

Summer v Ruckus 85 Corp.

2015 NY Slip Op 32096(U)

July 21, 2015

Supreme Court, New York County

Docket Number: 114295/11

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 2

Sumner, Thomas
-v-
Ruckus 85 Corp,

INDEX NO. 114295/11

MOTION DATE _____

MOTION SEQ. NO. 011

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 is decided under motion
sequence 010.

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

RECEIVED
AUG 12 2015
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Dated: 7-21-15
JUL 21 2015


HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: 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: PART 2

----- X
THOMAS SUMMER, SYDNEY LICHT and
ELIZABETH LOGAN HARRIS, individually and on
behalf of RUCKUS 85 CORP.,

Index No. 114295/11

Mot. Seq. Nos. 010, 011, 012

Plaintiffs,

- against -

RUCKUS 85 CORP., CHARLES GROOMS,
LYSIANE LUONG GROOMS and YVETTE
GEORGES DEETON,

FILED

SEP - 3 2015

COUNTY CLERK'S OFFICE
NEW YORK

Defendants.
----- X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE
REVIEW OF THE MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION (010) AND AFFIDAVIT AND AFFIRMATION ATTACHED	1 (Exhs A-T)
MEMORANDUM OF LAW IN SUPPORT	2
AFFIRMATION IN OPPOSITION.....	3 (Exhs 1-39)
MEMORANDUM OF LAW IN OPPOSITION AND SUPPORT OF CROSS MOTION	4 (Exhs A-C)
REPLY AFFIDAVIT	5 (Exhs A-N)
NOTICE OF CROSS MOTION AND AFFIDAVITS AND AFFIRMATION	6 (Exhs 1-70)
MEMORANDUM OF LAW IN SUPPORT AND IN OPPOSITION	7 (Exhs A-C)
AFFIRMATION IN OPPOSITION	8
AFFIRMATION IN OPPOSITION	9
REPLY AFFIRMATION IN SUPPORT.....	10 (Exhs A-R)
NOTICE OF MOTION (011) AND AFFIDAVITS ATTACHED ..	11 (Exhs A-G)
MEMORANDUM OF LAW IN SUPPORT	12
AFFIRMATION IN OPPOSITION	13 (Exhs 1-39)

PAPERS	NUMBERED
MEMORANDUM OF LAW IN OPPOSITION	14
REPLY AFFIDAVIT	15 (Exhs A-N)
REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT	16
NOTICE OF MOTION (012) AND AFFIRMATION ATTACHED	17 (Exhs A-I)
AFFIRMATION IN OPPOSITION	18 (Exhs A-B)
REPLY AFFIRMATION	19

This action involves a dispute among shareholders in defendant Ruckus 85 Corp. (Ruckus), a cooperative corporation owning the premises known as 85 Walker Street, New York, New York (the Building). This decision disposes of motion sequence numbers 010, 011, and 012.

In motion number 010, defendant Yvette Georges Deeton (Deeton) moves, pursuant to CPLR 3212 and Business Corporation Law §§ 722 and 724, for an order: (1) requiring Ruckus to indemnify her for the defense of this action; (2) allowing her reasonable expenses, including attorney's fees, during the pendency of this action that are necessary for her defense; (3) dismissing the first and second causes of action, and the third cause of action as against her; and (4) awarding her summary judgment on all five of her counterclaims.¹

Plaintiffs Thomas Summer (Summer), Sydney Licht (Licht), and Elizabeth Logan Harris (Harris) cross-move, pursuant to CPLR 3212 (c) and Business Corporation Law § 626 (e), for an order: (1) granting summary judgment on the first cause of action; (2) dismissing Deeton's second, third, and fourth counterclaims; (3) awarding attorney's fees, costs, and disbursements incurred in this action; and (4) severing and continuing the second and third causes of action.

In motion 011, defendants Charles Grooms and Lysiane Luong Grooms (Lysiane) (together,

¹In her notice of motion, Deeton states that she is seeking indemnification. But in her memorandum of law, Deeton states that she seeks indemnification as an alternative to the granting of summary judgment on her fifth counterclaim.

the Groomses) move, pursuant to CPLR 3212, for an order: (1) dismissing the second and third causes of action as asserted against them; and (2) maintaining the Groomses in the action as nominal defendants regarding the first cause of action.

In motion 012, Ruckus moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint for failure to state a cause of action, or, in the alternative, for a declaration that Ruckus is a nominal party in this action, against whom no parties assert any claims.

BACKGROUND

The underlying facts and allegations were set forth in prior decisions in this action. Summarized, on April 13, 2011, a piece of cast-iron fell from the facade of the Building (decision dated July 13, 2012, York, J. [July 2012 Decision] at 1). The New York City Department of Buildings (DOB) issued a notice of a “class one” violation requiring urgent repairs, but the Ruckus shareholders were unable to agree on a contractor (*Id.* at 2).

Until December 1998, the management of Ruckus was vested in a board of directors consisting of four members. On December 16, 1998, Ruckus’s certificate of incorporation and by-laws were amended to transfer the management to shareholders (decision dated June 27, 2012, York, J. at 2). Based on the amendment, the certificate of incorporation and by-laws requires a vote of 75% of the outstanding shares to take corporate action, and a quorum requires the presence of members owning at least 75% of the shares (July 2012 Decision at 2). Deeton, who owned 12 of 44 issued shares (27.3%), did not approve the decision of the other members to hire Deluc Inc. (Deluc), and she refused to pay her proportionate share of repair expenses. This action ensued (*Id.*)

Ruckus sought to terminate Deeton’s proprietary lease, and Deeton sought to enjoin Ruckus

from doing so. Pursuant to a so-ordered stipulation dated February 24, 2012 (February 2012 Order), the parties reached a temporary accommodation: Deeton agreed not to interfere with the repair work, and to pay her share of the expenses, plaintiffs agreed to withdraw the notice of termination of Deeton's lease, and the parties further agreed that a majority vote of the outstanding shares, instead of a 75% majority, would govern Ruckus (*Id.*).

In April of 2012, Ruckus served a notice on Deeton to cure her default in paying late charges in the amount of \$1,550.85, and again in May, 2012, for her failure to pay \$7,456.50 in attorneys' fees that Ruckus incurred in seeking to compel Deeton to pay her share of the repair expenses. Deeton moved to enjoin enforcement of the second notice to cure, restore her voting rights, and invalidate the shareholders' meeting wherein her vote was not counted. A temporary restraining order was issued, enjoining plaintiffs and Ruckus from taking any action to terminate Deeton's lease, and from interfering with her rights to vote and fully participate at all shareholders' meetings (*Id.* at 2-3).

The court disposed of Deeton's motion by: (1) granting an injunction tolling the cure period regarding the May, 2012 default notice, on the condition that Deeton post a \$10,000 bond; (2) enjoining plaintiffs and Ruckus from interfering with Deeton's voting rights; and (3) declaring as void the results of the May, 2012 shareholder's meeting, and providing for a new vote on the issues decided at that meeting (*Id.* at 7).

Additionally, the court validated the election of Summer as president and Lysiane as treasurer, finding that Deeton's vote would not have led to a different result. The court declined to consider other issues, including whether the assessment of late fees against Deeton was warranted, and whether she was obligated to pay attorney's fees (*Id.* at 6-7).

Through the three instant motions (010, 011, and 012) and the cross motion to motion 010, collectively, the parties seek summary judgment as to all three causes of action in the complaint, and all five of Deeton's counterclaims contained in her answer.

In the first cause of action, plaintiffs seek a judgment, on behalf of Ruckus, declaring that "Article Four" of the certificate of incorporation and those sections of the by-laws adopted on December 16, 1998 are null and void.

In the second cause of action, plaintiffs seek a permanent injunction, on behalf of Ruckus, enjoining the majority shareholders (i.e., defendants) from interfering with Ruckus' ability to perform the work that, allegedly, was authorized at the May 4, 2011 shareholders' meeting, and any necessary work to cure the conditions that resulted in the violations, and to cure existing hazardous conditions, including a leak around the roof's bulkhead and a mold condition, and a directive that each shareholder pay a proportionate share of the costs.

In the third cause of action, plaintiffs seek money damages against defendants in an amount to be determined by the court.

In her counterclaims, Deeton seeks: (1) a declaration that: (a) Ruckus' quorum requirement, provision for shareholder management, and voting provisions are valid; (b) the actions against Deeton to cancel her proprietary lease are premised upon invalid assessments and late fees; (c) voiding the allegedly unauthorized assessments and late fees; and (d) Ruckus' contract with Deluc was unauthorized and must be canceled; and (2) money damages in an amount to be determined at trial, plus attorneys' fees, and costs and disbursements.

DISCUSSION

Motion 010

Deeton seeks an order requiring that Ruckus indemnify her for the defense of the action against her, and seeks her reasonable expenses, including attorneys' fees, during the pendency of this litigation, that are necessary for her defense. The request is denied.

In seeking indemnification, Deeton invokes Business Corporation Law § 724 which provides, in relevant part:

“(a) Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the shareholders in the specific case under section 723 (Payment of indemnification other than by court award), indemnification shall be awarded by a court to the extent authorized under section 722 (Authorization for indemnification of directors and officers), and paragraph (a) of section 723.”

Business Corporation Law § 724 pertains to the indemnification of officers and directors (*see Britannia 54 Hotel Corp. v Freid*, 251 AD2d 49, 50 [1st Dept 1998]). Deeton seeks indemnification based on her status as a shareholder, rather than as an officer and director,² but argues that she can do so because of Business Corporation Law § 620 (f), which provides:

²In her initial memorandum of law, Deeton states that she is being sued in her capacity as an officer of Ruckus (*see* memorandum in support at 20; *see also* Deeton affidavit in support, ¶ 76, in which she states that she was a vice president at the time of the Deluc contract negotiations in July 2011). But in her reply memorandum of law, Deeton states that she is entitled to indemnification even though she is being sued in her capacity as a shareholder (*see* reply memorandum at 31; *see also* reply affirmation of Peter E. Sverd, Esq. at ¶ 14 [“The opponent overlooked BCL § 620 (f), and the argument that Deeton, who is being sued in her capacity as a ‘shareholder,’”])

“(f) The effect of any such provision authorized by paragraph (b) shall be to relieve the directors and impose upon the shareholders authorizing the same or consenting thereto the liability for managerial acts or omissions that is imposed on directors by this chapter to the extent that and so long as the discretion or powers of the board in its management of corporate affairs is controlled by any such provision.”

Business Corporation Law § 620 (f) refers to Business Corporation Law § 620 (b), which provides:

“(b) A provision in the certificate of incorporation otherwise prohibited by law because it improperly restricts the board in its management of the business of the corporation, or improperly transfers to one or more shareholders or to one or more persons or corporations to be selected by him or them, all or any part of such management otherwise within the authority of the board under this chapter, shall nevertheless be valid:

(1) If all the incorporators or holders of record of all outstanding shares, whether or not having voting power, have authorized such provision in the certificate of incorporation or an amendment thereof; and

(2) If, subsequent to the adoption of such provision, shares are transferred or issued only to persons who had knowledge or notice thereof or consented in writing to such provision.”

Deeton argues that the “managerial acts” mentioned in Business Corporation Law § 620 (f) includes shareholders acting in such capacity, because the word “chapter” refers to Chapter 4, which includes Article 7 (“Directors and Officers”). This argument is unpersuasive insofar as it claims entitlement to indemnification.

“The American Rule provides that ‘attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule’” (*Baker v Health Mgt. Sys.*, 98 NY2d 80, 88), *rearg denied* 98 NY2d 728 [2002], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Indemnification statutes that change the common-law rule that each party is liable for its own legal fees are to be construed strictly (*Baker v Health Mgt. Sys.*, 98 NY2d at 88; *546-552 W. 146th St. LLC v Arfa*, 99

AD3d 117, 121 [1st Dept 2012]). Here, there is no express provision for the indemnification of shareholders, which is the capacity in which Deeton seeks indemnification.

Even if the provisions of the Business Corporation Law that Deeton relies upon were applicable, or to the extent that she seeks indemnification as an officer (*see* note 2, *supra*), she has not demonstrated entitlement to indemnification on these papers, because there are issues of fact as to whether she acted in “good faith in dealing with the corporation” (*Zuckerman v Goldstein*, 71 AD3d 576, 577 [1st Dept 2010]).

Deeton next seeks dismissal of the first and second causes of action, and dismissal of the third cause of action as against her.

The request for dismissal of the first cause of action is denied. Plaintiffs are entitled to a declaration that Article Four of the amended certificate of incorporation and those sections of the by-laws adopted on December 16, 1998, providing that the management and operation of Ruckus are vested in the shareholders, and not in a board of directors, as required by Section 701 of the Business Corporation Law, are void.

Until December 16, 1998, Ruckus operated pursuant to its certificate of incorporation and a shareholders’ agreement, whereby its management was vested in a board of directors consisting of four members, three of whom constituted a quorum, and a unanimous vote of three were necessary for corporation action (affidavit of Elizabeth Logan Harris, sworn to October 24, 2013 [Harris aff], ¶¶ 11-12). In 1998, the shareholders’ agreement was superseded by by-laws vesting management in the shareholders, with no provision for a board of directors (*Id.*, ¶ 13; exhibit 16 to Harris aff). The by-laws provided for a president, vice president, treasurer, and secretary, and gave the shareholders power to prescribe the manner of maintaining and operating the Building (Harris aff, ¶¶ 13, 16;

exhibit 16 to Harris aff, Article IV, § 1 and Article II, § 6). Under certain provisions of the by-laws, shareholders owning at least 75% of the outstanding stock (33 of 44 shares) were required to agree for the transaction of any item of business (Harris aff, ¶ 18; exhibit 16 to Harris aff, Article II, § 5).

The by-laws required the stock certificates to bear a legend reading, in part: “Pursuant to the Certificate of Incorporation and By-laws, the shareholders of the Corporation manage the business of the Corporation and certain actions of the shareholders require a greater quorum and/or greater vote than would otherwise be required by law” (Harris aff, ¶ 20). Ruckus’ stock certificates failed to bear a legend stating that, pursuant to the certificate of incorporation and by-laws, the Ruckus shareholders manage the business of Ruckus, and certain actions of the shareholders require a greater quorum or greater vote than would otherwise be required by law (*id.*, ¶ 21; exhibits 2, 17, and 18 to Harris aff). The stock certificates did not contain language indicating that the shareholders of Ruckus managed the business of Ruckus, or an agreement of 75% of the outstanding stock was required for the transaction of any item of corporate business (Harris aff, ¶ 21). Plaintiffs argue persuasively that the absence of this legend voids the purported changes agreed upon in 1998.

Any restriction on the powers of a board of directors must be placed in the certificate of incorporation as required by Business Corporation Law §§ 701, 620 (b) (*see Model, Roland & Co. v Industrial Acoustics Co.*, 16 NY2d 703, 705 [1965] [“The two-thirds majority vote provision here involved would have been valid were it placed in the certificate of incorporation, but as a by-law it is invalid”]; *Joseph Polchinski Co. v Cemetery Floral Co., Inc.*, 79 AD2d 648, 649 [2d Dept 1980] [“By statute, any restriction on the powers of the board of directors must be placed in the certificate of incorporation . . . so that a by-law would be ineffective to shift this managerial prerogative into the hands of the shareholders”]; *see also Gazda v Kolinski*, 91 AD2d 860, 861 [1st Dept 1982])

[agreement may be legal if the certificate of incorporation had so provided pursuant to Business Corporation Law § 620 (b)], *affirmed in part, appeal dismissed in part* 64 NY2d 1100 [1985]; *Bank of New York Co., Inc. v Irving Bank Corp.*, 139 Misc 2d 665, 670 [Sup Ct, NY County 1988] [“By statute any restriction on the power of the board of directors must be placed in the Certificate of Incorporation . . . which was not done by IBC. Accordingly, the board of directors was without authority to adopt a provision restricting the action of a future board”). Thus, the agreement violated the statutory mandate that the business of the corporation is to be managed by the board of directors under Business Corporation Law § 701.

Deeton’s reliance on several decisions, each with a contrary determination, is unavailing because of a significant distinguishing feature in each of them. For example, in *Zion v Kurtz* (50 NY2d 92 [1980], *rearg denied* 50 NY2d 1060 [1980]), the Court of Appeals held that, when all stockholders of a Delaware corporation agree that “no ‘business or activities’ of the corporation shall be conducted without the consent of a minority stockholder, the agreement is, *as between the original parties to it*, enforceable even though all formal steps required by the statute have not been taken” (emphasis added). (*Id.* at 96). In so holding, the Court of Appeals found that, because there were no intervening rights of third persons, the agreement did not require anything not permitted by statute, and all of the stockholders gave their assent, the certificate of incorporation could be ordered reformed, by requiring the filing of the appropriate amendments (*Id.* at 102). The key element was the absence of third parties affected thereby (*see also Ench v Breslin*, 241 AD2d 475, 477 [2d Dept 1997] [proper to reform the certificate of incorporation where all shareholders agree to require the unanimous consent of the board of directors for corporate action, and consent to the amendment of the certificate to reflect this understanding, and where no rights of third parties are implicated]; *Adler*

v Svingos, 80 AD2d 764, 765 [1st Dept 1981] [same]).

Here, however, it is undisputed that Summer and Licht have occupied the second floor apartment at the Building since November of 2002, and Harris occupied the third floor artist-studio apartment since February of 2004 (Harris aff, ¶ 8). Hence, they are deemed third parties, in that they were not shareholders in 1998, and thus, they did not form part of the consenting shareholders.

Therefore, Deeton's citation to *Garson v Garson* (105 AD2d 726 [2d Dept 1984], *order aff'd sub nom Garson v Rapping*, 66 NY2d 928 [1985]) is inapposite. In *Garson*, the Court declared as valid the by-laws of the corporate defendant granting defendant three votes per share of stock owned and three votes as a director, as opposed to all other stockholders and directors who were to receive one vote per share of stock owned and one vote as a director. There was "nothing in the certificate of incorporation that alluded to the agreement of the parties as to special voting rights" (105 AD2d, *supra* at 727). The plaintiff requested that the voting provisions in the by-laws be declared invalid, and that the Court declare that she and defendant were entitled to one vote per share of stock owned and one vote each as directors. The Court found that the:

"documentary evidence and uncontested allegations of the parties on the record establish that although there was no written shareholders' agreement and no voting provisions were stated in the certificate of incorporation, plaintiff agreed to the voting provisions in the by-laws that gave defendant a three to one advantage. She ratified the by-laws at an organization meeting and acknowledged her ratification by signing the minutes of that meeting. She also signed the stock certificate which specifically referred to the voting provisions in the by-laws"

(*Id.* at 728-729). Such factors are not present here.

The request for dismissal of the second cause of action, seeking a permanent injunction, is granted. The February, 2012 order resolved the issue of enjoining the majority shareholders from

impeding or interfering with Ruckus's ability to perform the work that, allegedly, was authorized by all shareholders at the May 4, 2011 meeting. Specifically, the February, 2012 order provided, in part:

“Deeton agrees that neither she nor anyone acting on her behalf will interfere with or impede with the ability of Ruckus to remedy and cure the violations, including the work unanimously agreed to by the shareholders at the May 4, 2011 meeting and that is being carried out by DeLuc Inc. under the August 17, 2011 contract between DeLuc and Ruckus;

any further work beyond the scope of work unanimously approved at the May 4, 2011 meeting is subject to a shareholder vote and approval in accordance with the foregoing;

Deeton together with all other Ruckus shareholders agree to the outstanding settlement for mold remediation and repairs associated therewith or related to the cause thereof, and have no objection to Ruckus accepting and depositing the checks delivered previously by the insurer and hereby consents to Ruckus cashing those checks and proceeding with the work.”

Deeton seeks dismissal of the third cause of action as against her, which seeks money damages in an amount to be determined by the court. Allegedly, the acts and conduct of the majority shareholders (Deeton and the Groomses) have had a detrimental impact on the minority shareholders (plaintiffs), their valuable leasehold interests in the Building, and their substantial investments in Ruckus as shareholders. Plaintiffs contend that the majority shareholders breached a fiduciary duty to the minority shareholders to act in good faith and in the best interests of all shareholders.

According to plaintiffs, based on the allocation of shares provided for in the by-laws, the 75% requirement could not have been achieved unless Deeton and the Groomses both agreed. Even if the Groomses and plaintiffs agreed on proposed corporate action, Ruckus could not achieve the 75% requirement because, collectively, the Groomses and plaintiffs own only 32 of the outstanding 44 shares. Thus, Deeton and the Groomses have each been given an effective veto power over any corporate action (Harris aff, ¶ 19).

Plaintiffs aver that Deeton acted in bad faith by engaging in secret deals with the Groomsers; deliberately withholding payment of her proportionate share of assessments; by treating plaintiffs unfairly regarding the handling of repairs; by disregarding a serious leak in plaintiffs' units; and ignoring plaintiffs' heating problems, because Deeton's unit was not adversely affected. In her affidavit, Harris alleges that, as of the commencement of this action in December of 2011, through correspondence from her present attorney, Deeton continued to interfere with the process of the facade repair by contacting the New York City Landmarks Preservation Commission, whose approval for the work was required (Harris aff, ¶¶, 49-52). Deeton refused to have her unit inspected for mold, claiming that mold testing was not a Building issue, refused to vote for an increase in the monthly maintenance at the November, 2011 meeting, stating that she would not vote for anything until the facade repair dispute was resolved, and refused to approve necessary repairs to fix the leak in the Building that resulted in a harmful mold condition (*Id.*, ¶¶ 56, 60-61). She sought, by a preliminary injunction, to preclude any work from being done at the Building, whether by Deluc or anyone else (*Id.* ¶ 67).

In opposition, Deeton states that she was not opposed to the first assessment in principle, but wanted all formalities of the proprietary lease respected, including voting and agreeing on assessments "as actual numbers not notions floating the air" (affidavit of Yvette Georges Deeton, sworn to September 11, 2013, ¶ 59). She contested the assessments, because they were not adopted in accordance with the by-laws, proprietary lease, or certificate of incorporation. Up until the commencement of this action, she was never informed of any meeting at which late fees were ever discussed or voted upon, assessments were voted upon, or where the shareholders voted for Deluc to perform work at the building (*Id.*, ¶¶ 82-85). In its report, SW Engineering (brought in by the

Building's managing agent) did not state that the condition of the bulkhead was an emergency situation, and, in this regard, she agreed with the opinions of the Groomses (*Id.*, ¶¶ 88-94). Her "no" votes were made in the best interest of the corporation, and represented an honest exercise of her business judgment (*Id.*, ¶ 95).

"[T]he business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] [internal quotation marks and citation omitted]). Although the business judgment rule generally applies to directors and officers, here the shareholders were responsible for corporate decision making, the February, 2012 order provided that each party agreed to have a fiduciary duty to act in the best interests of Ruckus, as well as to each other, and all parties agree that the business judgment is applicable.

As described above, plaintiffs adequately allege that Deeton's conduct, vis-a-vs Ruckus, was influenced by self-interest, in contravention to her requirement to act in a fiduciary capacity pursuant to the February, 2012 Order. Hence, the burden shifted to Deeton to prove the fairness of the challenged acts (*Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]). Although Deeton disputes the veracity of plaintiffs' claims, the court cannot decide credibility issues on these papers. There are triable issues of fact as to whether Deeton acted in good faith, and whether her actions are protected by the business judgment rule (*DuBasso v East 69th Owners Corp.*, 51 AD3d 404, 405 [1st Dept 2008]).

Deeton next seeks summary judgment on all five counterclaims.

The first counterclaim seeks a declaration that the quorum requirement, provision for

shareholder management, and the shareholder voting provisions contained in the proprietary lease, by-laws, and certificate of incorporation of Ruckus are valid and in full force. The request is denied for the reasons stated above pertaining to plaintiffs' first cause of action.

The second counterclaim seeks a declaration that the actions and threatened action against Deeton to cancel her proprietary lease by Ruckus are unauthorized, and are premised upon the nonpayment of unauthorized and invalid assessments and late fees. Accordingly, the termination of Deeton's proprietary lease is invalid, and all such threats and actions must cease and be rescinded. The counterclaim is dismissed, because the February, 2012 order reinstated her proprietary lease.

The third counterclaim seeks a declaration that the assessments and late fees levied against Deeton were unauthorized acts, and that the assessments and late fees must be stricken and voided. The request is denied.

Deeton states that a vote was not taken to implement an assessment to pay for the scope of work that was agreed upon at the May 4, 2011 meeting, nor was a vote taken to implement a 15% late fee against shareholders who do timely pay their bills to the corporation (Deeton aff, ¶¶ 43-45). As discussed above, however, in the February, 2012 Order, Deeton agreed not to interfere with or impede with the ability of Ruckus to remedy and cure the violations, including the work agreed to by the shareholders at the May 4, 2011 meeting, and which was performed pursuant to the August 17, 2011 contract between Deluc and Ruckus. She also agreed to the settlement for mold remediation. The assessments pertain to the agreed upon work.

As for late fees, Deeton does not persuasively controvert the assertion that section 12 of the proprietary leases provide for the payment of late fees, and this applies to rent and "additional rent," which is defined as "any and all sums due hereunder other than rent whether or not such sums are

denominated as ‘additional rent’” (proprietary lease § 1 (a), at exhibit 27 to affidavit of Elizabeth Logan Harris, sworn to November 15, 2013).

The fourth counterclaim seeks a declaration that Ruckus’s contract with Deluc for construction at the Building was unauthorized, and that Ruckus must cancel the contract. The request is denied. As stated above, the issues concerning the work by Deluc were resolved by the February, 2012 Order.

The fifth counterclaim seeks money damages in an amount to be determined at trial, but not expected to be less than \$200,000, plus attorney’s fees, and costs and disbursements. The claim is based on the allegation that plaintiffs froze Deeton out of the governing affairs of Ruckus, in contravention of the by-laws, proprietary lease, and certificate of incorporation. Plaintiffs argue that their acts were ratified by the February, 2012 Order.

The February, 2012 Order was meant to permit Ruckus to proceed with work deemed necessary for the Building. In this regard, the February, 2012 order provided for, among other things, the withdrawal of the notice to cure and notice of termination; the governance of Ruckus; and the ability of Ruckus to remedy and cure the violations. It did not resolve issues of breach of fiduciary duty that any of the parties hereto may have against the others. As with the similar claims against Deeton, there are issues of fact as whether plaintiffs acted in good faith.

Plaintiffs’ Cross Motion

Plaintiffs’ request for summary judgment on the first cause of action is granted for the reasons stated above. Also for the reasons stated above, the request for dismissal of Deeton’s second, third, and fourth counterclaims is granted as to the second and third counterclaims.

The request for an award of attorney's fees, costs, and disbursements incurred in this action is denied without prejudice. Plaintiffs seek the award pursuant to Business Corporation Law § 626 (e), asserting that, by bringing this action, they conferred a substantial benefit on Ruckus, citing *Gusinsky v Bailey* (66 AD3d 614, 615 [1st Dept 2009]). Even if so, it would be premature to address this issue until the controverting allegations of breach of fiduciary duty and actions taken without authority and without good faith are resolved. To be sure, in *546-552 West 146th Street LLC v Arfa* (70 AD3d, *supra* at 512), the Court held that “[t]o make defendants wait until all of the related claims against them are resolved would eviscerate the right to indemnification.” Here, however, because there are numerous factual issues to be resolved, as discussed above, it is unclear as to whether plaintiffs’ own wrongful conduct may have contributed to the necessity of bringing this action.

Based on the foregoing, the request for severing and continuing plaintiffs’ second and third causes of action for trial is granted only as to the third cause of action.

Motion 011

The Groomses move for an order dismissing with prejudice the second and third causes of action asserted against them, and maintaining them in the action as nominal defendants with respect to the first cause of action.

As against the Groomses, the complaint alleges that they interfered with and impeded Ruckus from performing necessary repairs and maintenance by:

“(a) Threatening, in or about January 2011, at a special meeting of the shareholders, to use their ‘veto power’ and deny shareholders heat by refusing to approve a new boiler unless the Corporation paid for the removal of all asbestos in the basement, including asbestos outside the boiler room common area, which would otherwise have been the Groomses’ responsibility; and

(b) Refusing to approve repairs necessary to fix a leak into the Building and a hazardous mold condition affecting plaintiffs’ respective units at the Building”

(Complaint, ¶ 77).

The complaint also alleges that, at a shareholders’ meeting held on November 22, 2011, Lysiane asked Deeton if she would be willing to pay her assessment if Ruckus agreed to start over and hire a new contractor. Deeton said she would consider this, and that she would like to start over and get some additional bids, even though the engineer presented six bids on June 22, 2011 (*Id.*, ¶¶ 78-80). Allegedly, these actions were “impractical,” “counterproductive,” and exposed Ruckus to “further city violations, to further legal fees to negotiate a new contract with another contractor, to potential damages for canceling the contract with Deluc, further delays with DOB, additional charges for the scaffolding bridge, and other problems, fees and liabilities” (*Id.*, ¶ 81). Plaintiffs claim that these actions indicate that the Groomses assisted Deeton in her attempt to interfere with or halt the progress of essential work (*Id.*). The complaint alleges further that, at the meeting, together with Deeton, the Groomses voted against repairing the roof at that time, and, as a result, “the leak has not been repaired and plaintiffs’ respective units are continuing to sustain water damage and the existing mold condition has been exacerbated” (*Id.*, ¶¶ 85-86).

According to Lysiane, there is no merit to the allegation that the Groomses threatened at a special meeting of shareholders in January 2011 to use “veto power” and deny shareholders heat by refusing to approve a new boiler unless Ruckus paid for the removal of all asbestos in the basement.

She notes that the shareholders voted unanimously to replace the old boiler, as per a letter agreement dated January 27, 2011, and it was replaced. Moreover, the Groomses approved the assessment, as confirmed by plaintiffs' deposition testimony (See affidavit of Lysiane Luong Grooms, sworn to September 9, 2013, ¶¶ 4, 7).

As for the leak and mold condition, Lysiane avers that she approved repairs, again as confirmed by plaintiffs' deposition testimony (*Id.*, ¶ 11). Leighton Associates, Inc., an environmental health and safety consulting company, issued a report dated September 30, 2011 that found moisture and corrosion in the Groomses' apartment located in the basement and first floor, with "heavy amounts" of mold growth in the entrance to what Leighton referred to as the basement utility room (*Id.*, ¶ 12). As for the Summer's and Licht's unit and Harris' unit, the report found that the only areas of possible concern were some damage to the walls on the right side of the rear of each apartment, where water had leaked into the apartments from the top of the staircase; the walls were found to be dry at the time of the inspection (*Id.*, ¶ 13). According to the report, testing of airborne mold growth in all three apartments "was found to be within the acceptable range, with only one area slightly above this range, in the third floor apartment living room . . ." (*Id.*, ¶ 14).

At the time of the meeting on November 22, 2011, the shareholders were addressing urgently needed repair work to the Building's facade, and the ensuing issuance of violations. When the issue of immediately repairing the bulkhead came up for a vote, as opposed to the facade work, the Groomses voted a temporary "no," because they did not consider it urgent, unlike the facade repairs (*Id.*, ¶ 16).

Regarding the mold condition, the Groomses believed that it should be addressed after the leak is repaired, and that the basement, which is part of their unit, had the vast majority of the mold

(*Id.*, ¶ 17). After adequate progress on the facade repairs was done, they voted for the bulkhead repair and the mold remediation, both of which have been completed. Based on plaintiffs' own statements, and the report, plaintiffs' claim that they refused to approve repairs necessary to fix the leak and the mold condition is untrue (*Id.*, ¶ 21).

As for the claim that Lysiane acted improperly by asking Deeton at the November, 2011 shareholders' meeting "if she would be willing to pay her assessment if the Corporation agreed to start over and hire a new contractor [instead of Deluc]," Lysiane was trying to find a way out of the impasse that the shareholders were experiencing, for the good of Ruckus (*Id.*, ¶ 23). She argues that plaintiffs' claim that the suggestion was "impractical" and "counterproductive," and subjected Ruckus to risks of further fines from the DOB and construction expenses is based only on speculation. Ultimately, nothing came of the suggestion, because plaintiffs disagreed with it. Deluc completed the facade work, pursuant to a stipulation entered into by plaintiffs and Deeton, and so-ordered by the Court (*Id.*, ¶ 24).

In opposition, Harris states that the Groomses repeatedly acted in their own self-interest, and used their status as majority shareholders to plaintiffs' detriment, by imposing a "double standard" in their dealings with plaintiffs and their unequal dealings with the other majority shareholder, Deeton. The Groomses, especially Lysiane, who was president of Ruckus for many years, breached their fiduciary duty as majority shareholders to the minority shareholders and to Ruckus by refusing to approve urgently needed repairs, and ignoring recommendations by the Building's managing agent to cure hazardous violations, the leak, and resulting mold condition.

At the November 22, 2011 meeting, the Groomses voted "no" with respect to any work required to fix the leak (Harris aff, ¶ 61). As the mold report shows, a "higher than healthy" level of

mold was found in Harris's third floor unit. In her affidavit, Lysiane fails to mention that the mold testing showed that airborne mold spore concentrations were found to be elevated well above the acceptable range in both the basement and the staircases and halls. The omission of the "staircases and halls" from her affidavit is an attempt to conceal the hazardous mold conditions that affected all the residents of the Building living above the first floor. At the time of this mold report, Harris and her husband were residing permanently at the Building, while the Groomses had their permanent residence outside the Building, as they had for years. (*Id.*, ¶ 62). The Groomses never voted to repair the leak in the bulkhead roof or remediate the mold, contrary to Lysiane's statements in her affidavit. It took the lawsuit and the February, 2012 Order for the Groomses to support the bulkhead/roof repairs, the mold remediation, and for the ratification of the Deluc contract, which Lysiane had previously signed (*Id.*, ¶ 73). Up until that time, Ruckus had been deadlocked as a result of the Groomses' support of Deeton at the November 22, 2011 meeting, and thereafter (*Id.*, ¶ 74).

There were also secret negotiations between the majority shareholders in February, 2011 that occurred outside of a shareholder meeting and without a shareholder vote. Specifically, without the minority shareholders' permission, Lysiane, unilaterally and without prior consultation with the minority shareholders, gave Deeton extra time to pay the boiler assessment, which was due March 1, 2011 (*Id.*, ¶ 83). Months after the fact, the minority shareholders were informed that Lysiane gave Deeton until May, 2011 to pay (*Id.*, ¶ 84). Deeton claimed that she was given even more time, until July 1, 2011, to pay the assessment (*Id.*, ¶ 85).

Allegedly, the Groomses also received unequal treatment with respect to conditions and repairs in their apartment. Specifically, a leak in the Groomses' unit in 2012 was fixed right away, once the actual cause of the leak was determined after several visits from the plumber, but

repairs to correct leaks in the bulkhead that affected plaintiffs' interior units were not addressed immediately, and were voted down at the November 22, 2011 meeting of the shareholders (*Id.*, ¶ 89). The majority shareholders (including the Groomses) stated that they wanted to repair the facade before addressing the bulkhead leaks, even though SW Engineering and the managing agent said that the bulkhead leaks needed to be fixed as soon as possible (*Id.*, ¶ 90). The Groomses were concerned with the leak condition only to the extent that it affected their property (*Id.*, ¶ 93).

As evident from the foregoing, and as with the dispute between plaintiffs and Deeton, the court cannot resolve the conflicting allegations on these papers. Movants have not eliminated any triable issues of fact as to whether they took action that had no legitimate relationship to the welfare of the cooperative (*See Irene David Realty, Inc. v Moyal*, 107 AD3d 430, 431 [1st Dept 2013]) or accorded plaintiffs "disparate treatment" (*Kleinerman v 245 East 87 Tenants Corp.*, 105 AD3d 492 [1st Dept 2013]).

Motion 012

Ruckus moves for an order dismissing the complaint for failure to state a cause of action or, in the alternative, for a declaration that Ruckus is a nominal party in this action against whom no parties assert any claims and against whom no party seeks recovery for any damages related to their claims.

The motion is granted. Although the court previously determined that there were certain claims against Ruckus, based on the disposition herein of motion 010, disposing of the first cause of action, and the February, 2102 order, disposing of the second cause of action, the claims pertaining to Ruckus have been resolved. Thus, dismissing the complaint as against Ruckus is not

inconsistent with the court's prior order. The only remaining cause of action, the third, pertains only to the shareholders.

Accordingly it is

ORDERED that motion 010 by defendant Yvette Georges Deeton is granted to the extent of dismissing the second cause of action; and it is further,

ORDERED that the cross motion by plaintiffs Thomas Summer, Sydney Licht, and Elizabeth Logan Harris is granted to the extent of granting summary judgment as to the first cause of action and dismissing the second and third counterclaims; and it is further,

ADJUDGED and DECLARED that the 1998 amendment to the certificate of incorporation and by-laws of Ruckus 85 Corp. transferring the management of Ruckus 85 Corp. to shareholders and requiring a vote of shareholders owning at least 75% of the issued and outstanding stock of Ruckus 85 Corp. to agree to the transaction of any item of business by the corporation is null and void; and it is further,

ORDERED that motion 011 by Charles Grooms and Lysiane Luong Grooms is granted to the extent of dismissing the second cause of action as asserted against them; and it is further,

ORDERED that motion 012 by Ruckus 85 Corp. is granted and the complaint is dismissed as against Ruckus 85 Corp.; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 21, 2015

ENTER:



KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
SEP - 3 2015
COUNTY CLERK'S OFFICE
NEW YORK