

Matter of Thompson v Board of Director(s) 800 Grand Concourse
2015 NY Slip Op 31897(U)
September 21, 2015
Supreme Court, Bronx County
Docket Number: 261117/2014
Judge: Julia I. Rodriguez
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**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27**

S.K.

Index No. 261117/2014

In the Matter of the Application of
CHARLENE THOMPSON,

Petitioners,

-against-

DECISION and ORDER

BOARD OF DIRECTOR(S) 800 GRAND CONCOURSE,
OWNERS CHARLES H. GREENTHAL, AGENT/MGMT.,

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Respondents.

Recitation of the papers considered in review of Notice of Petition/Petition alleging breach of contract, fraud, deceit and psychological damages and the parties various motions as follows;

<u>Papers</u>	<u>Numbered</u>
Respondent's Motion to Dismiss, Memorandum of Law & Petitioner's Responses	1
Petitioner's Motion to Settle Matter for \$30,000	2
Respondents' Motion to Quash Petitioners' Subpoenas, Subpoenas & Petitioner's Responses	3
Petitioner's Motion to Add Husband to Caption & Respondents' Affirmation in Opposition	4

The parties' respective motions are consolidated and decided as follows:

Petitioner is a shareholder of the Respondent residential cooperative. The Petition alleges, in pertinent part, that respondents have engaged in a scheme to defraud petitioner and generate late fees; the petition seeks to:

1. Pay shareholder-tenant CHARLENE THOMPSON with retro payments of all late fees from 1990 to current with interest;
2. Have set-off and/or abatement wherein Petitioner does not pay rent for 24 months;
3. Be compensated monetarily and punitively for pain, suffering, emotional stress, psychological torment and torture at \$750,000.00;
4. Be compensated monetarily and punitively from CHARLES H. GREENTHAL for creating a pattern, practice and policy to withhold payments and generate a late fee for personal profit.

Respondents 800 Grand Concourse Co-op ("the Board of Directors") and Charles H. Greenthal (the "Managing Agent") move pursuant to CPLR §§3211(a)(1) & 7 to dismiss the petition, on various grounds, including:

- (1) the within is an improper special proceeding and should be a plenary action

instead;

(2) two other special proceedings between the parties are currently pending before the court;

(3) to the extent a special proceeding is appropriate, then the statute of limitations has expired for claims seeking reimbursement of late fees going back to 1990.

As an initial matter, the court refers to Index 251413/2014 titled *James Pettus, Husband of, Representative of, CHARLENE THOMPSON, Behalf of Petitioners v. Board of Director(s) 800 Grand Concourse Co-op as an entity, Charles H. Greenthal, as Agent (Mgmt)*. In that proceeding Petitioner Charlene Thompson challenged the respondent coop's authority to credit her unit with the STAR Rebate of \$295.76 rather than paying her directly, and challenged the coop board's authority to increase the assessment charges in general. Proceeding under index 251413/2014 was consolidated with two other petitions involving the same parties as herein: indices 250113/2015 and 251433/2014. Respondents moved to dismiss the petitions for the main reason that the petitioners failed to state a cause of action; their motion was granted, and the Petitions under index numbers 250113/2015, 251433/2014 and 251413/2014 were all dismissed.

In a sister proceeding under index 251751/2014, Petitioner Charlene Thompson and James Pettus seek to overturn the coop board's maintenance increase to 9%, challenging the board's authority to do so, and seeking the production of numerous financial documents pertaining to the individual shareholders and the cooperative's management. In the accompanying Decision & Order under index 251751/2014, Petitioner's requests for document production was denied for the reasons set thereto.

As is apparent, Petitioner Charlene Thompson has commenced duplicative proceedings under separate index numbers all stemming from the same grievance, to wit: the authority and operation of the coop board of directors to raise maintenance charges and charge, assess and collect late fees, and Petitioner's disagreement thereto. As already decided in the accompanying Decision & Order under index 251751/2014, the authority to assess, charge and collect maintenance and late fees generate from the powers inherent in the Proprietary Lease pertaining to Charlene Thompson, including paragraphs 1(a),

1(b) & 1(c) of the Proprietary Lease;¹; these sections authorize the board of directors to determine the coop's annual cash requirements vis-a-vis the amount of maintenance, "and to determine the cash requirements of the Corporation to be paid...by the shareholder tenants under their respective proprietary leases" [Article III, §7 of the By-Law at pg. 143]. Upon voting for an increase of maintenance, in accordance with the Proprietary Lease and By-laws, the decision of the cooperative board is preserved by the business judgment rule doctrine, which bars "judicial second guessing" of corporate decisions "so long as the decision is made in good faith and after reasonable investigation." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 926, 393 N.E.2d 994, 1000 (1979); *Levandusky v. One Fifth Avenue Apt. Corp.*, 171 A.D.2d 590, 567 N.Y.S.2d 662 (1st Dept. 1991) (unless a resident challenging the board's action is able to demonstrate a breach of the board's duty of loyalty to the cooperative, and/or of its duty to act for the benefit of the residents collectively, judicial review of the board's actions is not available).

After consideration of respondents' motion to dismiss, and petitioner's affidavits in opposition, dismissal of the proceeding is warranted under rule 3211(a)(4) of the CPLR (Civil Practice Law and Rules) which authorizes dismissal of an action or proceeding on the ground that "there is another action pending between the same parties for the same cause of action" in a another court." Inasmuch as the motion to dismiss points to the causes of action under index 251413/2014 as duplicative as those herein (261117/2014), at this time the proceeding under 251413/2014 has been dismissed; however, the causes of action alleged herein have "sufficient identity" with the causes of action alleged under index 251751/2014, which is still pending before the court. *White Light Prods. Inc. v. On the Scene Prods. Inc.*, 231 A.D.2d 90, 93, 660 N.Y.S.2d 568, 571 (1997)

More importantly, dismissal of this proceeding is warranted for failure to state a cause of action pursuant to Article 78 of the CPLR. The petition alleges causes of action sounding in breach of contract, fraud and psychological damage. Section 7801 of the CPLR specifically states that an Article 78 proceeding grants "relief previously obtained by writs of certiorari to review, mandamus or prohibition." According to Black's Law Dictionary, 5th Edition, a "writ" is an order issued from a court requiring the performance of a specific act, or giving authority to have it done. A *writ of certiorari* was issued by a

¹ Paragraph 28 of the Proprietary Lease also provides for "additional rent".

superior court to an inferior court in order for the superior court to inspect the proceedings and determine whether there were any irregularities. A *writ of mandamus* is a command issuing from a court of competent jurisdiction to commanding an inferior tribunal, board, corporation or person to perform a purely ministerial duty imposed by law. A *writ of prohibition* is that process by which a superior court prevents an inferior court from exceeding its powers in matters outside of its jurisdiction. While the issuance of "writs" is not practiced in civil law as frequently as it used to be, the relief requested in an Article 78 should be the modern day equivalent of the "relief previously obtained by writs of certiorari to review, mandamus or prohibition." CPLR §7802 provides that the Article 78 petition may challenge the final determination of a "body or officer" which includes a "court, tribunal, board, corporation, officer or other person, or aggregation of persons. . ." While the case law concerning the propriety of article 78 proceedings is exhaustive, it has been held that mandamus was an inappropriate vehicle for resolving disputes involving private contractual rights. *Yaeger v. Education Testing Service*, 158 A.D.3d 602, 551 N.Y.S.2d 574 (2d Dep't 1990).

Alternatively, claims for breach of contract, fraud and psychological damages require discovery for disposition. Consequently, these claims are inappropriate in a special proceeding such as the Article 78 herein.

For the foregoing reasons, Respondents' motion to dismiss pursuant to CPLR 3211(a)(1) and (7) is **granted**, and therefore it is

ORDERED that the Petition is dismissed.

Upon dismissal of the Petition, therefore:

- (1) Respondents' motion to quash subpoena duces tecum is **denied** as moot as now subpoenas require no response; and
- (2) ~~Respondents'~~ ^{Petitioner's} motion to compel settlement of \$30,000 in cash and related relief is **denied**.
- (3) Petitioner's motion to add Husband James Pettus as a Petitioner is **denied** as moot.

Those branches of the motion(s) seeking costs, reimbursement of costs and/or legal fees are **denied**.

Dated: Bronx, New York
September 21, 2015


Hon. Julia I. Rodriguez