of action alleges a federal RICO claim (18 USC § 1962 [c]).

This derivative action was commenced here on November 15, 2012 by plaintiff's filing of a summons with notice. On January 7, 2013, this action was removed to the United States District Court for the Southern District of New York based on plaintiff's inclusion of a federal RICO claim (*see* exhibit A to defendants' notice of motion seq. no. 002). By order dated March 14, 2014, the federal court granted dismissal as to the RICO claim for failure to allege fraud with the particularity required (exhibit C to defendants' notice of motion seq. No. 002). The federal court gave plaintiff leave to file an amended complaint no later than April 13, 2014, failing which the action would be dismissed for lack of subject matter jurisdiction (*id.*). By letter dated March 28, 2014, plaintiff informed the federal court that he did not intend to amend his complaint. On April 2, 2014, the federal court held that because "the RICO claim [has been] dismissed on the merits as to all defendants," the court lacked subject matter jurisdiction over the remaining claims which were remanded to this court (exhibit E to defendants' notice of motion seq. no. 002).

Defendants now move to dismiss the derivative complaint on various grounds. First, they urge that plaintiff failed to comply with the demand requirement under BCL § 626 (c). Next, they contend that judicial review of their actions is barred by the business judgment rule. Third, they contend that dismissal is appropriate based on the documentary evidence and for failure to state a claim.

Discussion

The motion to dismiss the complaint by the Board Defendants, Steve Osman, Metpac, and Lieber, and the motion by defendants Leifer, Astoria-Atlas, and Calix for dismissal of the claims against them (the third and seventh claims) are granted, and the complaint is dismissed as against these moving defendants based on plaintiff's failure to satisfy the pleading requirements of BCL § 626 (c).

Plaintiff's complaint has been brought entirely as a shareholder derivative action on behalf of Acropolis, and fails to fulfill the statutory requirements to plead demand futility. BCL § 626 (c) provides that in a shareholder derivative action "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." Presuit demand is the rule, excusing demand is the exception, and the exception should not be permitted to swallow the rule (*Marx v Akers*, 88 NY2d 189, 200 [1996]). Where a plaintiff shareholder alleges that a demand would be futile, he is required to allege

> "with particularity 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 at 198). To constitute director interest, the plaintiff may either allege self-interest in, such as a personal benefit from, the transaction or "a loss of independence because a director with no direct interest in a transaction is 'controlled' by a self-interested director" (*id.* at 200). Such interest may include a "direct financial benefit from the transaction which is different from the benefit to shareholders generally" (*id.* at 202 [citations omitted]). On

the failure to inform themselves, the plaintiff may establish that the director simply rubber-stamped the decisions of the active managers (*id.* at 200). As to the third basis, the plaintiff must allege with particularity "that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (*id.* at 200-201 [citations omitted]; *see also Matter of Omnicon Group Inc. Shareholder Derivative Litig.*, 43 AD3d 766, 768 [1st Dept 2007]). Thus, the facts as pleaded in the complaint must "rule out all possibility that the transaction was the product of sound business judgment" (*Matter of Omnicon Group Inc. Shareholder Derivative Litig.*, 43 AD3d at 769). The determination of whether the demand requirement is met is in the trial court's discretion (*Lewis v Akers*, 227 AD2d 595, 596 [2d Dept 1996]).

Here, in the complaint, plaintiff alleges that he has not made any demand on the Board Defendants to bring an action against the individual defendants, because such demand would be futile (complaint, ¶¶ 145-146). He alleges that demand was futile, because: (1) the board members "participated in, approved or recklessly disregarded, the wrongs complained of herein, and failed to inform themselves about the pertinent transactions," such as the approval of below market sales to Osman's entity Monarch, the approval of the 10-year contract with Metpac for a fee that is above fair and reasonable, and their approval of the sale of a unit to defendant Marzouka for $25,000 (*id.*, ¶¶ 133,145-146); (2) all the Board Defendants are still board members and comprise the entirety of the board, and, in order to bring this action, they would have had to sue themselves; (3) despite knowledge of the wrongdoing alleged, the Board Defendants have not taken any action to seek recompense from the wrongdoers; and (4) the Board never responded to his request to meet or provide information (*id.*, ¶¶ 146-147).

Plaintiff, however, fails to allege with the requisite particularity facts supporting any of the three grounds for the demand futility exception. With respect to the first ground, the complaint fails to allege any facts that the Board Defendants are deriving any personal financial benefit, and, as such, plaintiff has not pled with particularity that they were interested in the transactions plaintiff seeks to have Acropolis challenge. Plaintiff does not allege a direct financial benefit to any director defendant different from a benefit to all other shareholders (*see Walsh v Wwebnet, Inc.*, 116 AD3d 845, 847 [2d Dept 2014]). There also are no specific allegations about how these director defendants were interested by virtue of being under another director's control. Steve Osman and Metpac were not members of the board, and could not vote as directors. Plaintiff's conclusory allegation that the Board Defendants were interested because they were the entire board and, therefore, would be required to sue themselves, fails to satisfy its burden. "[T]he bare claim that the directors . . . should be viewed as interested because they are 'substantially likely to be held liable' for their actions is not enough" (*Wandel v Eisenberg*, 60 AD3d 77, 80 [1st Dept 2009] [quoting complaint therein]; *see also Glatzer v Grossman*, 47 AD3d 676, 677 [2d Dept 2008]). Plaintiff fails to allege that the Board Defendants were involved in the daily management of Acropolis. Where a majority of the board is comprised of outside directors, it is not reasonable to conclude that the members would not respond to a demand (*see Lewis v Akers*, 227 AD2d at 596). Although defendant Marzouka bought his unit at a reduced price, that challenged transaction occurred several years before he became a board member, so he did not vote on that transaction.

Plaintiff also has failed to allege particular facts supporting the second ground for excusing demand – that the directors failed to inform themselves about the transactions. Plaintiff

makes sweeping conclusory statements that the Board Defendants were aware or should have been aware that prices of the units sold to Monarch and others were unreasonably low, without sufficient underlying facts. This fails to meet the rigorous statutory derivative pleading requirements (*see Matter of Woolworth Corp. Shareholder Derivative Litig.*, NYLJ, Apr 22, 1996, at 28, col 5 [Sup Ct, NY County 1996], *affd* 240 AD2d 189 [1st Dept 1997]). There is proof in both parties' papers that many of the units sold were occupied, rent regulated units which would decrease their value (*see* Bass aff annexed as exhibit E to complaint; exhibit P to defendants' notice of motion seq. no. 002, Steve Osman affidavit, ¶ 22; reply affidavit of Steve Osman, ¶ 7). In addition, in support of its allegations that the Board Defendants failed to verify Osman's claim as to the value of the units sold to Monarch, plaintiff annexed to the complaint (as exhibit E) the affidavit of defendant Bass in other litigation brought by this plaintiff against Acropolis.[1] In contrast to what plaintiff alleges in the complaint, Bass attested that he and other members of the board at the time engaged in detailed, good faith negotiations with Osman, that spanned several months, regarding the terms of the sale, and met approximately six times among themselves to discuss the transaction (exhibit E to complaint, affidavit of Robert Bass at ¶¶ 3-5). He further attested that the price was based on a recent previous sale of other rent regulated units at the same price to Astoria-Atlas (*id.*, ¶ 5). He stated that the board members believed in good faith that it was in the cooperative's best financial interests "in large part to avoid imposing significant maintenance increases on Acropolis' shareholders," and to

[1] In December 2011, plaintiff commenced an Article 78 proceeding in New York State Supreme Court, Queens County, seeking to compel Acropolis to make available for his review the corporation's books and records, and provide him with a list of shareholders with mailing addresses. The court granted, and the Appellate Division affirmed, plaintiff's right to review such records and to the shareholders' information (*see* exhibit C to affidavit of Abbey Goldstein in opposition in motion seq. No. 002).

eliminate Acropolis' financial costs in maintaining those units (*id.*, ¶ 6). The Board Defendants submit a copy of the minutes of a board meeting held on September 23, 2009, which was provided to plaintiff in his prior Article 78 proceeding in Queens County, which reflect that the board discussed the cooperative's increasing costs, the financial drain of maintaining coop-owned units, which were rent regulated, and that a similar sale was made in another location (in Brooklyn) for $30,000 (as opposed to the $50,000 the units were being sold for by Acropolis), and that Monarch was owned by Osman, but that a legal opinion that the purchase did not create a conflict of interest was obtained (exhibit T to defendants notice of motion seq. no. 002; *see also* affirmation of Joseph C. Dejesu, ¶¶ 37-40). This clearly supports Bass' affidavit, which actually refutes plaintiff's allegations of the Board Defendants' failure to inform themselves.

With regard to the 10-year contract with Metpac, plaintiff's allegations, again, lack any particularity. For example, he alleges "[u]pon information and belief, defendant board members did not have this contract reviewed by counsel or seek any objective opinions as to its reasonableness," and that a 10-year contract is unheard of in the industry (complaint, ¶¶ 110-111). Metpac, however, has been Acropolis' managing agent since 1995, the 2009 contract was only the third signed between the parties, and it has similar long term contracts with some of the other cooperatives it manages (affidavit of Steve Osman in support, ¶¶ 6-7). The complaint contains no specific allegations demonstrating that the Board Defendants simply "rubber stamped" the decisions of more active managers by failing to inform themselves.

Finally, plaintiff's reliance on the third ground for excusing demand – that the directors failed to exercise sound business judgment in approving the sales to Monarch and Marzouka, in

omitting or incorrectly accounting for the proceeds of the transfers on the financial statements, and in approving the 10 year contract for Metpac – is equally unavailing. Plaintiff's conclusory allegations that the Board Defendants failed to investigate and take corrective action are inadequate to demonstrate demand futility. Again, the Bass affidavit, incorporated into the complaint and an exhibit to it, shows that the directors could have been making a business judgment that selling the units to known parties such as Monarch would bring money into Acropolis so that it would not have to impose a significant increase in the shareholders' maintenance, and would no longer incur the costs of maintaining those units, and that this was financially beneficial to Acropolis. The September 23, 2009 board meeting minutes further support that the board considered the issues, and made a business judgment that the sales were beneficial to the cooperative (exhibit T to defendants' notice of motion seq. no. 002). The business judgment rule will protect directors even when "results show that what they did was unwise or expedient" (*Auerbach v Bennett*, 47 NY2d19, 629 [1979] [quotation marks and citation omitted]). The facts as pleaded "do not rule out all possibility that the transaction was the product of sound business judgment" (*Matter of Omnicon Group Inc. Shareholder Derivative Litig.*, 43 AD3d at 769). Plaintiff does not allege that these challenged transactions were so egregious on their face that they could not have been the product of the Board Defendants' sound business judgment (*see id.*).

Plaintiff's contention that his lack of specificity in pleading is attributable to defendants' actions in failing to produce all records he is seeking, is unavailing. "Discovery in stockholders' derivative suits is allowed only under a showing of a meritorious cause of action and special circumstances" (*Teachers' Retirement Sys. of Louisiana v Welch*, 244 AD2d 231, 232 [1st Dept

1997] [quotation marks and citation omitted] [discovery not permitted unless plaintiff presents factual allegations of evidentiary value to establish charges of improper conduct]; *Karfunkel v US LIFE Corp.*, 116 Misc 2d 841, 848 [Sup Ct, Kings County 1978], *affd for reasons stated below* 98 AD2d 628 [1st Dept 1983]). Bare conclusory allegations of impropriety are insufficient to warrant discovery in such actions (*Karfunkel v US LIFE Corp.*, 116 Misc 2d at 848). The court notes that plaintiff has had some discovery, including the board meeting minutes, at the least for the September 23, 2009 meeting, for several years, and pursued obtaining corporate records in his Article 78 proceeding in Queens County. In light of the lack of particularized allegations showing that the Board Defendants would not have been responsive to a demand, defendants are entitled to dismissal of this action (*see Brewster v Lacy*, 24 AD3d 136, 136 [1st Dept 2005]). Because the defendants' motions are granted on this ground, the court does not reach the additional grounds asserted by the defendants that the claims failed to state a claim or should be dismissed based on documentary evidence.

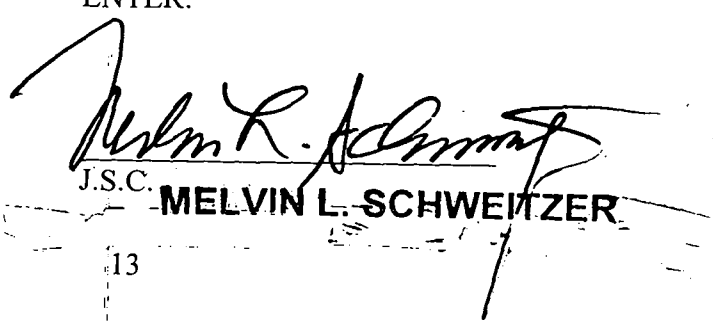
Accordingly, it is

ORDERED that defendants' motions (sequence nos. 001 and 002) to dismiss the complaint are granted and the complaint as against these moving defendants is dismissed in its entirety with costs and disbursements to the moving defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 16 2014

ENTER:



J.S.C. MELVIN L. SCHWEITZER