

Rubenstein v Berkeley Coop. Towers Sec. II Corp.
2015 NY Slip Op 31001(U)
June 5, 2015
Supreme Court, Queens County
Docket Number: 4558/14
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

Estate of DAVID K. RUBENSTEIN, HERBERT RUBENSTEIN and ADRIENNE RUBENSTEIN

Index Number: 4558/14

Plaintiff,

Motion Date: 3/9/15

-against-

Motion Seq. No. 1

Berkeley Cooperative Towers Sec. II Corp.

Defendants.

The following papers read on this motion by defendant pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-9
Reply Affidavits	10-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Adrienne Rubenstein is the mother of the late David K. Rubenstein, and was issued letters of administration for his estate pursuant to a decree of the Surrogate of Queens County dated February 21, 2013. Her decedent died on December 4, 2012. It is undisputed that at the time of his death, her decedent was a member of the defendant cooperative corporation, owning shares of stock therein, and resided in an apartment unit, in a building owned by the corporation, pursuant to an occupancy agreement between the decedent and the corporation. Following the death of the decedent, plaintiffs inquired as to the process necessary to cause the transfer of the decedent’s apartment to plaintiff Herbert Rubenstein, the brother of the decedent. Defendant instructed them to submit an application. In May 2013, plaintiffs applied to defendant for the transfer of the decedent’s apartment to plaintiff Herbert Rubenstein, and upon defendant’s demand, made certain payments in connection with such application. By letter dated August 6, 2013, defendant notified

plaintiff Herbert Rubenstein that the “application to transfer the shares for the [subject] apartment ... is denied.”

Plaintiffs commenced this action on March 21, 2014, by filing a summons with notice, and a complaint was filed upon defendant’s demand. It is alleged in the complaint dated August 4, 2014, that plaintiffs complied with the bylaws of defendant corporation and paid maintenance on the unit, but defendant exceeded its authority by requiring plaintiffs to engage in an approval process to exercise their rights to transfer the apartment to plaintiff Herbert Rubenstein. Plaintiffs allege that defendant imposed the requirement so as to collect a flip tax which, plaintiffs assert is unavailable to defendant if the transfer is made pursuant to section 4(a) of Article III of the corporation’s bylaws. Defendant allegedly breached its contractual obligation and violated the bylaws by refusing to assent to their exercise of their rights to transfer the unit to plaintiff Herbert Rubenstein. Plaintiffs further allege that defendant summarily rejected their application without first granting plaintiff Herbert Rubenstein an interview, and thereafter erroneously claimed that plaintiff Herbert Rubenstein had made no application. Plaintiffs additionally allege that on April 25, 2014 (following commencement of the action), defendant granted plaintiff Herbert Rubenstein an interview, which was held on May 19, 2014, but to date has not approved the transfer. Plaintiffs assert causes of action for breach of contract and breach of implied covenant of good faith and fair dealing, and seek specific performance to enforce section 4(a) of Article III of the corporation’s bylaws, an award of money damages, and injunctive and declaratory relief.

In lieu of serving an answer, defendant moves to dismiss the complaint on the grounds of failure to state a cause of action and a defense based on documentary evidence. Defendant contends plaintiffs have failed to state a cause of action against it. Defendant asserts its decision to reject plaintiffs’ application was proper under the bylaws, and is protected from judicial review by the business judgment rule. According to defendant, upon the death of a member, transfer of membership is prohibited, except as provided pursuant to sections 4(a) and 4(c) of Article III of the corporation’s bylaws. Defendant contends that because plaintiff Herbert Rubenstein is not an intestate distributee of the decedent, it is within its legal rights and authority to refuse to recognize plaintiff Herbert Rubenstein’s claim under section 4(a) of Article III of the bylaws to assume the occupancy agreement for the decedent’s apartment and obtain membership of the corporation upon payment of all amounts due thereunder. In addition, defendant contends that plaintiffs have failed to state a cause of action against it based upon its having withheld its approval from plaintiff Adrienne Rubenstein, as the personal representative of the Estate of David K. Rubenstein, to her proposed transfer, pursuant to section 4(c) of Article III of the bylaws, of the occupancy agreement to plaintiff Herbert Rubenstein and his becoming a member of the corporation.

Plaintiffs oppose the motion, asserting that defendant failed to provide a reason for their refusal to approve the transfer of the decedent's apartment to plaintiff Herbert Rubenstein. According to plaintiffs, plaintiff Herbert Rubenstein is entitled to assume the occupancy agreement and obtain membership, and defendant has acted in bad faith in its dealings with them, and improperly required them to make an application and pay fees to accomplish a transfer of the apartment to plaintiff Herbert Rubenstein.

On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). A motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *see YDRA, LLC v Mitchell*, 123 AD3d 1113 [2d Dept 2014]).

At the outset, the court notes that an estate cannot sue or be sued in its own name and, instead, appears as a party in litigation only through its personal representative (*see* EPTL 11–4.1). An examination of the allegations of the complaint indicates that plaintiff Adrienne Rubenstein is suing in her representative capacity as the administrator of the Estate of David K. Rubenstein, rather than in her individual capacity. The caption, therefore, should have identified her as such. Defendant, however, makes no objection to this procedural irregularity, and as a consequence, the action is deemed to have been brought by plaintiff Adrienne Rubenstein, in her capacity as administrator of the Estate of David K. Rubenstein, and Herbert Rubenstein, in his individual capacity.

Defendant Herbert Rubenstein is not a signatory or party to the occupancy agreement, but claims to have certain rights to the decedent's apartment pursuant to section 4 of Article III of the bylaws. Defendant Adrienne Rubenstein, as administrator of the Estate of David K. Rubenstein, is not a signatory to the occupancy agreement, but is recognized under its terms as having rights to the apartment pursuant to its terms, and is bound by the terms and conditions of the occupancy agreement, the corporate charter and bylaws, and rules and regulations of the corporation (*see* Occupancy Agreement, last paragraph beginning prior to Article 1). The occupancy agreement prohibits assignment of the agreement or subletting of the apartment without the written consent of the corporation (*see* Article 7 of the occupancy agreement), and provides that neither the occupancy agreement nor the member's right of occupancy is transferrable or assignable except in the manner as provided for the

transfer of memberships set forth in the bylaws of the corporation (*see* Article 8 of the occupancy agreement).

Article III, Section 4, of the corporation's bylaws governs transfer of membership, and in relevant part, provides that:

Section 4. Transfer of Membership. Except as provided herein, membership shall not be transferable.

(a) Death of Member. If, upon death of a member, his/her stock in the corporation passes by will or intestate distribution to a member of his/her immediate family, such legatee or distributee may, by assuming in writing the terms of the Occupancy Agreement within sixty (60) days after member's death, and paying all amounts due thereunder, become a member of the corporation. If member dies and an obligation is not assumed in accordance with the foregoing, then the corporation shall have an option to purchase the stock from the deceased member's estate in the manner provided in paragraph (b) of this Section, written notice of the death being equivalent of intention to withdraw. If the corporation does not exercise such option, the provisions of paragraph (c) of this Section shall be applicable, the reference to "member" therein to be construed as references to the legal representatives of the deceased member. For the purpose of these By-Laws "immediate family" shall include the deceased member's spouse, domestic partner, mother, father, sister, brother of the whole (or half) blood and children, natural or adopted.

(b) Option of Corporation to Purchase. If the member desires to leave the complex he/she shall notify the corporation in writing of such intention and the corporation shall have an option for a period of thirty (30) days thereafter, but not the obligation to purchase the member's shares of common stock and right of occupancy, purchase to be at an amount to be determined by the corporation as representing the book value thereof, less any amounts due by the member to the corporation. The purchase by the corporation of the member's stock will immediately terminate the member's rights and the member shall forthwith vacate the premises.

(c) Procedure where Corporation does not Exercise option. If the corporation waives in writing its right to purchase the member's stock under the foregoing option, or if the corporation fails to exercise such option within the thirty day period, the member may sell his/her stock to any person who has been duly approved by the Corporation as a member.

By the plain terms of section 4(a) of Article III of the bylaws, upon the death of a member, the legatee or distributee, who is a member of the defined class of "immediate family" of the deceased member, and who has obtained the stock by will or intestate distribution, may assume the occupancy agreement and become a member upon payment of all amounts due thereunder.

According to the petition filed by plaintiff Adrienne Rubenstein in Surrogate's Court, Queens County, her decedent died intestate and had no spouse or issue at the time of his death, and was survived by her and his father, Sherman Rubenstein, and siblings. For purposes of intestate succession, where a decedent dies intestate and is survived by one or both parents, and no spouse and no issue, all of the decedent's property passes to the surviving parent or parents (*see* EPTL 4-1.1[a][4]), notwithstanding the existence of siblings (*see DeLuca v Gallo*, 287 AD2d 222, 225-226 [2d Dept 2001]). Thus, by operation of law, plaintiff Adrienne Rubenstein and Sherman Rubenstein were the sole distributees of their son's estate at the time of his death (*see* EPTL 4-1.1[a][4]). Plaintiffs have failed to allege or show that plaintiff Adrienne Rubenstein and Sherman Rubenstein have timely filed formal renunciations (*see* EPTL 2-1.11), and all such persons (except for Herbert Rubenstein) who would inherit upon the renunciations of Adrienne and Sherman likewise have timely filed formal renunciations (*see* EPTL 2-1.11[e]; *see DeLuca v Gallo*, 287 AD2d at 226). Plaintiffs therefore have failed to allege or prove facts sufficient to show that plaintiff Herbert Rubenstein has been caused to be vested in the decedent's shares of stock referable to the apartment as the decedent's distributee.

To the extent plaintiffs seek a more expansive reading of section 4(a) of Article III of the bylaws, i.e. to include plaintiff Herbert Rubenstein as an immediate family member who may assume the occupancy agreement and become a member of the corporation, regardless of whether he is a distributee of the decedent, they have failed to state a cause of action against defendant. Defendant is entitled to follow its own bylaws, and apply them as written, without expansion, pursuant to the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]). Pursuant to that rule, absent evidence of bad faith, fraud, self-dealing, or other misconduct, the courts must respect business judgments (*see Auerbach v Bennett*, 47 NY2d 619, 630 [1979]). Although plaintiffs assert they have been treated as "second class citizens" by defendant, they make

no claim that defendant accorded the Estate of David K. Rubenstein disparate treatment from other estates in refusing to recognize a non-legatee or non-distributee of a deceased member as a person entitled to assume the occupancy agreement and obtain membership pursuant to section 4(a) of Article III of the bylaws. Consequently, plaintiffs have failed to state a claim sounding in breach of contract, breach of the implied covenant of good faith and fair dealing, or specific performance or declaratory or injunctive relief, in the nature of mandamus, pursuant to section 4(a) of Article III, predicated upon defendant's refusal to recognize plaintiff Herbert Rubenstein as a person entitled to rights of assumption of the occupancy agreement and membership under section 4(a) of Article III of the bylaws.

Plaintiffs also have failed to state a cause of action against defendant sounding in breach of contract, breach of the implied covenant of good faith and fair dealing, or specific performance or declaratory or injunctive relief, based upon defendant's failure to approve, pursuant to section 4(c) of Article III of the bylaws, the transfer by plaintiff Adrienne Rubenstein, as administrator of the Estate of David K. Rubenstein, of the occupancy agreement and membership to plaintiff Herbert Rubenstein. Defendant Herbert Rubenstein lacks standing to enforce the rights of the Estate of David K. Rubenstein pursuant to the occupancy agreement and section 4(c) of Article III of the bylaws (*see Leist v Goldstein*, 305 AD2d 468 [2d Dept 2003]). To the extent plaintiff Adrienne Rubenstein, as the administrator of the Estate of David K. Rubenstein, claims defendant has wrongfully failed to approve her application to transfer the decedent's apartment to plaintiff Herbert Rubenstein pursuant to section 4(c) of Article III of the bylaws, it is the business judgment rule, not the court's independent assessment of the reasonableness of the decision to withhold such consent, that provides the proper standard of review (*see del Puerto v Port Royal Owner's Corp.*, 54 AD3d 977 [2d Dept 2008]; *Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002]; *Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]). Plaintiff Adrienne Rubenstein, as administrator of the Estate of David K. Rubenstein, has failed to allege or demonstrate that defendant's withholding of consent is in bad faith or in furtherance of purposes other than those legitimately held by the corporation (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537–538). The mere hope by plaintiffs that discovery might provide some factual support for their causes of action is insufficient to avoid dismissal of them (*see Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001]).

To the extent plaintiffs claim that defendant failed to issue, following the interview of plaintiff Herbert Rubenstein, a determination with respect to their application, they do not seek in the complaint to direct defendant to make a determination, but rather to compel defendant to consent to plaintiff Herbert Rubenstein's assumption of the occupancy agreement and membership in the corporation. Defendant rejected plaintiffs' application by the August 6, 2013 letter, and has since withheld its consent to the assumption of the

occupancy agreement by plaintiff Herbert Rubenstein and his membership. To the extent plaintiffs seeks injunctive relief in the nature of mandamus pursuant to section 4(c) of Article III of the bylaws, it is not available since the approval of the assumption of the occupancy agreement by plaintiff Herbert Rubenstein and his membership in the corporation under that section is not a non-discretionary act.

The claim by plaintiff Adrienne Rubenstein, as administrator, that the Estate has had to pay maintenance in relation to the decedent's apartment also does not state a cause of action against defendant sounding in breach of contract and breach of implied covenant of good faith and fair dealing. The occupancy agreement binds plaintiff Adrienne Rubenstein, as the administrator of the deceased member's estate, and sets forth the obligation for payment of monthly carrying charges, among other things.

Lastly, plaintiffs' request for leave to replead is advanced in the last sentence on the final page of their memorandum of law, and there is no indication, even in a conclusory fashion, as to what the new pleading would be.

Accordingly, the motion by defendant to dismiss the complaint asserted against it is granted.

Dated: June 5, 2105

J.S.C.