

Jarmuth v Leonard
2019 NY Slip Op 30846(U)
April 4, 2019
Supreme Court, New York County
Docket Number: 152535/2018
Judge: Kelly A. O'Neill Levy
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**KELLY O'NEILL LEVY
JSC**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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SANDRA JARMUTH,

Plaintiff,

- v -

LAUREN LEONARD, NEAL LEONARD, TERESE SANDRA
NUNNERLEY, JORGE ELIAS, and LUCILA ELIAS.

Defendants.

INDEX NO. 152535/2018

MOTION DATE 01/23/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 36, 37, 42

were read on this motion to/for DISMISS

HON. KELLY O'NEILL LEVY:

This is an action where the plaintiff alleges breach of fiduciary duty, among other claims, against individual members of a cooperative corporation's board of directors.

Defendants Lauren Leonard, Neal Leonard, Terese Sandra Nunnerley, Jorge Elias, and Lucila Elias move for an order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the complaint. Plaintiff Sandra Jarmuth opposes.

BACKGROUND

This matter concerns the cooperative residential building located at 36 East 69th Street in Manhattan (hereinafter, the building) and owned by 36 East 69th Corp. (hereinafter, the corporation). At the times relevant to the complaint, the Board of Directors of the corporation (hereinafter, the board) consisted of defendants Lauren Leonard, Neal Leonard, Terese Sandra Nunnerley, plaintiff, and non-party Francine Morin. The corporation operates pursuant to certain bylaws. The corporation issues proprietary leases for the apartments to its shareholders appurtenant to their shares. The building has ten residential units, there are nine shareholders of

the corporation, and there are 3,468 shares divided among the shareholders. Plaintiff is the owner of the 320 shares appurtenant to Unit 3B in the building. Plaintiff has commenced four actions against the board, the corporation, the corporation's counsel, and various shareholders (in addition to the present action, *Jarmuth v. Nunnerley*, Supreme Court, New York County, Index No. 153095/2014; *Jarmuth v. Leonard*, Supreme Court, New York County, Index No. 152754/2014; *Jarmuth v. Wagner*, Supreme Court, New York County, Index No. 155922/2018).

By Contract of Sale, dated November 7, 2017 (hereinafter, the contract), plaintiff sought to purchase the shares appurtenant to Unit 3A in the building, which shares are owned by defendants Jorge Elias and Lucila Elias. The contract was presented to the board as part of an application for approval, as required by the bylaws and proprietary lease for the building. On January 23, 2018, the board held a vote on whether to approve the contract, and the only voting members for this vote were Mr. Leonard, Ms. Leonard, and Ms. Nunnerley. In a letter, dated January 25, 2018, the board advised plaintiff that the request to transfer the shares appurtenant to Unit 3A to plaintiff had been denied.

On March 22, 2018, plaintiff filed her complaint, alleging the following causes of action: (1) breach of fiduciary duty and disparate treatment, (2) interference with prospective financial relations, (3) prima facie tort, (4) tortious interference with a contract, (5) a declaratory judgment, (6) a mandatory permanent injunction, (7) punitive damages, and (8) attorneys' fees.

DISCUSSION

CPLR 3211(a)(1) allows a defendant to seek dismissal of a complaint based on a defense "founded upon documentary evidence."

CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every

favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). If the court “determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete” and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). While factual allegations in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to the presumption of truth. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep’t 1995). The test is not whether the complaint states a cause of action but whether the pleader has, in fact, a cause of action. *Scarlett Letters, Inc. v. Compugraphic Corp.*, 61 A.D.2d 930, 930 (1st Dep’t 1978).

When a complaint fails to plead that the individual members of a cooperative’s board of directors have “acted tortuously other than in their capacity as board members,” the cause[s] of action as to the individual members shall be dismissed. *Brasseur v. Speranza*, 21 A.D.3d 297, 298 (1st Dep’t 2005); *Hersh v. One Fifth Ave. Apt. Corp.*, 163 A.D.3d . The courts are generally prohibited by the business judgment rule from inquiring into the propriety of actions taken by the directors on its behalf. *Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 325 (1st Dep’t 1998). That a cooperative corporation’s board of directors may have taken action that deliberately singles out individuals for harmful treatment does not, ipso facto, expose the individual board members to liability. *Id.* at 326.

Plaintiff’s claims against Ms. Leonard, Mr. Leonard, and Ms. Nunnerley are solely based on and limited to their decision, as voting members of the board, to reject plaintiff’s application to purchase the shares appurtenant to Unit 3A. Therefore, as the claims are not based on Ms.

Leonard, Mr. Leonard, and Ms. Nunnerley's individual actions independent of their roles on the board, dismissal of the complaint as against them is warranted.

Plaintiff's claims against Mr. Elias and Ms. Elias do not allege any wrongdoing on their part, nor does plaintiff seek relief from them. The contract states that the sale of shares is contingent upon the unconditional consent of the corporation. As this contingency has not come to fruition, there is no basis for any claim against Mr. Elias or Ms. Elias. Thus, based on the documentary evidence, namely the contract, there is no basis for a claim against Mr. Elias or Ms. Elias.

Under the business judgment rule, it is presumed that the action of a cooperative's board of directors are taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Levandusky v. One Fifth Ave Apartment Corp.*, 75 N.Y.2d 530, 537-538 (1990). A judicial review of a board's decision is only permitted of "improper" decisions, such as "when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority." *Id.* at 540.

Plaintiff's complaint alleges that because of her actions and lawsuits, she was prohibited from obtaining additional shares in the corporation. Plaintiff asserts that the board's bad faith precludes reliance on the business judgment rule. But in *Simon v. 160 W. End. Ave. Corp.*, the board of directors relied on what the plaintiffs claimed to be false and defamatory statements against the shareholder seeking to transfer shares to the plaintiffs in denying the pertinent transfer requests; one of the plaintiffs applied for the transfer in her individual capacity but was denied as a result of a false accusation made by the defendants that she was not a good neighbor,

and the court held that the defendant's alleged improper actions did not amount to bad faith, or to overcome a cooperative corporation's right to reject a transfer of shares. *Simon v. 160 W. End Ave. Corp.*, 2003 NYLJ LEXIS 1228, *4, 7-9 (Sup. Ct. N.Y. Co. 2003). Here, there is no allegation in the complaint that provides a basis to overcome the business judgment rule, which precludes judicial review of the board's decision. None of the allegations in the complaint amount to the level of bad faith. Thus, dismissal of the complaint in its entirety is proper.

Beyond the protections of the business judgment rule, the proprietary lease explicitly states that the board has the authority to reject a transfer of shares "for any reason or for no reason" [Proprietary Lease (ex. B to the Leonard aff.) at ¶ 16]. Therefore, the documentary evidence is dispositive in establishing the board's authority in rejecting plaintiff's application.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that defendants Lauren Leonard, Neal Leonard, Terese Sandra Nunnerley, Jorge Elias, and Lucila Elias' motion for an order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the complaint is granted and the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

April 4, 2019
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE:

152535/2018 JARMUTH, SANDRA v. LEONARD, LAUREN
Motion No. 001