

Lama v 3681 Broadway HDFC
2019 NY Slip Op 31061(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 656634/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 52EFM

Justice

INDEX NO. 656634/2016

MOTION DATE 10/31/2018

MOTION SEQ. NO. 005

FRANKLIN LAMA, LIDIO ZAPATA, RAMONA BAUTISTA, JUAN TAVARES, ILUMINADA BLANCO, INDIVIDUALLY AND DERIVATIVELY AS SHAREHOLDERS OF THE 3681 BROADWAY HDFC,

Plaintiff,

- v -

THE 3681 BROADWAY HDFC, MIRTHA HASBURN, ANTONIO HASBUN, CELINA ALMONTE, BEATRIZ SANTANA, CRISTIAN DELGADO, VALERIE MATOS, MICHELLE THEN, BOARD OF DIRECTORS OF THE 3681 BROADWAY HDFC, THE CITY OF NEW YORK, JOHN DOE, JANE DOE

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing papers, defendants, excluding The City of New York,1 move pursuant to CPLR 3212, for an order granting them summary judgment and dismissing plaintiffs' amended complaint. Plaintiffs oppose the motion and defendants submit a reply. For the reasons set forth below, defendants' motion is granted in part, and denied in part as follows.

BACKGROUND

Plaintiffs are individual shareholders and tenants of an entity known as 3681 Broadway Housing Development Fund Corporation (3681 HDFC). 3681 HDFC is organized, pursuant to Private Housing Finance Law, as a cooperative corporation whose objectives include providing affordable housing to persons of low income (amended complaint, at 1). 3681 HDFC is the owner of the cooperative building (Co-op) at issue in this case. The Co-op is located at 3681 Broadway, New York, NY (id.). Defendants

1 It is undisputed that The City of New York is a lienholder and, therefore, a necessary party to this action (CPLR 1001 [a]). The City of New York has neither joined in the instant application nor opposed the same. Accordingly, for the purposes of this motion, any reference to the defendants shall exclude The City of New York.

include, among others, 3681 HDFC, its Board of Directors (Board), as well as individual defendants. Plaintiffs allege that beginning in or around 2013, the corporate defendants “began engaging in a pattern of conduct detrimental to 3681 HDFC and its individual shareholders” (*id.* at 5, ¶ 18). Prior to the commencement of this action, plaintiffs served 3681 HDFC’s Board with a written demand requesting, among other things, the issues raised in this motion (NYSCEF Doc. No. 26). Plaintiffs claim that their good faith efforts to resolve the issues were ignored by defendants (*id.* at 2). As a result, plaintiffs filed the instant action.

Plaintiffs commenced this shareholder derivative action on December 20, 2016 by filing a summons and verified complaint. Plaintiffs filed an amended complaint which alleged various instances of misconduct by defendants.² Plaintiffs bring their claims individually and derivatively as shareholders on behalf of 3681 HDFC. Plaintiffs claim that defendants breached their fiduciary duty based on the: (1) failure to pay real estate taxes and utility services; (2) unauthorized payments to non-parties for construction work performed at the property without disclosure to all shareholders; (3) failure to abide by specific voting requirements; (4) election of unqualified directors and officers; and (5) lack of transparency with the books, records and use of assets of 3681 HDFC (*id.* at 2). Plaintiffs’ amended complaint set forth causes of action for breach of fiduciary duty; accounting; declaratory judgment; relief pursuant to BCL § 619; and breach of contract (*id.* at 12-16). Defendants filed a verified answer and now move for summary judgment dismissing the amended complaint pursuant to CPLR 3212.

DISCUSSION

A motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212 [b]). However, “facts must be viewed in the light

² Plaintiffs’ original verified complaint contained a cause of action for unjust enrichment. In the amended verified complaint, plaintiffs dropped the unjust enrichment cause of action and added causes of action for an accounting and breach of contract.

most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citations omitted]), and “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]). Once the moving party has demonstrated the absence of any triable issue of fact through the submission of sufficient evidence, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]).

I. Breach of Fiduciary Duty

Defendants move for summary judgment dismissing plaintiffs’ first cause of action for breach of fiduciary duty. In support of their motion, defendants argue that the first cause of action is procedurally defective because the allegations set forth therein are not pled with particularity as required by CPLR 3016 (b). Defendants also argue that the allegations in the first cause of action do not rise to the level of a breach of fiduciary duty.

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity (CPLR 3016 (b)); (*Burry v Madison Park Owner, LLC*, 84 AD3d 699 [1st Dept 2011]). A fiduciary relationship arises when one is “under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). CPLR 3016 (b), entitled “Particularity in specific actions,” reads as follows:

“(b) Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

A review of plaintiffs' first cause of action reveals that a claim for breach of fiduciary duty was sufficiently pled. First, the individual defendants, Antonio Hasbun, Celina Almonte, Beatriz Santana, Cristian Delgado, Valerie Matos, and Michelle Then are alleged to be members of the Board (amended complaint at 3, ¶¶ 7-14). Mirtha Hasbun is alleged to have acted as President of the Board, as well as the Managing Agent of 3681 HDFC (*id.* at 5, ¶ 18). Next, it is further alleged that the individually named defendants, in their roles as board member, and/or officers, the Board, and Mirtha Hasbun, as Managing Agent, acted in a manner inconsistent with the best interest of 3681 HDFC and failed to act or otherwise take appropriate action to protect the interests of 3681 HDFC (*id.* at 12, ¶¶ 52-52). Finally, plaintiffs' also claim 3681 HDFC is entitled to damages in the sum of \$500,000. Moreover, plaintiffs set forth particular allegations that Ms. Hasbun, as Managing Agent and Board member, together with the other individual Board members, neglected her obligation to, among other things, collect all maintenance and rent payments owed to 3681 HDFC and arbitrarily enforced collection against certain tenants and tenant-shareholders (amended complaint at 12, ¶ 52). Accordingly, the Court concludes that the amended complaint asserts particularized facts and details (*see Shearson Lehman Bros. v Bagley*, 205 AD2d 467 [1st Dept 1994]).

Next, defendants argue that the allegations set forth in the first cause of action do not rise to the level of a breach of fiduciary duty. In their role as Board members, defendants owe a fiduciary duty to the corporation's shareholders "to act solely in the best interest of all shareholders" (*Berkowitz v 29 Woodmere Blvd. Owners', Inc.*, 50 Misc 3d 843, 848 [Sup Ct, Nassau County 2015], quoting *Bryan v West 81st Street Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992]; *see also Murphy v State*, 14 AD3d 127 [2d Dept 2004]). As a general rule, the managing agent of a cooperative corporation owes a fiduciary duty to the cooperative corporation, but not to the individual shareholders (*Caprer v Nussbaum*, 36 AD3d 176 [2d Dept 2006]). An exception may arise where a managing agent has aided and abetted a breach of fiduciary duty (*id.* at 191).

In support of their motion, the individually named defendants argue that they do not owe a fiduciary duty to plaintiffs outside their official capacity as members of the Board. However, nothing in the first cause of action alleges that any individual defendant acted outside their official capacities, and in fact, the plaintiffs clearly state that “each of the Defendants identified owed a fiduciary duty to Plaintiffs and to 3681 in their roles as Board of Directors and/or Officers and, in the case of Mirtha Hasbun, as the Managing Agent” (*id.* at 12, ¶ 52). Plaintiffs’ first cause of action specifically names each individual defendant, as well as the Board and Mirtha Hasbun, as Managing Agent. Individual directors may not be subject to liability absent allegations that they committed separate tortious acts (*Stalker v Stewart Tenants Corp.*, 93 AD3d 550 [1st Dept 2012]; see *Konrad v 136 E.64th St. Corp.*, 246 AD2d 324 [1st Dept 1998]).

Defendants further argue that the actions of the Board are protected by the Business Judgment Rule and their determinations are entitled to deference from the court (*Matter of Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530 [1990]). The Court of Appeals in *Matter of Levandusky v One Fifth Ave. Apt. Corp.* held that the business judgment rule is the proper standard to evaluate a cooperative, acknowledging that lessees “consent to be governed, in certain respects, by the decisions of a board,” who is exercising authority and is “responsible for running the day-to-day affairs of the cooperative” (75 NY2d 530, 536 [1990]). “[A]s with any authority to govern,” cooperative boards, like corporate boards, “hold potential for abuse through arbitrary and malicious decision making, favoritism, discrimination, and the like” (*Levandusky*, 75 NY2d at 536). In applying the business judgment rule, “courts will not substitute their judgment for the board’s” as long as “the board acts for the purposes of the cooperative, within the scope of its authority and in good faith” (*Levandusky*, 75 NY2d at 538). Put differently, judicial scrutiny into the board’s actions may only be triggered if “an aggrieved shareholder-tenant [can] make a showing that the board acted (1) outside the scope of its authority, (2) in

a way that did not legitimately further the corporate purpose or (3) in bad faith” (*40 West 67th Street Corp. v Pullman*, 100 NY2d 147, 155 [2003]).

In support, defendants submit the affidavits of Mirtha Hasbun, President of the Board and Managing Agent of the Co-op, and Maria Reyes, the Bookkeeper of 3681 HDFC. Ms. Hasbun attests that when she was elected to the Co-op’s Board in 2013, the Co-op had a total of \$2,500 in its accounts. As a result, the Co-op was unable to pay expenses, including real estate tax arrears which predated 2013 (Hasbun aff at 2, ¶ 3). Ms. Hasbun states that the outgoing Board failed to turn over financial records or books to the incoming Board except for the years of 2011 and 2012. Ms. Hasbun further states that the Board was unable to take certain actions, such as pursuing non-payment proceedings against all shareholders who had defaulted in their maintenance obligations, because the Co-op did not have the funds to retain a lawyer.

Ms. Reyes states that in 2013 “the Co-op had in its account an approximate total of \$2,500 (Reyes aff at 2, ¶ 5). Ms. Reyes also attests to the fact that the Co-op could not access those funds or the sum of \$36,740.68 being held in a CD (*id.*).

Plaintiffs argue that certain board members were without authority to act on behalf of the corporation. Consequently, there is an issue of fact as to whether the business judgment rule even applies. Assuming arguendo that it does not, while a corporation’s alleged financial inability to act on behalf of the corporation may qualify as a valid defense to a claim of breach of fiduciary duty, in the instant case, issues of fact exist as to whether the Board should have taken certain measures to protect 3681 HDFC and whether the alleged failure to act constitutes a breach of their fiduciary duty (*see Owen v Hamilton*, 44 AD3d 452 [1st Dept 2007]). Accordingly, that branch of defendants’ motion for summary judgment dismissing the first cause of action is denied.

II. Accounting

Defendants move for summary judgment dismissing plaintiffs' second cause of action for an accounting. Under the second cause of action, plaintiffs are not only seeking an accounting of the defendants actions and transactions from 2013 through the present, but plaintiffs also seek, presumably under Business Corporation Law § 624, to have defendants turn over and provide plaintiffs access to all books, records, financial reports, bank statements, credit card statements and all other corporate records relating to 3681 HDFC's transaction (amended complaint at 13, ¶ 59).

To prevail on a cause of action for an accounting, a party must show that, in addition to being a shareholder, he or she demanded an accounting and that the demand was refused by the corporation, or that such demand would have been futile (*World Ambulette Transp. v Kwan Haeng Lee*, 161 AD3d 1028, 1032, [2d Dept 2018]); *Walsh v Wwebnet, Inc.*, 116 AD3d 845, 846–848 [2d Dept 2014]). As a general rule, to be entitled to an equitable accounting, a plaintiff must demonstrate that he or she has no adequate remedy at law (*Webster v Forest Hills Care Ctr., LLC*, 164 AD3d 1499, 1501, [2d Dept 2018]; *Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568 [1st Dept 2011]). However, where “there is a fiduciary relationship between the parties, there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law” (*Webster v Forest Hills Care Ctr., LLC*, 164 AD3d 1499, 1501, [2d Dept 2018]; *Koppel v Wien, Lane & Malkin*, 125 AD2d 230, 234 [1st Dept 1986]).

To the extent that this cause of action seeks an accounting, defendants do not dispute that plaintiffs demanded an accounting. Rather, defendants allege that the second cause of action is moot on the ground that plaintiff is “in receipt of the requested documentation” (defendants' mem at 8-9, ¶¶ 36, 37). Defendants however, do not admit or deny that they have complied with the plaintiffs' request for an accounting.

A review of the exhibits and documents referenced by defendants in the instant motion does not establish that an accounting was conducted. Therefore, defendants have failed to meet their prima facie

burden for summary judgment. As to that branch of the second cause of action involving the production of books, records, etc., defendants have shown that certain information was provided to plaintiffs. However, defendants acknowledge that they were prevented from being able to generate proper books and records for the time during which they have held their positions on the board (*id.* at 8, ¶ 34). In response, plaintiffs allege defendants have not provided the requested documentation. The Court finds factual issues exist as to whether the current Board was in a position to generate proper books and records for the time during which they were elected to their positions on the Board. Accordingly, defendants' motion for an order granting judgment dismissing the second cause of action is denied.

III. Declaratory Judgment and a Permanent Injunction

Defendants move for summary judgment dismissing plaintiffs' third cause of action for a declaratory judgment and a permanent injunction against Mirtha Hasbun, Antonio Hasbun, Celina Almonte, Beatriz Santana, Cristian Delgado, Valerie Matos, Michelle Then, the Board (appointed at the March 2017 Election) and Mirtha Hasbun, as Managing Agent. Specifically, plaintiffs seek an order (1) declaring defendants have engaged and continue to engage in misconduct in violation of the By-Laws of 3681 HDFC, and (2) enjoining defendants from exercising any further dominion and control over assets belonging to 3681 HDFC (amended complaint at 14, ¶¶ 63, 64). They also allude to the propriety of the elections due to alleged unlawful restrictions on shareholder voting.

Plaintiffs raised issues of fact as to whether declaratory and injunctive relief may be warranted, given the appropriateness of the restrictions placed on shareholders from voting (*see Yu v Linton*, 68 AD2d 856 [1st Dept 1979]). Defendants cite no cases in reply indicating otherwise. Accordingly, defendants' motion for summary judgment dismissing plaintiffs' third cause of action is denied.

IV. Relief Pursuant to BCL § 619

Defendants move for summary judgment dismissing plaintiffs' fourth cause of action which seeks an order, pursuant to BCL § 619, requiring Mirtha Hasbun, Antonio Hasbun, Celina Almonte,

Beatriz Santana, Cristian Delgado, Valerie Matos, Michelle Then, the Board, and Mirtha Hasbun, as Managing Agent, to hold a new election of the Board, including its officers and managing agent.

Plaintiffs' fourth cause of action alleges that defendants have not complied with the method and frequency mandated by the By-Laws for the process of elections to the Board (amended complaint at 15, ¶ 74). In particular, plaintiffs' amended complaint filed on May 23, 2017, requested an order requiring that the defendants hold an election.

McKinney's Business Corporation Law § 619, entitled "Powers of supreme court respecting elections," reads as follows:

"Upon the petition of any shareholder aggrieved by an election, and upon notice to the persons declared elected thereat, the corporation and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the corporation is located shall forthwith hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require."

Here, plaintiffs' fourth cause of action is essentially a proceeding under BCL § 619. That branch of defendants' motion to dismiss this cause of action is denied in light of the Court's finding *supra* that the alleged unlawful restriction on shareholder voting may necessarily effect the proprietary of the election.

V. Breach of Contract

Defendants move for summary judgment dismissing plaintiffs' fifth cause of action for breach of contract. Plaintiffs allege that the corporate defendant, 3681 HDFC, breached its contract with plaintiffs by failing to provide the books, records, statements, financial reports, returns and any related documents to plaintiffs for review as required by the By-Laws governing 3681 HDFC.

Defendants claim that the issue is moot because they have provided plaintiffs with the requisite financial information. Plaintiffs failed to articulate opposition to this argument; therefore, that branch of the motion is granted. However, to the extent that this necessarily implicates discovery issues as to the overall action, they may be appropriately addressed in compliance conferences.

Accordingly, it is hereby **ORDERED** that defendants' motion for an order granting summary judgment is granted in part solely to the extent that the fifth cause of action is dismissed; and it is further **ORDERED** that the motion is otherwise denied; and it is further **ORDERED** that counsel are directed to appear for a conference to be held in DCM, Room 103 of 80 Centre Street, on May 15, 2019 at 2:00 PM.

The foregoing constitutes the decision and order of the Court.



HON. ALEXANDER M. TISCH

4/11/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: