

Hernandez v 186 E. 111 St. Hous. Dev. Fund Corp.
2020 NY Slip Op 30773(U)
February 21, 2020
Supreme Court, New York County
Docket Number: 656920/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

SANDRA HERNANDEZ, Plaintiff, - v - 186 EAST 111 STREET HOUSING DEVELOPMENT FUND CORPORATION, TARIQ MOHAMMED, PERRY SHEFFIELD, and ADAM BENN Defendants.
INDEX NO. 656920/2017
MOTION DATE 01/09/2020
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 246, 251, 283, 284, 285, 286, 332

were read on this motion for CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 155, 156, 157, 158, 159, 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, 244, 245, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 330, 331, 333

were read on this motion for SUMMARY JUDGMENT

Redmond Law PLLC, New York, NY (Jennifer Redmond of counsel), for plaintiff. Harlowtown Community Law Office, New York, NY (T.S.M. Mohammed of counsel), for defendants.

Gerald Lebovits, J.

These motions arise out of a dispute between plaintiff, Sandra Hernandez, and defendants about whether Hernandez should be permitted to conduct extensive renovations of her apartment.

In motion sequence 002, Hernandez asserts that this court should hold defendants in contempt for putatively failing to comply with a court order requiring them to refrain from unreasonably delaying completion of her renovation, that the court should compel defendants to permit her to complete the renovation, and that the court should disqualify one of the attorneys

for defendants (Tariq Mohammed, himself a defendant in the action) for a putative conflict of interest. In motion sequence 003, defendants move for summary judgment on all of plaintiff's causes of action, and plaintiff cross-moves for summary judgment in her favor on four of those causes of action.

Motion sequences 002 and 003 are consolidated here for disposition.

BACKGROUND

Hernandez owns shares in defendant 186 East 111 Street Housing Development Fund Corporation, a cooperative housing corporation, and occupies an apartment at 186 East 111 Street under a proprietary lease. Shortly after purchasing those shares, Hernandez sought and received permission to renovate her apartment under the terms of an agreement between her and the co-op. The co-op board later revoked that permission on the ground that Hernandez had assertedly filed a false scope of work with the New York City Department of Buildings (DOB) and that her contractors had assertedly created a dangerous condition in the apartment.

Hernandez brought this action in November 2017 for declaratory and injunctive relief relating to her desired renovations. In January 2018, this court issued an order requiring defendants to sign certain documents so that the documents could be submitted to DOB for its consideration and requiring defendants to refrain from unreasonably delaying or hindering completion of the renovation. (*See* NYSCEF No. 105; NYSCEF No. 123, at 9-12.)

In October 2018, Hernandez moved to have defendants held in contempt for assertedly violating the court's January 2018 order and for other relief (motion sequence 002). (*See* NYSCEF No. 116.) In November 2018, defendants moved for summary judgment dismissing plaintiff's complaint in its entirety (motion sequence 003). (*See* NYSCEF No. 155.) Hernandez cross-moved in motion sequence 003 for summary judgment in her favor on several of her causes of action. (*See* NYSCEF No. 252.)

DISCUSSION

I. Motion Sequence 002

In motion sequence 002, Hernandez seeks three principal forms of relief. First, she asks this court to hold defendants in contempt for assertedly violating this court's prior order in the case and to require them to permit Hernandez to proceed with renovating her apartment. Second, she asks this court, in effect, to declare that the individual defendants have breached their fiduciary duties as members of the co-op board. Third, she seeks to disqualify defendant Mohammed from serving as counsel for defendants in the action.

Hernandez's motion is denied in its entirety.

A. The Branch of Hernandez's Motion Seeking to Have Defendants Held in Contempt

Hernandez claims that defendants have acted contumaciously by unreasonably hindering the renovations of her apartment. This court disagrees.

Hernandez argues defendants unreasonably refused to sign documents for over six months after the issuance of the court's January 2018 order. However, as evidenced in the affidavits and exhibits to this motion, *Hernandez* caused and prolonged that delay by submitting several different design plans prepared by different design professionals. (See NYSCEF No. 195, at ¶¶ 18, 34, 107.) Moreover, once defendants signed the documents and Hernandez submitted them to DOB, defendants noticed that a member of her design team had forged the signature of the co-op's President. (See NYSCEF No. 195, at ¶¶ 22, 31, 71; NYSCEF No. 196, at ¶¶ 47, 66; NYSCEF No. 230.)

Hernandez contends that the forged signature is inconsequential because the contents of the original document and the submitted document were identical and because the architect who submitted the document was merely transcribing the information onto a new form so that it was legible. (See NYSCEF No. 283, at ¶ 30.) But at a minimum, the document needed to be re-executed with a legitimate signature, leading to additional delays in commencing renovations. (See NYSCEF No. 286, at ¶ 9; NYSCEF No. 233.) This is just one example of how Hernandez's actions contributed to any delay in renovations.

This court concludes that defendants have not unreasonably delayed or hindered the completion of the renovation since the entry of the January 2018 order. Instead, the evidence reflects that Hernandez failed to comply with provisions set out in the Alteration Agreement and the Rider, which delayed and hindered the renovation.

This court previously denied Hernandez's request for an order compelling defendants to permit her to proceed with her renovations. (See NYSCEF No. 123, at 11 [motion sequence 001].) In these circumstances, she has failed to establish that this court should revisit that determination and grant such an order on this motion.

B. The Branch of Hernandez's Motion Seeking a Declaration that Defendants Have Breached Their Fiduciary Duties

There is also no merit to Hernandez's argument that defendants have violated New York Business Corporation Law ("BCL") §§ 713 and § 717.

Under BCL § 717, "[a] director shall perform his duties as a director . . . in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances." This duty extends to board members of Cooperatives and Condominiums. BCL § 713 (a) defines a board member as "interested" in a transaction when, either as an individual or director of another entity, the board member enters into a transaction with the corporation or has a substantial financial interest in the transaction.

"Interested" transactions will be upheld only if (1) the material facts as to the director's interest are disclosed in good faith or otherwise known and the board approves the transaction without counting the vote of the interested director or, if the number of disinterested directors is

insufficient to constitute board action, by unanimous vote of disinterested directors; or (2) the material facts as to the director's interest are disclosed in good faith or otherwise known to the shareholders, and the transaction is approved by the shareholders. BCL § 713(a).

Hernandez argues that the defendants have breached their fiduciary duty by (i) appointing defendant Mohammed as their attorney, (ii) working to gain possession of her apartment, and (iii) requiring her to meet unreasonable hurdles in renovating her home. (*See* NYSCEF No. 119 at 16.) This court is unpersuaded.

Hernandez repeatedly accuses Mohammed of attempting to stretch out the litigation for personal financial gain. She fails, however, to provide evidence of how Mohammed would benefit from that outcome. She bases her accusation that defendants wish to gain possession of her apartment on statements defendants made in settlement discussions, which are plainly inadmissible here. Hernandez also contends that the unreasonable hurdles in renovating her home were not applied to other shareholder renovations, but those renovations took place under different, superseded regulations put in place by prior, different boards of the co-op. The record reflects that Hernandez's renovation was governed by the more recent (and more stringent) version of the alteration rules put in place by the co-op's current board; and also that Hernandez was aware when she purchased her shares in the co-op that these rules were in the process of being drafted and would govern future alterations.

C. The Branch of Hernandez's Motion Seeking to Disqualify Mohammed as Defendants' Counsel

Hernandez also accuses Mohammed of committing "multiple violations of New York's Rules of Professional Conduct" and argues that those violations require his disqualification as defendants' counsel. (NYSCEF No. 119, at 24 [capitalization altered].) This argument is baseless.

Hernandez advances three grounds for disqualification. First, she claims that Mohammed faces an unacceptable conflict of interest under a combination of Rule 1.13 and Rule 1.7 of the New York Rules of Professional Conduct. She asserts that Rule 1.13 (a) provides that as the co-op's attorney, Mohammed "represents the organization *acting through its duly authorized constituents*," such as shareholders like Hernandez—and therefore that Mohammed has conflicting obligations both to the co-op and to Hernandez that require his disqualification under Rule 1.7. (*Id.* [quoting "NYRPC 1.13(a)"] [emphasis in original].) This assertion is false.

Rather, Rule 1.13 plainly and expressly provides that where an attorney is "employed or retained by an organization" with constituents such as members or shareholders, the attorney serves as the "lawyer for the organization and *not* any of the constituents." (Rule 1.13 [a] [emphasis added].) The contrary language relied upon—and quoted—by Hernandez, suggesting that an attorney representing an organization thereby represents its constituents, appears in the ABA's Model Rules of Professional Conduct. It is nowhere to be found in *New York's* Rules.

Hernandez also quotes definitional language from "Rule 1.13 (f)" to bolster her claim that Mohammed has an ethical obligation running to her as well as to the co-op. (NYSCEF No. 119, at 24.) But Rule 1.13 of the New York Rules of Professional Conduct has only four subsections.

Subsection 1.13 (f)—including the language quoted by plaintiff—appears in the ABA Model Rules. But it is not law in New York.¹

Hernandez also argues that Rule 1.7 requires Mohammed's disqualification in light of the conflict between his role as defendant and his role as counsel for the other defendants. (*See* NYSCEF No. 119, at 25-26.) But Hernandez has failed to identify any way in which, under the particular facts of this case, Mohammed's interests in defending his own conduct conflict with Mohammed's interests in representing the other defendants. The court also notes Mohammed's representations to the court that he is providing legal services in this case on a volunteer basis through a pro bono legal organization, the Harlowtown Community Law Office, that is representing defendants on contingency. In these circumstances, the court is disinclined at this late date to afford Hernandez the tactical advantage of forcing defendants to find new counsel willing to take the case notwithstanding their financial constraints.

Finally, Hernandez argues that Mohammed should be disqualified under Rule 3.7 of the Rules of Professional Conduct because he is likely to be a witness on a significant issue of fact. (*See* NYSCEF No. 119, at 26-27.) In response, however, defendants point out that given the co-op's financial constraints, disqualifying Mohammed would impose significant hardship on them—and that the co-op's other authorized corporate representatives can provide testimony on the same issues in any event. (*See* NYSCEF No. 195, at ¶¶ 133-137; NYSCEF No. 196, at ¶ 43; NYSCEF No. 197, at ¶ 18.) Since Rule 3.7 (a) (3) permits a lawyer to serve both as an advocate and a witness if his disqualification would work substantial hardship on the client, and since Hernandez has not established why the relevant information cannot be obtained from the other authorized corporate representatives, this court declines to disqualify Mohammed under Rule 3.7.

II. Motion Sequence 003

A. Defendants' Motion for Summary Judgment

Defendants move for summary judgment dismissing each of plaintiff's causes of action. The motion is granted.²

Hernandez's First Cause of Action

¹ This court notes with disfavor that although Mohammed's affirmation opposing disqualification expressly identified and criticized these defects in plaintiff's moving papers (*see* NYSCEF No. 195 at 30-31), the reply affirmation of Hernandez's counsel does not defend (or even *mention*) the disqualification argument—let alone explain why counsel based an argument on misleading quotations from regulatory provisions not in effect in New York (*see* NYSCEF No. 283).

² Plaintiff's first, second, third, fourth, ninth, tenth, and eleventh causes of action are discussed in this section. Plaintiff's fifth, sixth, seventh, and eighth causes of action—as to which plaintiff and defendants have cross-moved for summary judgment—are discussed at Section II.B, *infra*.

Hernandez asserts that defendants breached their fiduciary duty to her. (*See* NYSCEF No. 24 ¶¶ 88-95.) Defendants argue that this cause of action is defective because it does not identify the “Cooperative Defendants” to which it refers, and because plaintiff fails to establish that the Individual Defendants Sheffield, Benn and Mohammed, as shareholders, owed a fiduciary duty to Hernandez. (*See* NYSCEF No. 156 at 13.) In response, Hernandez argues that the Individual Defendants, as officers and directors of the corporation, have a fiduciary relationship with her, and that the Individual Defendants violated their fiduciary duties by (i) appointing Mohammed as their attorney, (ii) working to gain possession of Hernandez’s apartment, and (iii) requiring her to meet unreasonable hurdles in renovating her home. (*See* NYSCEF No. 279 at 5, 8.)

Additionally, even assuming that Hernandez could maintain a damages claim against the Individual Defendants for breaching a fiduciary duty to her, defendants would still be entitled to judgment as a matter of law on this cause of action for the reasons given in Section I.B, *supra*.

Hernandez’s Second Cause of Action

Hernandez next claims that, by failing to allow her to complete the renovation to her apartment, the co-op breached the warranty of habitability by permitting unfit, unsafe, and dangerous living conditions in her apartment. (*See* NYSCEF No. 24 at ¶¶ 96-102.) Defendants are entitled to judgment as a matter of law on this cause of action because Hernandez’s own conduct caused any unsafe or dangerous living conditions that might implicate the warranty of habitability. (*See* NYSCEF No. 289 at 23; Sheffield Aff., NYSCEF No. 290 at 2.) Conditions caused by the misconduct of the lessee do not constitute a breach of the warranty of habitability. (*See* Real Property Law (RPL) § 235-b.)

Hernandez’s Third Cause of Action

Hernandez contends that defendants breached the proprietary lease’s covenant of quiet enjoyment. (*See* NYSCEF No. 24 at ¶¶ 103-107.) But the Individual Defendants signed the lease solely in their capacity as co-op officers, not as individuals. There is, therefore, no privity of contract between Hernandez and the Individual Defendants.³

Hernandez’s Fourth Cause of Action

Hernandez claims that defendants fraudulently represented that they would permit her to renovate her apartment under the new Alteration Agreement. (*See* NYSCEF No. 24 at ¶¶ 108-115.) Defendants are entitled to judgment as a matter of law on this claim because Hernandez has failed to satisfy the particularity requirements of CPLR 3016 (b), such as specific information about (i) the circumstances of the supposed misstatements; (ii) the way in which the statements were knowingly false; or (iii) her reliance upon those supposed misstatements.

Hernandez’s Ninth, Tenth, and Eleventh Causes of Action

³ To the extent that one could construe Hernandez’s argument on this cause of action as seeking to pierce the corporate veil, she has not put forward evidence that creates a dispute of material fact about whether veil-piercing might be warranted.

Hernandez's ninth, tenth, and eleventh causes of action are brought under CPLR 7803. They challenge the defendants' actions in amending the co-op's by-laws, allegedly withholding or delaying consent to alterations in the apartment, and allegedly ousting Hernandez as board secretary in September 2017, respectively. Defendants are entitled to summary judgment on these causes of action.

Hernandez does not provide a basis to conclude for purposes of CPLR 7803 that the amendment to the co-op's by-laws was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious. She asserts that the Corporation's by-laws were improperly amended to permit director-interested transaction by majority, rather than unanimous vote. But the record reflects that the bylaw amendment was passed pursuant to the co-op's applicable procedures. As reflected above, Hernandez's contention that the amendment was passed to facilitate impermissible self-dealing by Mohammed is without merit. And the unreasonable-withholding-of-consent claim fails for the reasons discussed in Section I.A, *supra*.

Finally, Hernandez fails to provide any evidence that she was improperly removed from her board position as secretary. The September 16, 2017, board minutes show that plaintiff was not a candidate for the secretary position and suggest that she in fact voted for the new board secretary. (*See* Sheffield Aff. NYSCEF No. 157, at ¶ 82; Board Minutes, NYSCEF No. 193.)

B. Plaintiff's Cross-Motion

With respect to Hernandez's fifth, sixth, seventh, and eighth causes of action, defendants move for summary judgment dismissing those claims, and she cross-moves for summary judgment in her favor. Defendants' motion is granted; Hernandez's cross-motion is denied.

These causes of action are based on Hernandez's claim that defendants unreasonably withheld, delayed, or hindered her right to make certain alteration to her apartment. Hernandez asserts that in so doing, defendants breached her lease, the Alteration Agreement, and the covenant of good faith and fair dealing implied under each of those contracts. (*See* NYSCEF No. 24 at ¶¶ 120, 125, 131, and 137.)

This court concludes that defendants are entitled to summary judgment on these four causes of action. As noted above, the Individual Defendants were not privy to the Proprietary Lease or the Alteration Agreement in their individual capacities. A breach-of-contract damages claim therefore does not lie against them as individuals. Additionally, the record reflects that the co-op provided Hernandez with written consent to commence renovations in January 2017, and thus did not breach her lease by hindering her from making repairs. (*See* NYSCEF No. 289 at 26; Sheffield Aff., NYSCEF No. 157 at ¶¶ 8-11.) Rather, the co-op suspended Plaintiff's renovation only after discovering that Hernandez had hired an unlicensed and uninsured contractor with no authority to work on the weekends. (*Id.* at ¶ 54.) Hernandez also failed to secure DOB authorization for her renovations, failed to comply with notices of call for inspection from the DOB, used unlicensed and uninsured contractors, and made false and misleading filings with the

DOB. (See *id.* at ¶ 61; see also NYSCEF No. 156 at 21, 24).⁴ The co-op did not violate covenants of good faith and fair dealing in these circumstances when it withdrew Hernandez’s approval to renovate her apartment.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of Hernandez’s motion seeking to hold defendants in contempt (motion sequence 002) is denied; and it is further

ORDERED the branch of Hernandez’s motion seeking to compel defendants to permit her to proceed with the renovation (motion sequence 002) is denied; and it is further

ORDERED that the branch of Hernandez’s motion seeking a declaration that the Individual Defendants have breached their fiduciary duties (motion sequence 002) is denied; and it is further

ORDERED that the branch of Hernandez’s motion seeking to disqualify Tariq Mohammed as counsel for defendants (motion sequence 002) is denied; and it is further

ORDERED that Hernandez’s cross-motion for summary judgment on her fifth, sixth, seventh, and eighth causes of action (motion sequence 003) is denied; and it is further

ORDERED that defendants’ motion for summary judgment on all of Hernandez’s causes of action is granted, and Hernandez’s complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

2/21/2020

DATE

GERALD LEBOWITZ, 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

⁴ Plaintiff’s cross-motion references several allegations of conduct that post-dated the amended complaint and therefore are not properly before the court. Plaintiff also relies on defendants’ putative breach of certain sections of the proprietary lease; but those claimed breaches were not raised in the amended complaint.