

Iannece v 47-55 39th Place Condominium
2018 NY Slip Op 30547(U)
January 16, 2018
Supreme Court, Queens County
Docket Number: 4291/17
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

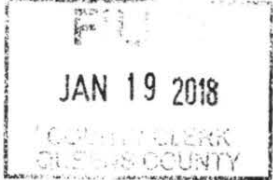
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JERRY IANNECE and LYNN IANNECE,

Plaintiffs,
-against-

THE 47-55 39th PLACE CONDOMINIUM,
RAYMOND CHAN, HARESH KUMAR JOSHI,
NEAL MILANO, DASTAGIR HOSSIAN and
SAMIR JOSHI,

Defendants,

Index No.: 4291/17
Motion Date: 8/24/17
Mot. Seq.: 1



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The following papers were read on this motion by defendants The 47-55 39th Place Condominium (Condominium), Raymond Chan, Hareesh Kumar Joshi, Neal Milano, Dastagir Hossain, and Samir Joshi to dismiss the complaint as against them.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	1 - 9
Answering Affidavits - Exhibits.....	10 - 12
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Upon the foregoing papers it is ordered that this motion is granted in part and denied in part, as follows:

The plaintiffs are the owners of Units 1D and 4B of the condominium building, located at 47-55 39th Place, Sunnyside, New York. The Condominium established governing by-laws in 1985. The Board of Managers was established as the governing body. No amendments to the by-laws have been passed. The plaintiffs allege in their complaint that the Board of Managers began to increase and impose fees, fines, flip taxes, sublet fees and other costs. The plaintiffs further allege that these actions were not authorized by the by-laws and were improper. The complaint names the Condominium, as well as individual board members, as defendants.

The individual defendants have all moved to dismiss the complaint for lack of personal jurisdiction. First, there is no affidavit of service for defendant Raymond Chan and the plaintiff has admitted that service was not effectuated upon defendant Raymond Chan. Therefore, the complaint must be dismissed against the defendant Raymond Chan.

Insofar as defendant Haresh Kumar Joshi claims the court lacks personal jurisdiction over him due to improper service, the plaintiffs offer an affidavit of service, dated April 27, 2017. This affidavit of service reflects that defendant Haresh Kumar Joshi was served on April 26, 2017, by delivery to a co-tenant who refused to give her name, a person of suitable age and discretion, at the defendants' actual residence, and subsequent mailing of the summons and complaint to the same address on April 27, 2017. This affidavit constitutes *prima facie* proof of proper service upon the defendant Haresh Kumar Joshi to CPLR 308(2)(see *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742 [2d Dept 2011]).

Defendant Haresh Kumar Joshi's bare and unsubstantiated denial of service does not rebut the presumption of proper service created by the affidavit of service (see *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984 [2d Dept 2009]; *Simmons First Natl. Bank v Mandracchia*, 248 AD2d 375 [2d Dept 1998]; *Remington Investments, Inc. v Seiden*, 240 AD2d 647 [2d Dept 1997]). The Court does not need to "conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service" (*Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, 733 [2d Dept 2008]); see *Simmons First Natl. Bank*, 248 AD2d at 376; *Sando Realty Corp. v Aris*, 209 AD2d 682 [2d Dept 1994]). The conclusory statements by the defendant Haresh Kumar Joshi without any elaboration that jurisdiction was not obtained is insufficient. Therefore, the plaintiff has established service upon Haresh Kumar Joshi.

The plaintiff utilized substituted service, under CPLR 308(4), to serve the defendants Neal Milano, Samir Joshi, and Dastagir Hossain. Service under CPLR 308(4) can only be used if service under CPLR 308(1) and (2) cannot be effectuated with due diligence (see *Simonovskaya v Olivo*, 304 AD2d 553 [2d Dept 2003]). In opposition, the defendant Samir Joshi submitted an affidavit that he moved out of the subject apartment building, where service allegedly occurred, in 2015, prior to the commencement of this

lawsuit. Therefore, service was not effectuated upon Samir Joshi and the complaint must be dismissed against the defendant Samir Joshi.

However, the affidavits of service as to Neal Milano and Dastagir Hossain lists the attempts made by the process server, at different days at different times, and is sufficient to establish due diligence to use CPLR 308(4) service. The affidavits further state that a subsequent mailing of the summons and complaint to the same address was sent on May 1, 2017. These affidavits constitutes *prima facie* proof of proper service upon defendants Neal Milano and Dastagir Hossain, pursuant to CPLR 308(4)(see *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742 [2d Dept 2011]). Additionally, where part of the service consists of mailing to the defendants there is a presumption that a properly mailed letter was received by the addressee. Therefore, the motion to dismiss the complaint by the defendants Neal Milano and Dastagir Hossain for lack of jurisdiction is denied.

The Court next turns to the rest of the motion to dismiss the complaint. On a motion to dismiss, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]). The individual board members have moved to dismiss the complaint against them. Board members are not individually liable for the actions of the board absent the allegation that they committed separate tortious acts (*Meadow Lane Equities Corp. v Hill*, 63 AD3d 699 [2d Dept 2009]). The only cause of action against the individual board members is the twenty-first cause of action. There are no allegations of separate tortious acts by any of the individual defendants. The conclusory allegations stated generally against all board members is insufficient to state a cause of action against any individual board member. The twenty-first cause of action against the individual defendants, therefore, must be dismissed as the individual board member defendants are not personally liable for the actions conducted on behalf of the condominium. The complaint is therefore dismissed against the remaining individual board members.

Thus, the Court now addresses the causes of action against the defendant Condominium. Here, the by-laws allowed the Board of Managers (Board) to adopt rules

and to impose fines for violations of these rules, however, it did not authorize the Board to adopt rules that are in conflict with the by-laws. The Board may only make such changes by amending the by-laws (*Olszewski v Cannon Point Assoc., Inc.*, 148 AD3d 1306 [3d Dept 2017]; *Board of Managers of Village View Condominiums v Forman*, 78 AD3d 627 [2d Dept 2010]). The Board may only adopt reasonable rules provided such rules and regulations do not conflict with or purport to impair a right expressly granted to the individual homeowners. Contrary to the argument put forth by the defendants that each unit must be occupied by its owner, Section 7 of the by-laws allows units owners to lease their units. Thus, any rule adopted by the Board that impairs the ability to rent the unit is improper and can only be done by amending the by-laws. The first cause of action alleges that the Board improperly passed a House Rule that imposed a \$750 interview and application fee for all new tenants. The second cause of action is that the Board improperly imposed a \$1,500 new tenant fee. The third cause of action alleges that the Board improperly imposed a \$2,500 rental application fee. The fourth cause of action is that the Board imposed a \$850 application fee and \$1,500 Management fee for all sales/purchases. The fifth cause of action is that the Board improperly started to charge additional purchase/sale transfer fees under which sellers are required to pay a processing/service fee in the amount of \$5,000 and purchasers were required to pay a \$1,500 application fee and a \$2,500 management fee. The sixth cause of action is that the Board changed the qualification for prospective board members and required that all board members must reside in the condominium building for a minimum of one-year prior to election to the board. The eighth cause of action is that the Board placed unreasonable restrictions on the rental of units including restricting rentals to a one-year term, all renewal leases are subject to the right of first refusal, \$100 surcharge if a guest is in the unit, \$500 per week contractor surcharge during renovations, \$300 elevator fee during renovations. The tenth cause of action is that the board has indicated that it will begin charging a \$200 per month per unit rental surcharge/sublet fee and if that fee is not paid the unit owner would be fined \$5,000. These allegations are sufficient to state causes of action and these causes of action cannot be dismissed on a CPLR 3211(a)(7) motion.

The other causes of action against the board must be dismissed. The seventh cause of action is that the board passed house rules making it more burdensome to rental or sell

units and requires buyers or tenants to submit copies of a US Passport or US Residency Card, State Driver's License or ID Cards, Social Security Cards, Criminal Background Check, Credit Report, three years of tax returns. The ninth cause of action is that the board is misapplying the right of first refusal contained in the by-laws in rental situations by applying it to every lease renewal situation rather than only once after approval of a specific tenant. The eleventh cause of action is that the is that the board without soliciting owner approval placed decorations that the plaintiff found offensive in the lobby. The twelfth cause of action was the that placement of holiday decorations created excessive and unreasonable noise. The thirteenth cause of action is that defendants improperly started charging fines for the violations of the house rules. The fourteenth cause of action is that the plaintiff's tenant was charged \$500 for the improper removal and disposal of a Christmas tree. The sixteenth cause of action is that defendants improperly build a storage shed in the year yard of the building. They allege that the shed was built improperly and that it has caused the tenants in unit 1D a deprivation of air, view and light and has caused a reduction in the fair market rental/sale value of the plaintiff's unit. The twenty-second cause of action alleges that the board decided to settle and extinguish a lien arising out of the alleged non-payment of an assessment by a shareholder. These causes of action concern matters within the board's authority and because the plaintiff has failed to allege any bad faith, fraud, self-dealing, or other misconduct on the part of the board, judicial review of the reasonableness of the board's action is foreclosed (see *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Jacobs v Grant*, 127 AD3d 924 [2d Dept 2015]; *Longo v Town 'N Harbor Owners Corp.*, 180 AD2d 779 [2d Dept 1992]).

The fifteenth cause of action is that the defendants posted notices with false derogatory, libelous and slanderous pictures and/or language in an attempt to harass and annoy the tenants in 1D which has caused the plaintiffs to have to reduce the rent of the tenants by \$100 a month to get them to stay. The allegation making up this claim are vague and conclusory and the facts pled do not state a cause of action. Therefore, this cause of action must be dismissed.

The seventeenth cause of action is that the defendants have taken numerous aggressive and illegal actions against the plaintiffs and their tenants in attempt to reduce

the value of their units. This cause of action is not based upon any factual allegations and is simply duplicative of other causes of action and must be dismissed.

The eighteenth cause of action is for breach of contract. In this cause of action they plaintiff allege that the defendants actions have violated the by-law, but it does not reference any specific actions. This cause of action must be dismissed as it is duplicative of the other causes of action which allege the specific acts taken by the board that violate the by-laws.

The nineteenth cause of action is for breach of fiduciary duty. This cause of action is simply a repetition of the actions that violated the by-laws, is duplicative and is not an independent cause of action.

The twentieth cause of action is for breach of fiduciary duty and punitive damages. This cause of action is a summary of the actions in the other causes of action is improper and must be dismissed. Furthermore, punitive damages are available only when the misconduct is beyond mere negligence such as when the tortfeasor acted wantonly, maliciously or with a reckless disregard that transcends mere carelessness or the wrongdoer engaged in intentionally oppressive or outrageous misconduct (*New York University v Cont. Ins. Co.*, 87 NY2d 308 [1995]; *Arnold v Siegel*, 296 AD2d 363 [2d Dept 2002]; *Kopec v Hempstead Gardens*, 264 AD2d 714 [2d Dept 1999]). Here, the allegations in the complaint are insufficient to state a claim for an award of punitive damages.

The twenty-third cause of action is for attorneys' fees. Here, this cause of action must be dismissed as the Plaintiff has not pled any facts that show an entitlement to attorneys' fees.

Accordingly, it is

ORDERED, that the branch of the motion to dismiss the complaint against the individual board members, defendants Raymond Chan and Samir Joshi, for lack of personal jurisdiction, is granted: and the complaint is dismissed against the defendants Raymond Chan and Samir Joshi; and it is further

ORDERED, that the branch of the motion to dismiss the complaint against the remaining individual board members, defendants Haresh Kumar Joshi, Neal Milano, is granted. As delineated above, only the twenty-first cause of action is against the

individual defendants, who are not personally liable for the actions conducted on behalf of defendant Condominium; and it is further

ORDERED, that the branches of the motion to dismiss the seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, and twenty-third causes of action are granted, and those causes of action are dismissed as against the Condominium; and it is further

ORDERED, that the branches of the motion to dismiss the first, second, third, fourth, fifth, sixth, eighth, and tenth causes of action are DENIED, and those causes of action as against the Condominium are NOT dismissed.

The foregoing constitutes the decision and order of this Court,

Dated: January 16, 2018


TIMOTHY J. DUFFICY, J.S.C.