Rushmore v Park Regis Apt. Corp.
2018 NY Slip Op 31335(U)
June 20, 2018
Supreme Court, New York County
Docket Number: 650610/15
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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STEPHEN RUSHMORE and JULIA RUSHMORE

Plaintiffs

Index No. 650610/15

v

DECISION and ORDER

PARK REGIS APARTMENT CORP., ROBERT BOURQUE, JAY RACHMANI, BRIAN HARRIS, RUTH TURNER, JAY WILKER, SHELDON WERDIGER, FRED SAMUELS, PATRICIA KANTOR and ELISE KASELL

MOT. SEQ. 001

Defendants.
---X

NANCY M. BANNON, J.:

I. INTRODUCTION

At the core of this action to recover damages for, inter alia, breach of a proprietary lease and the by-laws of a residential cooperative housing corporation, is the parties' dispute over the plaintiffs' right to use and convey certain roof terrace space adjacent to their penthouse apartment. Before the court is a motion by the plaintiffs pursuant to CPLR 3212 for summary judgment on the breach of contract cause action against defendant Park Regis Apartment Corp. (PRAC) and on the breach of fiduciary duty cause of action against defendants Robert Bourque and Jay Rachmani, two members of PRAC's board of directors. The action was previously discontinued as against the remaining individual defendants, all members of the board. PRAC, Bourque,

and Rachmani cross-move for summary judgment dismissing all three causes of action of the complaint. The motion is denied and the cross-motion is granted in part.

II. BACKGROUND

In support of their motion, the plaintiffs submit, inter alia, the affidavits of the plaintiff Stephen Rushmore (Stephen), the plaintiffs' former real estate attorney Jesse Gordon, and an attorney's affidavit, the pleadings, a copy of the proprietary lease, an acknowledgment agreement they were requested to and did execute in 2006, a 2014 contract of sale referable to the subject penthouse apartment, a proposed acknowledgment agreement that their prospective purchasers were requested to sign in 2014, and copies of letter and electronic mail correspondence.

In opposition to the motion, and in support of their cross motion, the defendants rely on some of the same documentation, along with affidavits from Bourque and Rachmani, the coop's offering plan and by-laws, closing documents referable to the 2014 sale of the subject penthouse apartment, deposition transcripts of the parties, sales listing agreements, an apartment appraisal report, the final signed acknowledgment agreement between the purchasers of the plaintiff's apartment and PRAC, photographs, and correspondence.

The plaintiffs' submissions show that, in 2006, they

purchased shares in PRAC referable to a penthouse unit on the roof of PRAC's cooperative apartment building, and were issued a proprietary lease in connection therewith. There are two roof terraces in the building that are at issue - one terrace space above, or on the roof of, the penthouse unit, as well as a terrace on the same level, just outside the unit. The plaintiff's claim of entitlement to the latter space arises from section 7(a) of the proprietary lease, which provides, in relevant part, that "[i]f the apartment includes a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse." As the plaintiffs explain in their supporting affidavits and deposition, and as set forth in the 2006 acknowledgment agreement, when they closed on their purchase of the unit, they executed a statement in which they "acknowledge[d] that we were advised by the Board of Directors of Park Regis Apartment Corporation that the Co-op intends to re-open the garden on the roof over the penthouses for use by residents of the building" (emphasis added). The plaintiffs' acknowledgment did not concern the terrace space level with the unit.

It is undisputed that, when the plaintiffs later placed their unit on the market in 2014, members of PRAC's board of directors suggested that they advise prospective purchasers that the board still had the intention of using the roof over the

penthouse unit for a garden, accessible by all residents of the coop. According to the plaintiffs, on October 8, 2014, prospective purchasers executed a contract to purchase the plaintiffs' penthouse unit for the sum of $8.75 million. The plaintiffs assert that, shortly thereafter, board members Bourque and Rachmani drafted a proposed acknowledgment agreement for signature by the prospective purchasers, pursuant to which the purchasers were to acknowledge that the "Roof and Roof Terrace are the property of [PRAC] and that pursuant to the [Proprietary Lease] or otherwise, neither is owned nor was ever intended for the exclusive use and occupancy by the [Unit] or by its owner." The prospective purchasers declined to execute the agreement, and the sale was never consummated. The plaintiffs claim that they complained to Bourque that the required agreement reduced the market value of their unit.

Thereafter, as described by Stephen, the plaintiffs lowered their asking price and, after making attempts to negotiate new language for the acknowledgment agreement, ultimately sold their unit for the sum of $8.25 million. PRAC's attorneys thereafter billed the plaintiffs the sum of $23,773.00 for their involvement in the final closing, and PRAC assessed the plaintiffs therefor.

This action ensued.

The plaintiffs assert that PRAC breached the proprietary lease and the coop's by-laws by compelling prospective purchasers

to execute the subject acknowledgment agreement, thus causing the plaintiffs to incur damages by depressing the resale value of the subject penthouse. They argue that imposition of a new acknowledgment agreement improperly stripped away the inherent rights reserved by penthouse owners to object to PRAC's use of a penthouse roof as a garden terrace. In addition, the plaintiffs claim that the fees charged by PRAC's attorney were improperly assessed against them or, at the very least, excessive and unreasonable, thus constituting a further breach of the by-laws. The plaintiffs also assert that Bourque and Rachmani breached the fiduciary duty owed by board members to shareholders by drafting the proposed acknowledgment agreement to their detriment.

The defendants counter that the new acknowledgment agreement simply clarified the status quo, the plaintiffs never had a right to prevent the coop's use of the penthouse roof as a garden, subject to approval by the New York City Department of Buildings, there were no breaches of contract or fiduciary duty, and the attorneys' fees assessed against the plaintiffs were reasonable and authorized by the by-laws.

The motion is denied and the cross motion is granted to the extent of dismissing the first and third causes of action, which respectively seek to recover for breach of fiduciary duty against PRAC and the individual board members, and so much of the second cause of action as alleges that PRAC breached its own by-laws and

the subject proprietary lease by requiring a prospective purchaser of the plaintiffs' penthouse unit to acknowledge PRAC's right to use the roof of that unit as a garden for the benefit of all tenant shareholders of the cooperative corporation. Thus, upon disposition of the motion, the only issue remaining to be tried is that portion of the second cause of action which alleges that PRAC breached its by-laws by assessing the plaintiffs an unreasonable amount in closing costs, including attorneys' fees, upon the ultimate sale of the unit.

III. DISCUSSION

A. STANDARD FOR SUMMARY JUDGMENT MOTIONS

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish his or her prima facie entitlement to judgment as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish his or her claim or defense sufficiently to warrant a court's directing judgment in the movant's favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the

opposing papers. See Winegrad v New York Univ. Med. Ctr., supra; O'Halloran v City of New York, supra. Should the movant meet his or her burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra.

B. BREACH OF CONTRACT

To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiffs are required to establish (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). A cause of action sounding in breach of contract may be based on the violation of a condominium's or coop's by-laws. See Big Four LLC v Bond St. Lofts Condominium, 94 AD3d 401 (1st Dept. 2012).

The construction of an unambiguous contract is an issue of law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance. See NFL Enters. LLC v Comcast Cable Communications, LLC, 51 AD3d 52 (1st Dept. 2008). The question of whether an ambiguity exists must be ascertained from the face of an agreement, without regard to extrinsic evidence. See Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78 (1st Dept. 2013).

It is also well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); 1009 Second Avenue Assocs. v New York City Off-Track Betting Corp., 248 AD2d 106 (1st Dept. 1998); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995). Thus, a written lease "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002); see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1 (1st Dept. 2012); 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1st Dept. 2004). Further, "[a]ll parts of a contract must be read in harmony to determine its meaning." Bombay Realty Corp v. Magna Carta, Inc., 100 NY2d 124, 127 (2003).

Applying these principles, the court concludes that the defendants established that the word "roof," as employed in the proprietary lease, refers only to the roof of the building, and gives exclusive use, to the owners of a penthouse unit, of that portion of the roof of the building adjoining and appurtenant to the penthouse unit, i.e., the portion of the roof of the building which is on the same level as the floor of the penthouse unit. An "appurtenance" is a right of way that is necessary to give

usable enjoyment to the conveyed premises. See Fischer v Anger, 283 AD2d 865 (3rd Dept. 2001). Here, the exclusive use of the penthouse roof by the owner of the penthouse unit is not necessary to give that owner usable enjoyment of the unit, just as the use of the roof of the building is not necessary to give the owner of the apartment units immediately thereunder usable enjoyment of those apartments. Contrary to the plaintiffs' contention, the phrases "portion of the roof adjoining a penthouse" and "portion of the roof appurtenant to the penthouse" in the proprietary lease were not intended by the parties to refer to different areas of the roof but only the roof area on same level and just outside the penthouse. See Rose v 115 Tenants Corp., 150 AD3d 472 (1st Dept. 2017); Grace Terrace Apt. Corp. v Goldstone, 103 AD2d 699 (1st Dept. 1984) *app dismissed* 63 NY2d 925 (1984). Notably, in both Rose v 115 Tenants Corp., supra and Grace Terrace Apt. Corp. v Goldstone, supra, the First Department reached the same conclusion in interpreting nearly identical lease provisions as that in the parties' lease. Thus, the plaintiff's rights extended only to the roof area on the same level and just outside the penthouse, not to any roof area on top of the penthouse.

Indeed, there is no dispute here that the former and current owners of the penthouse unit had and have exclusive use of that portion of the roof of the building that is adjacent to the floor

of the subject penthouse unit, the terrace on the same level as and just outside the unit. The proprietary lease was clearly not intended to refer to the roof over the penthouse unit itself since it neither "adjoins" the unit nor is an "appurtenance" thereto. In opposition to the defendants' showing in this regard, the plaintiffs do not show that the proprietary lease was ambiguous, and fail to raise a triable issue of fact as to whether the parties intended for the plaintiffs to reserve any rights in connection with the roof of the penthouse unit itself.

Conversely, the defendants' submissions establish that the acknowledgment agreements executed by the plaintiffs in 2006, and drafted by Bourque and Rachmani in 2014, clearly refer to the roof of the penthouse unit itself. Contrary to the plaintiffs' contention, their alleged retention of some unwritten, inchoate "right to object" to PRAC's conversion of the roof of the penthouse unit into a garden terrace neither defeats PRAC's right to such use of that roof under the by-laws, as protected by the business judgment rule (see Rubinstein v 242 Apt. Corp., 189 AD2d 685 [1st Dept. 1993]), nor precludes PRAC or its board members from asking prospective purchasers to acknowledge PRAC's right in this regard.

Thus, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on so much of the breach of contract cause of action as is premised on the

defendants' conduct in compelling the purchaser to execute an acknowledgment agreement. For the same reasons, the defendants have thus shown that their claim of right over the use of the roof of the penthouse unit itself, as opposed to the roof of the building adjacent to the penthouse unit, does not constitute a breach of the proprietary lease. Thus, in connection with their cross motion, the defendants have established their prima facie entitlement to judgment as a matter of law dismissing the breach of contract cause of action, except as to the claim that attorneys' fees assessed against the plaintiffs in connection with the closing were unreasonable. In that regard, the defendants have not shown that the entirety of the $23,773 in attorneys' fees that was billed was necessary to the consummation of the closing. The plaintiffs' opposition, however, is insufficient to defeat PRAC's entitlement to judgment dismissing the claim that it breached the lease and by-laws by requiring the purchasers to execute the acknowledgment agreement since, even if the plaintiff's version of the facts are accepted as true, PRAC's conduct does not rise to a breach of contract. See Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra.

C. BREACH OF FIDUCIARY DUTY

The plaintiffs correctly point out that Business Corporation

Law § 501(c) prohibits the unequal treatment of similarly situated shareholders. See Wapnick v Seven Park Avenue Corp., 240 AD2d 245 (1st Dept. 1997). It is also well settled that members of a board of directors of a corporation "owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly." Schwartz v Marien, 37 NY2d 487, 491 (1975).

Like any other corporate board, the board of a residential cooperative has a fiduciary duty to the shareholders, and where violations of individual officers' and board members' fiduciary duties are alleged, a breach of fiduciary duty claim may be maintained against such individuals. See Ramos v 24 Cincinatus Corp., 104 AD3d 619 (1st Dept. 2013); Fletcher v Dakota, Inc., 99 AD3d 43, (1st Dept. 2012); Ackerman v 305 East 40th Owners Corp., 189 AD2d 665 (1st Dept. 1993). The party challenging the board's actions has the burden of demonstrating the breach (see Silverstein v Westminster House Owners. Inc., 50 AD3d 257 (1st Dept. 2008]) by showing "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." Parekh v Cain, 96 AD3d 812, 816 (2nd Dept. 2012), quoting Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 (2nd Dept. 2010).

> "[T]here is no principle of corporate law that director liability arises only where the director commits a tort independent of the tort committed by the corporation itself. On the contrary, it has long been held by this

> Court that 'a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced.'"

Fletcher v Dakota, Inc., 99 AD3d 43, 49 (1st Dept. 2012), quoting Pequero v 601 Realty Corp., 58 AD3d 556, 558 (1st Dept. 2009); see Espinosa v Rand, 24 AD3d 102 (1st Dept. 2005); American Exp. Travel Related Services Co., Inc. v North Atlantic Resources, Inc., 261 AD2d 310 (1st Dept. 1999).

However, the plaintiffs have failed to allege any conduct on the part of Bourque or Rachmani which would constitute a breach of fiduciary duty so as to impose individual liability upon them. They failed to show that the treatment of their unit by these defendants was unfair, that these defendants committed misconduct, or that they imposed any unauthorized restrictions on the sale of their unit.

On the other hand, in connection with the cross motion, the affidavits of Bourque and Rachmani establish, prima facie, that the treatment of the plaintiffs was no different than the treatment of any other penthouse owner, and that such treatment was fair, authorized, and within the intendment of the proprietary lease and the by-laws. For the same reasons as their failure to establish their own right to judgment, the plaintiffs failed to raise a triable issue of fact in this regard.

Finally, that branch of the cross motion which is for summary judgment dismissing the portion of the second cause of

action which alleges that PRAC breached the by-laws by assessing the plaintiffs an unreasonable amount in closing costs, including attorneys' fees, in connection with the final sale of the subject penthouse unit is denied, leaving that issue for trial.

IV. CONCLUSION

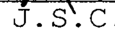
Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment is denied; and it is further,

ORDERED that the defendants' cross motion for summary judgment is granted to the extent of dismissing (a) the first cause of action, which is to recover for breach of fiduciary against the defendant Park Regis Apartment Corp., (b) so much of the second cause of action as seeks to recover damages from Park Regis Apartment Corp. for breach of contract, based on its requirement that prospective purchasers must execute the subject acknowledgment agreement in connection with the use of the penthouse roof, and (c) the third cause of action, which is to recover for breach of fiduciary duty against defendants Robert Bourque and Jay Rachmani, the motion is otherwise denied, and those causes of action or portions thereof are dismissed.

This constitutes the Decision and Order of the court.

Dated: June 20, 2018

ENTER: 
J.S.C.

HON. NANCY M. BANNON