

Mees v Sweeney Bldg.

2018 NY Slip Op 34588(U)

September 7, 2018

Supreme Court, Kings County

Docket Number: Index No. 508420/2017

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of September, 2018.

P R E S E N T:
HON. RICHARD VELASQUEZ

Justice.

-----X
HELEN MEES,

Plaintiff,

Index No.: 508420/2017

-against-

Decision and Order

THE SWEENEY BUILDING,
BY ITS BOARD OF MANAGERS,

Defendant(s).

-----X

The following papers numbered 1 to 6 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Cross-Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	1
Opposing Affidavits (Affirmations) _____	2
Reply Affidavits (Affirmations) _____	3
Memorandum(a) of Law _____	4-6

After a review of the submissions herein, the Court finds as follows:

Defendant's, THE SWEENEY BUILDING BY ITS BOARD OF MANAGERS, hereinafter "THE BOARD", move by Notice of Motion to dismiss pursuant to CPLR 3211(a)(1) and (7) and 3016(b) dismissing the plaintiff's verified complaint with prejudice.

Plaintiff opposes the same.

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#2

ARGUMENTS

Defendant, in support of their motion contends the plaintiff's complaint should be dismissed pursuant to CPLR § 3211(a)(1) and (7). Defendant alleges plaintiff's first and sixth causes of action should be dismissed contending they are meritless because they are based on a faulty interpretation of the By-Laws. Defendant's allege plaintiff's second cause of action has no basis in law or fact. Defendant's further allege, plaintiff's third and seventh causes of action should be dismissed because the plaintiff has no entitlement to such relief as a matter of law. Defendant's allege the Plaintiff's fourth cause of action should be dismissed as untenable. Defendants allege the Plaintiff's fifth cause of action should be dismissed because the plaintiff bases the same on a demonstrably false allegation, documentary evidence to the contrary exists, and the plaintiff cannot satisfy the elements of her cause of action for estoppel. Defendant's allege Plaintiff's eighth cause of action should be dismissed because the condo has absolute discretion to refuse any request the plaintiff makes to lease a portion of her unit. Plaintiff's ninth cause of action should be dismissed because it fails to state a legally cognizable claim for illegal lock out because the plaintiff has not demonstrated that the Condo illegally evicted her. Defendant's allege Plaintiff's tenth cause of action should be dismissed because it is not plead with the requisite particularity and because the documentary evidence demonstrates that the Condo, through its Board acted well within its authority under the By-Laws. Finally, defendants allege the plaintiff's eleventh cause of action for attorney's fees and costs should be dismissed because there is no provision in the by-laws pursuant to which the plaintiff would be entitled to attorney's fees or any other expenses. The defendant's do not address their claim regarding CPLR 3016(b).

Plaintiff opposes the same contending a valid cause of action for breach of fiduciary duty exists because the Board acted outside of its scope of authority and the business judgment rules does not apply. Moreover, the document relied upon by the defendant support the plaintiff's claims. Plaintiff further alleges enactment and enforcement of house rule #47 singled out plaintiff for disparate treatment which is also a breach of fiduciary duty. Additionally, plaintiff alleges that the defendant breached their fiduciary duty when the defendant illegally locked the plaintiff out of the building as alleged in the complaint. Plaintiff alleges she has a valid claim for illegal lockout because the Board intentionally and maliciously disabled plaintiff's keycode which denied her access to the front door of the building. Plaintiff further alleges her second cause of action should not be dismissed because there is no provision in the by-laws which authorizes or otherwise empowers the Board to promulgate a House Rule suspending services to owners with common charge arrears in dispute. Plaintiff alleges the third cause of action must not be dismissed because the suspension of services for outstanding common charges cannot be enforced while the plaintiff continues to pay base common charges and while the disputed penalties and assessments are being litigated. Plaintiff further alleges that the fifth cause of action should not be dismissed because discovery has not yet been conducted in this case. Plaintiff also alleges the documentary evidence does not conclude as a matter of law that the plaintiff is not entitled to declaratory judgment that article 6 applies to portion unit rentals exclusive of article 8 requirements, contending Section 8.1 and 6.1 are incongruous and do not modify or supplement the other because if they were 81 would have specifically so stated and it does don't. Moreover, plaintiff contends it would be "absurd" for the Board to be given the right of first refusal to become a roommate of a person leasing a portion of the unit. Finally, plaintiff alleges it is entitled

to legal fees when it is awarded a judgment for the causes of action alleged in this complaint, and that the plaintiff is entitled to the reciprocal right of legal fees to the extent that the condo is entitled to legal fees over and against the plaintiff.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v. Purdy*, 29 NY2d 157, 324 NYS2d 47, 272 NE2d 550). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, *supra*, 40 NY2d at 635, 389 NYS2d 314, 357 NE2d 970) and **“the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, *supra*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). “[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion” (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). **“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss”** (*Shaya B. Pac., LLC v. Wilson, Elser,*

Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19).

In the present case, affording the complaint a liberal construction, accepting the facts as alleged therein as true, and granting plaintiffs the benefit of every possible inference, it is the opinion of this Court that the complaint sufficiently states a cause of action for all claims including but not limited to breach of fiduciary duty and illegal lockout; at this pre-discovery stage of the proceedings (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra* at 38). Although facts sufficient to justify opposition may exist, they currently reside almost exclusively within the knowledge of the officers or employees of defendant (see CPLR 3211[d]). See also *Iommarini v. Mortg. Elec. Registration Sys., Inc.*, 54 Misc 3d 1225(A) (NY Sup Ct. 2017).

When a party, usually the defendant, moves for a motion to dismiss, it is asking the court to make that determination instead. "Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other words, it must err on the side of the plaintiff. Toward this aim, many rules and standards have evolved for the court to follow." *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 NYS2d 869 (Sup Ct 2013).

Moreover, in the case at bar, Plaintiff's sworn complaint constitutes evidence that there is a basis for all the causes of action including and not limited to defendants breaching their fiduciary duty to the plaintiff and illegally locking out the plaintiff. How credible that evidence is irrelevant at this juncture. Plaintiff must still make out a *prima facie* case against them at trial through competent evidence, but when it comes to "he said, she said," merely raises a question of credibility for the jury to decide (see

Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc., supra, 202 AD2d 191, 608 NYS2d 214). As such, the plaintiffs have plead facts sufficient to state a cause of action and the defendant has failed to submit any documentary evidence to the contrary. Additionally, defendant's contention that the plaintiff is not entitled to legal fees because the by-laws do not provide for such relief has no merit.

Accordingly, Defendant's motion to dismiss plaintiff's complaint is hereby Denied in its entirety, as the plaintiff has sufficiently stated numerous causes of action in their complaint.

This constitutes the Decision/Order of the Court.

Date: September 7, 2018



RICHARD VELASQUEZ, J.S.C.

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So Ordered
Hon. Richard Velasquez

KINGS COUNTY CLERK
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