

Aflalo v Sassouni & Torbati

2019 NY Slip Op 32713(U)

September 13, 2019

Supreme Court, New York County

Docket Number: 650791/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

ALBERT AFLALO, PERLA AFLALO, WILLIAM CRAIG, 338
WEST 19TH STREET INCORPORATED

Plaintiff,

- v -

SASSOUNI & TORBATI, BITA SASSOUNI, DAVID
GALANTER,

Defendant.

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INDEX NO. 650791/2018
MOTION DATE 02/08/2019,
02/08/2019
MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 151, 152, 153, 154, 155, 156, 157, 158, 159, 204

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 205, 206

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (9/11/19), Bita Sassouni’s motion to dismiss pursuant to CPLR 3211(a)(7) (mtn. seq. no. 005) is granted, Sassouni & Torbati and David Galanter’s motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) (mtn. seq. 006) is granted with respect to Mr. Galanter and the 8th through 10th causes of action only, and the plaintiffs’ cross motion for partial summary judgment pursuant to CPLR 3212 on the 1st through 4th, the 7th and the 10th causes of action is denied as premature. The branch of the plaintiffs’ cross motion seeking to disqualify David Galanter from representing the Board of Directors is denied, and the branch of the cross motion seeking leave to file a Third Amended Complaint is granted as set forth herein.

RELEVANT FACTUAL BACKGROUND

The following facts are taken from the Second Amended Verified Complaint dated January 14, 2019 (the **Complaint**) and assumed as true for purposes of this motion to dismiss (*see* NYSCEF Doc. No. 147). Albert Alfalo, Perla Alfalo, and William Craig (collectively, the **Plaintiffs**) bring this action individually, and derivatively on behalf of 338 West 19th Street Incorporated (the **Corporation**), for damages, injunctive and declaratory relief as a result of defendant Sassouni & Torbani's (the **Sponsor**) alleged breach of a certain Stipulation of Settlement (the **Settlement Agreement**) dated October 1, 2013 in connection with a prior action captioned *Sassouni & Torbani v. 338 West 19th Street Incorporated, et al.*, 653019/2013 (the **Prior Action**) (*see* NYSCEF Doc. No. 197). Individual defendant Bitu Sassouni is one of the Sponsor's partners and a member of the Corporation's current Board of Directors (the **Board**). David Galanter is a lawyer who, according to the Complaint, is a longtime "personal attorney" for Ms. Sassouni and the Sponsor, as well as the general counsel for the current Board (Compl., ¶¶ 67, 29). At oral argument on motion seq. no. 002, this court (Ramos, J.) dismissed the initial complaint in this action against the Board and the other individual Board members, Marc Frankel and Michael Spence, (10/9/2018 Order, NYSCEF Doc. No. 156; Tr., NYSCEF Doc. No. 185).¹

The Plaintiffs are shareholders and lessees of the Corporation, a residential cooperative apartment building located at 338 W. 19th Street, New York, NY. The Alfalos have been shareholders of the Corporation for nearly thirty years and own three units: unit 1B, in which they reside, and units 3A and 3C which is they rent to subtenants (Compl., ¶ 92). Mr. Craig purchased unit 2A at the Corporation's inception in or about 1989, and purchased another unit,

¹ Ms. Sassouni had not yet formerly appeared in the case at the time that motion seq. 002 was filed.

2C, in or about 2001, with the intention of residing in one unit and renting out the other (Compl., ¶ 93).

The Prior Action appears to have been settled without an RJI ever having been filed and, as such, no judge was ever assigned to hear that case. The parties also engaged in another action before this court (Ramos, J.), which was commenced in 2008 and settled at or around the same time as the Prior Action, which 2008 action was captioned *338 West 19th Street Incorporated v. Sassouni & Torbati* (the **2008 Action**). Pursuant to the Stipulation of Settlement (the **Settlement Agreement**), dated October 1, 2013, signed by 338 West 19th Street Inc. and the Sponsor in the Prior Action, the Sponsor was obligated to, among other things, in good faith, “sell all of its remaining shares in the Apartment Corporation on a continuing bases to bona fide purchasers with no affiliation to the Sponsor,” which “must occur from time-to-time in order for the Apartment Corporation to eventually achieve total divestiture of all Sponsor-held units” (NYSCEF Doc. No. 197, ¶ 16). With respect to certain Sponsor-owner, rent stabilized units in the building, paragraph 16 of the Settlement Agreement obligates Sponsor to “sell the shares allocated to such apartments to non-sponsor affiliated bona fide purchasers” immediately upon recovery of possession of said units.” (*id.*). The Settlement Agreement further prohibits the Sponsor from entering into any fair market leases in excess of two-year terms and from entering into any lease agreements for rent stabilized Sponsor Units after the recovery of possession of said units (*id.*). The Plaintiffs allege that the Sponsor breached the Settlement Agreement by, among other things: (i) refusing and/or failing to sell any Sponsor Units to bona fide purchasers, (ii) entering into fair market leases for Sponsor Units with terms that exceed two years, and (iii)

entering into lease agreements for rent stabilized Sponsor Units subsequent to recovery of possession of said units.

The complaint alleges the following eleven causes of action:

1. Breach of contract (against the Sponsor)
2. Specific Performance of Settlement Agreement by the Sponsor
3. Mandatory Injunction (Compelling the Sponsor to Comply with Terms of Settlement Agreement)
4. Appointment of Receiver
5. Declaratory Relief that June 2017 Election of the Board was Null and Void
6. Mandatory Injunction (Directing Defendants to Schedule New Board Election)
7. Declaratory Relief that certain notices to cure issued by the Board were improper
8. Declaratory Relief that the “alleged transfer” of unit 3B from the Sponsor to Mr. Spence was null & void
9. Injunction (against the Sponsor/Sassouni)
10. Attorneys’ Fees (against the Sponsor)
11. Attorneys’ Fees (against the “Sponsor- Controlled Board”).

(NYSCEF Doc. No. 147).

DISCUSSION

A. The Amended Complaint

As an initial matter, the defendants maintain that the Plaintiffs improperly amended the Complaint without leave of court. CPLR 3025(a) provides that a party may amend a complaint

without leave of court once, within 25 days of service of the original complaint. To amend a complaint at after this stage of litigation, a plaintiff would need to secure leave of court. At oral argument on motion seq. 002, the court (Ramos, J.) granted the Plaintiffs leave to file the second amended verified complaint (NYSCEF Doc. No. 185), however, pursuant to a subsequent compliance conference order dated November 18, 2018, the court directed the Plaintiffs to re-file their second amended complaint to remove the “Coop Defendants” (defined in the Court’s Order dated October 9, 2018 as the Board and Messrs. Frankel and Spence) from the caption and to remove all claims against them (NYSCEF Doc. N0. 157). After several clarifying orders and conferences, the Plaintiffs filed the third version of their Second Amended Verified Complaint, which is the version of the complaint presently before the court. However, although they removed the “Coop Defendants” from the caption, the Plaintiffs left in all of the claims against the dismissed defendants. The Plaintiffs also revised some of their factual allegations. As this court inherited this case from New York Supreme Court Justice Charles Ramos and was not privy to the various “clarifying orders and conferences” concerning the second amended verified complaint, the court cannot say what was expressly agreed to with reference to this pleading. Accordingly, the court will address the motion to dismiss the second amended verified complaint to the document filed on January 14, 2019.

B. Bit a Sassouni’s Motion to Dismiss (Mtn. Seq. No. 005)

As the Board was dismissed from this action and the court directed the Plaintiffs to “remove” the claims against the Board from the complaint, all the claims against the Board must be dismissed. Accordingly, the fifth cause of action (for declaratory judgment that the Board’s election was null and void), the sixth cause of action (for an injunction requiring a new election), the seventh

cause of action (for declaratory judgment that the Board's notices to cure are invalid), the eleventh cause of action (for attorneys' fees from the Board) are all hereby dismissed. None of the claims against the Board reference Ms. Sassouni specifically, aside from the Complaint's general reference to Ms. Sassouni being a member and treasurer of the Board, nor does the Complaint seek any relief specifically from her. Rather, the Complaint seeks relief from the Board as an entity, and, in any case, seeks relief that she, alone, would be unable to effect, even if the court had not already ordered the plaintiffs to "remove" these claims from their complaint.

Turning to the sole remaining claim against Ms. Sassouni, the ninth cause of action seeks an injunction against Ms. Sassouni and the Sponsor to prevent the "Sponsor" from "self-dealing and having the Board adopt certain resolutions that are for the benefit of Sponsor and to the detriment of ... the Plaintiffs." The ninth cause of action contains a single allegation with respect to Ms. Sassouni: that, "Plaintiffs will be irreparably harmed if Sassouni and/or the Sponsor-controlled Board continues to govern the affairs of the Corporation so as to benefit the interests of the Sponsor" (Compl., ¶ 147). This is insufficient to state a claim upon which relief may be granted against Ms. Sassouni and, as such, the ninth cause of action is also dismissed against her.

C. The Sponsor and David Galanter's Motion (Mtn. Seq. No. 006)

As noted above, the Sponsor seeks to dismiss the first through fourth, and the eighth and tenth causes of action. Mr. Galanter seeks to dismiss the complaint against him in its entirety.

That branch of the motion that that seeks to dismiss the complaint against Mr. Galanter is granted. None of the claims are asserted against Mr. Galanter individually. In addition, to the

extent that the Plaintiffs seek to prevent Mr. Galanter from representing the Board or the Sponsor, they do not have standing to do so in this action.

That branch of the motion to dismiss the claims against the Sponsor is denied with respect to the first through fourth causes of action. The Complaint sufficiently sets forth allegations in support of its claim that the Sponsor breached the Settlement Agreement by, *inter alia*, (i) failing to sell Sponsor-owned units, (ii) entering into lease agreements for rent stabilized units, and (iii) entering into market-rate leases for sponsor-owned units with terms in excess of two years (Compl., ¶¶ 114-115). For the same reasons, the Complaint sufficiently alleges claims for specific performance of the Lease (the second cause of action) and mandatory injunction (the third cause of action) in that Plaintiffs have no adequate remedy at law (*id.*, ¶¶ 118-124, 128). In the event that the Plaintiffs are successful in their efforts, a receiver would be appropriate and, therefore, the motion to dismiss the fourth cause of action is also denied.

With respect to the eighth cause of action for declaratory judgment that the transfer of unit 3B from the Sponsor to Mr. Spence was “null, void and of no effect,” this claim was dismissed by the court in its prior decision on motion seq. no. 002, without prejudice to renewal following discovery, for lack of specificity (NYSCEF Doc. No., 185, pp. 17:22-18:3). Accordingly, this cause of action is dismissed as against the Sponsor now, without prejudice to renewal in the event that evidence adduced in discovery shows that the apartment sale to Mr. Spence may have been fraudulent.

The ninth cause of action for injunction, alleged against the Sponsor and Ms. Sassoumi, does not state a claim upon which relief may be granted.

The motion to dismiss the tenth cause of action for attorney's fees is granted insofar as a "claim for attorney's fees may not be maintained as a separate cause of action" (*La Porta v Alarca, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]). However, inasmuch as paragraph 23 of the Settlement Agreement provides for attorneys' fees, if the Plaintiffs are successful on any of their first through fourth causes of action, attorneys' fees may be proper and the claim for attorneys' fees can be maintained as part of the Plaintiffs' first cause of action for breach of the Settlement Agreement.

With respect to the Plaintiffs' cross motion for summary judgment, the motion is premature as there are presently factual issues as to whether the Sponsor is in breach of the Settlement Agreement particularly in light of the fact that the adduced evidence does not indicate how many units may have been sold or marketed, and there is no credible evidence in the record to support the notion that the Sponsor could not sell the units because of the department of buildings violation on the Plaintiffs unit or any assessment related to Plaintiffs' purported failure to pay required maintenance.

Finally, with respect to the branch of the cross motion seeking to file a third amended complaint, the motion is denied as to the proposed third amended complaint annexed to the moving papers, as that proposed complaint suffers from all of the defects set forth above, but granted insofar as the Plaintiffs have leave to file a third amended complaint that excludes all the heretofore

dismissed parties and claims, in accordance with this decision and order and the court's prior decision and order on motion seq. no. 002.

Accordingly, it is

ORDERED that the motion (seq. no. 005) of defendant Bita Sassouni to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant; and it is further

ORDERED that the branch of the motion (seq. no. 006) of defendant David Gallanter to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant; and it is further

ORDERED that the branch of the motion (seq. no. 006) to dismiss the complaint as against Sassouni & Torbati is granted only with respect to the eighth, ninth and tenth causes of action and is otherwise denied; and it is further

ORDERED that the cross motion (seq. no. 006) for summary judgment is denied, and that branch of the cross motion seeking to disqualify David Gallanter is denied, and that branch of the motion seeking leave to file an amended complaint is granted as set forth above; and it is further

ORDERED that the plaintiffs are directed to file and serve their third amended complaint within 20 days of this decision and order; and it is further

ORDERED that the defendant is directed to answer or move to dismiss the third amended complaint within 20 days of service thereof; and it is further

ORDERED that the action is severed and continued against Sassouni & Torabati; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption as follows:

*Albert Aflalo, Perla Aflalo, and William Craig, individually and derivatively on behalf of
338 West 19th Street Incorporated,*

Plaintiffs,

-against-

Sassouni & Torbati,

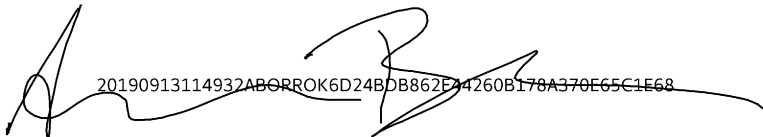
Defendant.

and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse*

and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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9/13/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE