354 Bowery-Bazbaz, LLC v Board of Mgrs. of Bowery Tenants Condominium
2020 NY Slip Op 30758(U)
March 10, 2020
Supreme Court, New York County
Docket Number: 158113/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**
Justice

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354 BOWERY-BAZBAZ, LLC,

Plaintiff,

- v –

THE BOARD OF MANAGERS OF BOWERY TENANTS CONDOMINIUM, ANTHONY MARANO, OZYMANDIUS REALTY, LLC, BOWERY ACQUISITION PARTNERS, LLC, BOWERY SHED, LLC, THREE TO GET READY, LLC, ARENA, LLC, JOHN DOE,

Defendants.

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INDEX NO. 158113/2019

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25- 54 were read on this motion for appointment of a temporary receiver.

By order to show cause, plaintiffs move pursuant to Real Property Law (RPL) 339-aa and CPLR 6401 *et seq.*, for the appointment of a temporary receiver to manage the business of defendants the Board of Managers of Bowery Tenants Condominium (Board) and Bowery Tenants Condominium (Condominium), and disqualifying Lewis Kuper, Esq. from representing the Board and the other defendants based on inherent conflicts of interest. Defendants oppose the motion.

I. PERTINENT BACKGROUND

The Condominium consists of four residential units and one commercial unit. Plaintiff is the tenant of the commercial unit (unit 1). Unit 2 is owned by defendant Bowery Acquisition Partners (BAP), unit 3 is owned by defendant Bowery Shed, LLC (Shed), unit 4 is owned by defendant Arena, LLC, and unit 5 is owned by defendant Three to Get Ready, LLC (TTGR). The

commercial unit, currently vacant, previously housed a restaurant. Defendant Marano is the president of the Board, the managing member of defendant Ozymandius Realty LLC, the Condominium's managing agent, and the managing member of TTGR, and he has equity interests in Shed and Arena. (NYSCEF 49).

The Condominium's governing documents require the Board to collect common charges promptly for the preservation of the Condominium's common elements, including the filing of liens against units in default on the payment of common charges. (NYSCEF 28).

In August 2019, plaintiff commenced the instant action for breach of fiduciary duty, fraud, breach of contract, conversion and unjust enrichment, based on allegations that defendants intend to transfer to related third parties and convert improperly assets rightfully belonging to the Condominium through *ultra vires* acts. Plaintiff also asserts in its complaint that it would seek a receiver for the Condominium and a declaratory judgment that the Board is not authorized to sell common charge liens to an unidentified party related to Marano and/or persons or entities under his control or affiliated with him. (NYSCEF 1).

By decision and order dated October 7, 2019, plaintiff's motion seeking to enjoin defendants preliminarily from selling and/or transferring any right, title, or interest in common charge liens attached to certain Condominium units was denied for failure to establish that it would suffer irreparable harm absent the injunction (NYSCEF 15, 24).

By letter to the Condominium dated October 30, 2019, an attorney representing a neighboring building advised that a kitchen exhaust duct attached to plaintiff's unit in the building improperly extends across the neighboring building's property line, without authorization from the building or a legal easement, and demanded its immediate removal. According to the attorney, the neighboring building had complained about the duct years earlier

and by emails sent in 2015 and he had repeatedly asked the prior owner of the unit to remove it. The attorney notified the Condominium that unless the duct was removed within 30 days, the building would take action to remove it and hold the Condominium fully liable for associated costs and expenses, including attorney fees. (NYSCEF 51).

By notice of lien dated November 7, 2019, the Board filed a lien against plaintiff's unit in the amount of $84,677, representing unpaid common charges from October 2016 to October 2019, including any and all other common charges, assessments, late charges, interest, fines and collection costs, including attorney fees. (NYSCEF 50).

At oral argument on the motion, held on November 13, 2019, as pertinent here, plaintiff conceded that it owed common charges on its unit and represented that it would pay them when Marano paid overdue charges on his unit. (NYSCEF 55).

II. APPOINTMENT OF RECEIVER

A. Plaintiff (NYSCEF 26, 27)

According to plaintiff, all of the residential units, except unit 2, are owned, managed and/or operated as income properties by Marano or entities owned or controlled by him. Plaintiff alleges that Marano uses his positions as president of the board and owner of Ozymandius to allow the residential units to avoid their obligations to the Condominium, including the duty to pay common charges, and that he has failed to fulfill his fiduciary obligations by not taking action to enforce the payment of charges.

Plaintiff contends that Marano has advised that he has no funds to pay the common charges on his units, and that, on information and belief, Marano's units are secured by high-interest mortgage loans from private lenders, which have caused him financial difficulties and are eroding equity value in the units. In support, plaintiff offers a registered mortgage on Shed

and Arena's units reflecting a mortgage amount of $1.25 million. (NYSCEF 29).

Plaintiff observes that on September 23, 2019, in the course of an action to foreclose on a mortgage on Arena's unit, a default judgment for approximately $885,000 was entered against Arena, Marano, and non-party Patrick Meagher, jointly and severally. (NYSCEF 30). Plaintiff also submits proof that a foreclosure action was commenced against TTGR and that the Board is among the named defendants. Attorney Kuper is counsel of record for TTGR in that action, as to which the Board apparently has not answered or appeared. (NYSCEF 32, 33).

Plaintiff contends that given the outstanding common charges on Marano's units, the Board voted, on or about April 25, 2018 and July 31, 2019, for liens to be filed against them. To date, the Board has not followed through, and despite due request, defendants have failed to provide transcribed meeting minutes.

Plaintiff thus maintains that a receiver is necessary to represent all of the unit owners and to enforce the Condominium's rules and file common charge liens. The failure of the unit owners to pay their common charges and the Board's failure to take appropriate action, it alleges, has seriously depleted the Condominium's assets and affected its financial viability. According to plaintiff: 1) Shed and Arena have not paid common charges for more than two years, accruing more than $41,000 in past charges, not including interest, late fees, penalties or collection costs; and 2) TTGR owes common charges for more than 33 months, totaling more than $29,000 before other fees and costs. Moreover, plaintiff maintains, the foreclosure actions may cause the Condominium to lose its right to collect the overdue common charges.

According to plaintiff, Marano has devised a scheme to sell or transfer the tax liens to an undisclosed party related to him, as part of a side deal to redevelop his units, at the expense and to the detriment of the other unit owners. It cites an email dated August 8, 2019 from Marano to

the other unit owners, which provides

> Liens on 2, 3, 4 and 5 have been prepared. The owners on 2 have decided to pay their CC's in full, a related party is buying the liens on 3 and 4 from the Condo Association, so the CC's on those floors will be paid in full. Unit 5 is outstanding, we will see if we can get another party to buy the lien. We also anticipate offering the lien on [plaintiff's unit], in the event ownership does not satisfy the arrears.

Marano also mentions therein that the Board has engaged a lawyer to furnish an opinion letter (NYSCEF 38). Plaintiff argues that the email reflects that Marano's sale of the liens not only violates the Condominium's rules, but also constitutes self-dealing.

B. Defendants' opposition (NYSCEF 49, 53, 54)

According to Marano, plaintiff does not have "clean hands" in advancing its application, claiming that, while many of the unit owners have been in arrears occasionally on their payment of common charges, only plaintiff owes approximately $100,000 which includes extensive overdue water charges from its past restaurant use. Moreover, on information and belief, plaintiff unlawfully removed a separate water meter for its unit, thereby improperly saddling the Condominium with an obligation to pay for its water usage. Plaintiff's overdue payments, moreover, caused the Condominium to file a common charge lien against its unit.

Plaintiff's commencement of the instant frivolous lawsuit, Marano alleges, is forcing the Condominium to incur legal fees, rather than raising funds to cover the costs of required repairs and increasing the building's value, and plaintiff illegally installed the kitchen exhaust duct that encroaches on the neighboring building, subjecting the Condominium to significant legal exposure.

Marano explains the existence of private lender mortgages on some of the units as resulting from plaintiff's failure to pay its charges and its obstructive conduct, and argues that if plaintiff allowed him to complete the required repair work and bring the building up to code,

institutional mortgage lenders would offer mortgage loans for the units. He denies that the existing mortgages or foreclosure actions affect the Condominium and that the Condominium's assets have been affected or that sums collected by the Condomium are not accountable, and maintains that the Condominium's interests and ability to collect sums due will be protected in the foreclosure actions.

C. Analysis

The purpose of the appointment of a receiver is to secure the property at issue in order to preserve it from loss, destruction, or waste. (13 Carmody-Wait 2d § 83:2 [2019]). The appointment of a receiver is an extraordinary and extreme remedy that is not lightly granted, and it requires the movant to make a clear evidentiary showing that a receiver is necessary to conserve the property and protect the movant's interests. (13 Carmody-Wait 2d § 83:5 [2019]; *Meagher v Doscher*, 157 AD3d 880 [2d Dept 2018]). The movant must establish that the property is in danger of being materially injured or destroyed. (*Sec. Cap. Corp. of N.Y. v Dansker*, 263 AD2d 503 [2d Dept 1999]). The nature of the loss or damage must be irreparable (*Groh v Halloran*, 86 AD2d 30 [1st Dept 1982]), and the proof must be clear and convincing (*Trepper v Goldbetter*, 205 AD2d 363 [1st Dept 1994]).

Here, plaintiff submits no proof, much less clear and convincing proof, that Marano's proposed sale of the liens is to an entity related to him or that he has otherwise engaged in self-dealing. Moreover, the August 2019 email reflects that Marano has taken steps to file and sell the liens on the units with unpaid charges, and that the owner of unit 2 has agreed to pay its common charges. Thus, plaintiff's own evidence shows that Marano is not neglecting his fiduciary duties to collect the common charges and file the liens.

Further undermining plaintiff's claim is that while it complains that Marano has not filed

liens on units with overdue charges, plaintiff is also fighting the lien issued on its unit, and while admitting that it owes charges and fees to the Condomium, it has still not paid them. Nor is there evidence at this juncture that the Board will be unable to collect the overdue common charges and/or will lose its interest in the charges or liens due to a pending foreclosure.

In sum, plaintiff does not demonstrate, by clear and convincing evidence and/or with a clear evidentiary showing, that the Condominium is in danger of being materially injured or destroyed or that the nature of the alleged loss or damage is irreparable. Plaintiff thus fails to establish that a receiver is warranted in order to conserve the Condominium and protect plaintiff's interests.

III. DISQUALIFICATION OF COUNSEL

A. Plaintiff's contentions (NYSCEF 44)

Plaintiff contends that as it sues derivatively on behalf of the condominium, and as its derivative action has merit, there is a conflict of interest between the Condominium and the defendants, and thus, the same attorney may not represent both. While Kuper holds himself out as counsel for the Board, he also represents defendants here and in the foreclosure action against TTGR, and he cannot simultaneously represent the Condominium in its effort to collect common charges and represent Marano and the other units owners who are obligated to pay the charges. Plaintiff also argues that Kuper's conflict is apparent from the fact that it requested a copy of Board minutes from Kuper, but he has not yet provided them.

B. Defendants' contentions (NYSCEF 54)

Kuper denies that a conflict exists, contends that plaintiff's action is frivolous, and observes that defendants have requested that he continue to represent them. (NYSCEF 54).

By affidavit dated November 8, 2019, Marano and the managing members of BAP and

Shed confirm that they desire to have Kuper represent them, and deny that the Condominium has paid for Kuper's fees for his representation of defendants. They observe that BAP's managing member, as the Condominium's secretary, was in charge of preparing Board minutes, not Kuper. They otherwise deny a conflict of interest. (NYSCEF 53).

C. Analysis

As an attorney owes a duty of confidentiality and loyalty to his or her client, the attorney must avoid not only the fact, but the appearance of representing conflicting interests. (*Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123 [1996]). Thus, pursuant to section 1.7 of the Rules of Professional Conduct, an attorney may not act as an advocate in a matter where he or she has a conflict of interest with his or her current client.

As disqualification conflicts with the policy favoring a party's representation of counsel of its choice, the party moving for disqualification must establish that: (1) a prior attorney-client relationship existed between the moving party and opposing counsel, (2) the matters involved in both representations are substantially related, and (3) the interests of the present and former client are materially adverse. (*Tekni-Plex, Inc.*, 89 NY2d at 131). The movant bears the burden of proving, by a clear showing, that disqualification is warranted. (*Delaney v Roman*, 175 AD3d 648 [2d Dept 2019]).

Whether to disqualify an attorney from continuing to represent his or her client lies within the sound discretion of the court, and doubts as to the existence of a conflict of interest must be resolved in favor of disqualification to avoid the appearance of impropriety. (*Delaney v Roman*, 175 AD3d 648 [2d Dept 2015]).

Plaintiff has not shown that his derivative claim has merit, having failed to establish entitlement to a preliminary injunction (NYSCEF 24) or to the appointment of a receiver. Nor

has it established that Marano or the other defendants engaged in behavior contrary to the Condominium's interests and/or breached their fiduciary duties to the Condominium. Thus, plaintiff fails to establish that the interests of the Condominium and defendants are adverse. It therefore does not meet its burden of demonstrating that Kuper's continued representation of defendants creates a conflict of interest between them and the Condominium.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is denied in its entirety, and it is further

ORDERED, that the parties appear for a status conference on May 6, 2020, at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

3/10/2020
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE