Harway Terrace, Inc. v Shlivko
2020 NY Slip Op 31215(U)
April 30, 2020
Supreme Court, Kings County
Docket Number: 504029/2018
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of April, 2020.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.
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HARWAY TERRACE, INC. AND NINA SHALSHINA,

Plaintiffs,

- against -

Index No. 504029/2018

NINA SHLIVKO AND SAVE HARWAY TERRACE,

Defendants.
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The following e-filed papers read herein:	NYSEF #
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	50-54
Opposing Affidavits (Affirmations)	55-59
Reply Affidavits (Affirmations)	62
Shlivko's Memorandum of Law	60

Upon the foregoing papers, plaintiffs/counterclaim defendants Harway Terrace, Inc. (Harway Terrace) and Nina Shalshina (Shalshina) (collectively, plaintiffs) move (Motion Seq. 4) for an order, pursuant to CPLR 3211 (a) (7), partially dismissing the counterclaims of defendant/counterclaim plaintiff Nina Shlivko (Shlivko), with prejudice, for failure to state a claim upon which relief can be granted.

Facts and Procedural Background

Harway Terrace is a cooperative housing corporation, which owns a residential apartment complex located at 2475 and 2683 West 16th Street, Brooklyn, New York. Harway Terrace has a board of directors, consisting of nine members, who are elected on an annual basis. In 2017, Shlivko, a shareholder of the cooperative, who had once been a member of the board of directors, ran against Shalshina, another shareholder of the cooperative who is an attorney, to become a member of the board. In June 2017, the shareholders elected Shalshina to serve on the board. The nine-person board then elected Shalshina to serve as the president of the board of directors. Plaintiffs claim that Shlivko, out of animosity due to losing the election and Shlivko's own desire to claim the title of president of the board of directors, began a "defamatory revolt" and purposefully began spreading lies against plaintiffs, which Shlivko presented as fact.

According to plaintiffs, Shlivko, working together and in concert with another individual, created a public Facebook group called "Save Harway Terrace". Plaintiffs allege that on August 7, 2017, Shlivko and Save Harway Terrace (posting as Save Harway Terrace), wrote defamatory statements on the Facebook group website. Plaintiffs further claim that on January 22, 2017, at 4:27 p.m., Shlivko texted a series of false and defamatory statements to Lenny Bolson, another resident of Harway Terrace. Plaintiffs additionally allege that on

or about February 2, 2018 between 5:00 p.m. and 8:00 p.m., Shlivko approached shareholders Irina Pobukobskiy and Galina Goloborodko, in an effort to spread lies about Shalshina.

On February 27, 2018, plaintiffs filed this action for defamation against defendants. On June 4, 2018, plaintiffs served a first amended complaint as of right pursuant to CPLR 3025 (a). By a decision and order dated March 8, 2019, the court denied a motion by Shlivko to dismiss plaintiffs' first amended complaint except insofar as it sought dismissal of plaintiffs' third cause of action for a declaratory judgment, and granted plaintiffs leave to file a second amended complaint. On April 19, 2019, Shlivko served and filed an answer to plaintiffs' second amended complaint. Shlivko's answer contains seven counterclaims.

On June 13, 2019, plaintiffs filed the instant motion to dismiss Shlivko's second counterclaim for harassment under Administrative Code of the City of New York § 27-2004 as against them, her third counterclaim for discrimination under Business Corporation Law § 501 (c) as against them, her fourth counterclaim for retaliation under Real Property Law § 223-b as against them, her fifth counterclaim for attorney's fees as against Harway Terrace, her sixth counterclaim for abuse of process as against Shalshina, and her seventh counterclaim for breach of fiduciary duty, derivatively, on behalf of Harway Terrace, as against Shalshina. Shlivko opposes plaintiffs' motion.

Discussion

Shlivko's Second Counterclaim for Harassment

Shlivko's answer pleads that Harway Terrace has violated Administrative Code § 27-2004 (48) (d-1), which provides as follows:

> "commencing a baseless or frivolous court proceeding against a person lawfully entitled to occupancy of such dwelling unit if repeated baseless or frivolous court proceedings have been commenced against other persons lawfully entitled to occupancy in the building containing such dwelling unit."

Shlivko points to six other actions commenced by Harway Terrace (one of which was commenced by both Shalshina and Harway Terrace), in addition to the instant action, which, she claims, were frivolously commenced. Shlivko alleges that she is entitled to a judgment declaring plaintiffs' actions to be harassment within the meaning of the statute and to an award of penalties and Shlivko's reasonable attorney's fees. Shlivko concedes that any penalty would be payable to the Department of Housing Preservation and Development, and not to her (*see* Administrative Code § 27-2155 [m] [2]).

In support of their motion, plaintiffs contend that New York does not recognize a cause of action to recover damages for harassment, and that Administrative Code § 27-2004 is merely a definition of harassment and does not confer a private right of action for damages. Administrative Code § 27-2004 (48) defines harassment as meaning:

> ". . . any act or omission by or on behalf of an owner[1] that (I) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, except that such presumption shall not apply to such acts or omissions with respect to a private dwelling, as defined in paragraph six of subdivision a of section 27-2004."

Administrative Code § 27-2004 (48) then lists the acts or omissions that are included.

There is no common law cause of action for harassment in New York, and any remedy for harassment derives from statute (*see Jerulee Co. v Sanchez*, 43 AD3d 328, 329 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007]; *Edelstein v Farber*, 27 AD3d 202, 202 [1st Dept 2006]; *1068 Winthrop St. LLC v Zimmerman*, 65 Misc 3d 1107, 1118 [Civ Ct, Kings County 2019]). Here, Shlivko's allegations in her answer do not meet the statutory definition of harassment

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[1]Harway Terrace may be deemed to be an "owner" under this section since Administrative Code § 27-2004 (a) (45) defines the term "owner" as meaning and including "the owner or owners of the freehold of the premises or lesser estate therein . . . lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling" (*see Leprovost v Pitts*, 46 Misc 3d 1216[A], 2015 NY Slip Op 50102[U] [Civ Ct, NY County 2015]).

under Administrative Code § 27-2004 (48) (d-1). The court does not find that plaintiffs' action was frivolously commenced or baseless.

Although not pleaded in her answer, Shlivko, in her attorney's memorandum of law, now claims that plaintiffs have also committed harassment under Administrative Code § 27-2004 (48) (g), which provides that the acts committed by Harway Terrace include:

> "other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, including improperly requiring such person to seek, receive or refrain from submitting to medical treatment in violation of subdivision b of section 26-1201."

Even considering this unpleaded claim, the court does not find that the allegations of Shlivko's answer meet this definition. Thus, dismissal of Shlivko's second cause of action is mandated.

Shlivko's Third Counterclaim for Discrimination Under Business Corporation Law § 501 (c)

Shlivko's third counterclaim alleges that plaintiffs have discriminated against her under Business Corporation Law § 501 (c) because other shareholders of Harway Terrace maintain fixtures, including jetted bathtubs, that preexist the issuance of the post-conversion proprietary leases in 2016. Specifically, Shlivko

asserts that apartment 15D and apartment 2G in building 2475 of the cooperative have preexisting jetted bathtubs. She also asserts that a shower stall was recently built in apartment 14D without the prior consent of the board. She alleges, upon information and belief, that Harway Terrace is not seeking to terminate the tenancies or revoke the shares of these other shareholders with similar fixtures. She claims that there exists two sets of rules and standards for shareholders of Harway Terrace; one for friends of Shalshina, and one for everyone else.

Business Corporation Law § 501 (c) prohibits the "unequal treatment of shareholders holding the same class of shares" (*Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 246 [1st Dept 1997]). This section provides that "each share shall be equal to every other share of the same class." In the context of a cooperative building, this "requires parity of rights granted to shareholders by the lease or bylaws" (*Pilipovic v Laight Coop. Corp.*, 137 AD3d 710, 711 [1st Dept 2016]; *see also Razzano v Woodstock Owners Corp.*, 111 AD3d 522, 523 [1st Dept 2013]; *Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204, 205 [1st Dept 2003]). Thus, to state a claim under Business Corporation Law § 501 (c), a plaintiff must allege "that the terms of their lease or shares are . . . different from those of the other shareholders" (*Moltisanti v East Riv. Hous. Corp.*, 149 AD3d 530, 532 [1st Dept 2017]).

Shlivko does not claim that the terms of her lease or shares are any

different from those of the other shareholders of Harway Terrace. Rather, Shlivko claims that she was treated differently from other shareholders because she alone was not permitted to install a jetted bathtub without the prior consent of the board. Assuming, arguendo, that Shlivko was, in fact, treated differently, this is not the type of differential treatment that Business Corporation Law § 501 (c) was designed to address (*see Moltisanti*, 149 AD3d at 532; *Musey v 425 E. 86 Apartments Corp.*, 2019 NY Slip Op 31821[U], *9 [Sup Ct, NY County 2019] [dismissing Business Corporation Law § 501 [c] claim where the plaintiff "merely allege[d] that other shareholders received more lenient treatment from the [b]oard when they sought to make alterations or to make use of their terraces"]; *Lackey v 62 E. 87th St. Owners Corp.*, 2019 NY Slip Op 30738[U], *10-11 [Sup Ct, NY County 2019] [dismissing Business Corporation Law § 501 [c] claim where the plaintiffs were not permitted to perform ordinary repairs to the ceiling, and plaintiffs alleged that "no other shareholders had been stopped from performing ordinary repairs]). Thus, Shlivko's third counterclaim for discrimination under Business Corporation Law § 501 (c) must be dismissed.

Shlivko's Fourth Counterclaim for Retaliation under Real Property Law § 223-b

Shlivko, in her fourth counterclaim for retaliation under Real Property Law § 223-b, alleges that she has complained to Harway Terrace's board, Harway Terrace's shareholders, and the Attorney General of the State of New York about

the management of Harway Terrace, and about actions taken by Shalshina, which appear to be self-dealing and not in Harway Terrace's interest. Shlivko states that she has attempted to organize the tenant-shareholders of the building in relation to her concerns, and that her actions were taken in good faith.

Shlivko claims plaintiffs have denied her the services of building maintenance personnel to resolve issues of flooding and sewage backups in her apartment. Shlivko further claims that plaintiffs purportedly caused the notice to cure to be served upon her, even though there was no violation by her of the proprietary lease. Shlivko also alleges that plaintiffs have assessed fines against her for purported violations of house rules that were not duly adopted by the board and not permitted by the bylaws. She further alleges that plaintiffs have assessed these fines against her in arbitrary and excessive amounts. She asserts that the foregoing actions by plaintiffs constitute an alteration of the terms of her tenancy and were done in retaliation for her protected activities under Real Property Law § 223-b. Plaintiffs argue that Shlivko has not alleged that this notice to quit was in retaliation for any protected activity under Real Property Law § 223-b.

"Real Property Law § 223-b prohibits landlords from attempting to evict tenants for actions taken in good faith by a tenant to secure or enforce any rights under a lease" (*Raderman v Talia Mgt. Co.*, 170 Misc 2d 622, 623 [Sup Ct, NY

County 1996]). Real Property Law § 223-b specifically prohibits the landlord from serving a notice to quit in retaliation for, among other things, "[a]ctions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease," and [t]he tenant's participation in the activities of a tenant's organization." Real Property Law § 223-b has been held to be applicable to protect proprietary lessees of cooperative apartments (*Raderman*, 170 Misc 2d at 623).

On this motion to dismiss, the court must construe this counterclaim liberally and afford Shlivko the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994). In doing so, the court finds that Shlivko's allegations adequately plead a claim for retaliation under Real Property Law § 223-b as against Harway Terrace. Thus, dismissal of Shlivko's fourth counterclaim as against Harway Terrace must be denied.

However, Shlivko also asserts this counterclaim against Shalshina, individually. A tenant may only assert a claim under Real Property Law § 223-b against the landlord, and not its agents (*Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 348 [1st Dept 1986]). Accordingly, this counterclaim must be dismissed as against Shalshina.

Shlivko's Fifth Counterclaim For Attorney's Fees:

Shlivko's fifth counterclaim alleges that Harway Terrace has caused her to

incur attorney's fees to enforce her rights under the proprietary lease. Shlivko asserts that pursuant to the proprietary lease and Real Property Law § 234, she is entitled to legal fees for defending this action and prosecuting her counterclaims. This counterclaim is asserted solely as against Harway Terrace.

Generally, "attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *see also Congel v Malfitano*, 31 NY3d 272, 291 [2018]). Shlivko is not entitled to attorney's fees for defending this action since the claims asserted against her are for defamation and do not pertain to her rights under the proprietary lease. There is no agreement, statute, or court rule permitting Shlivko to recover attorney's fees in defending a defamation action. Thus, this counterclaim must be dismissed to the extent that it seeks such relief.

Insofar as Shlivko seeks attorney's fees for prosecuting her counterclaims, paragraph 28 of the proprietary lease permits Harway Terrace to recover attorney's fees in asserting a counterclaim brought by the lessee. Real Property Law § 234 provides Shlivko with reciprocal rights.

As discussed above, the court has dismissed Shlivko's counterclaims related to the lease except her fourth counterclaim under Real Property Law §

223-b. Real Property Law § 223-b (3) provides for the recovery of attorney's fees in any case in which the landlord (which here, is the cooperative corporation, Harway Terrace) has violated the provisions of this section. Thus, dismissal of Shlivko's fifth counterclaim is denied to the extent that Shlivko seeks attorney's fees pursuant to Real Property Law § 223-b (3).

Shlivko's Sixth Counterclaim for Abuse of Process

Shlivko's sixth counterclaim for abuse of process alleges that Shalshina knowingly commenced this action solely to harass and/or oppress her. Shlivko alleges that Shalshina has instituted and prosecuted this action individually and on behalf of Harway Terrace, not on the basis of a good faith belief in her claims, but to use the civil legal process to crackdown on dissent among shareholders and preserve her position of power in Harway Terrace. Shlivko further alleges that Shalshina knowingly made misrepresentations and/or inaccuracies in her allegations in this action. Shlivko asserts that this action was commenced by Shalshina without a legal basis, and with malicious intent.

Plaintiffs contend that there was no unlawful interference with Shlivko's person or property under color of process by Shalshina, and that Shlivko has, therefore, failed to meet the elements of this cause of action. Shlivko argues that plaintiffs overlook her allegations that this defamation action is being used for the purpose of interference with and obstruction of her legitimate activities as a

concerned tenant. Specifically, Shlivko claims that Shalshina is using this action to coerce her silence surrounding Shalshina's alleged malfeasance and to induce her not to enforce her rights as a tenant-shareholder. She asserts that this is akin to the extortion of money from her and the other shareholders.

It is well established that there are three essential elements to the tort of abuse of process, namely: "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *see also Perry v McMahan*, 164 AD3d 1486, 1488 [2d Dept 2018]). As to the first element, "the process used must involve an unlawful interference with one's person or property" (*Curiano*, 63 NY2d at 116 [1984][internal quotation marks omitted]; *see also Perry*, 164 AD3d at 1488).

Insofar as the only process issued in this action was a summons, there was no unlawful interference with Shlivko's person or property. "The institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Curiano*, 63 NY2d at 116; *Goldman v Citicore I, LLC*, 149 AD3d 1042, 1044-1045 [2d Dept 2017]; *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010]). Moreover, there was no allegation that plaintiffs improperly used process after it was issued (*see Goldman*, 149 AD3d at 1045). Furthermore, "a malicious motive alone does not give rise to a cause of

action to recover damages for abuse of process" (*Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010]; *see also Curiano*, 63 NY2d at 117).

Therefore, Shlivko's sixth counterclaim must be dismissed.

Shlivko's Seventh Counterclaim For Breach of Fiduciary Duty:

Shlivko's seventh counterclaim for breach of fiduciary duty against Shalshina is brought derivatively pursuant to Business Corporation Law § 626. Plaintiffs contend that this counterclaim fails to meet the demand futility requirement of Business Corporation Law § 626 (c), and, therefore, must be dismissed.

Business Corporation Law § 626(c) provides that in a derivative action, the complaint is required to "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." Shlivko's asserts that such a demand of action by the board was futile. Paragraph 126 of her answer provides as follows:

> "Based on the campaign of harassment against Shlivko, disregard for the [b]ylaws of the [c]orporation including purported amendments by the [b]oard without approval of the shareholders, and obvious control of the [b]oard and hijacking of corporate authority by Shalshina, demanding action from the [b]oard as to Shalshina would be futile and therefore is not a pre-condition to instituting this claim."

"Demand is futile, and excused, when the directors are incapable of making

an impartial decision as to whether to bring suit" (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003]). This occurs "when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction" (*Marx v Akers*, 88 NY2d 189, 200 [1996]). "Director interest may either be self-interest in the transaction at issue, . . . or a loss of independence because a director with no direct interest in a transaction is 'controlled' by a self-interested director" (*id.* [internal citation omitted]; *see also Bansbach v Zinn*, 1 NY3d 1, 11 [2003], *rearg denied* 1 NY3d 1 [2004]).

Shlivko, throughout her answer, sets forth allegations that the board of directors was controlled by Shalshina. Shlivko alleges that while the board's February 20, 2018 resolution authorized Harway Terrace to commence an action against her, the complaint interposed on February 27, 2018, the amended complaint filed on June 4, 2018, and the second amended complaint filed on August 22, 2018 all include Shalshina as a named plaintiff, and each allege damages to Shalshina personally as distinct from Harway Terrace. Shlivko's tenth affirmative defense alleges that the February 20, 2018 resolution was issued from a purported board meeting that lacked a quorum to transact business. Shlivko further alleges that this board meeting, (if it actually occurred), was led by Shalshina. Shlivko claims that at that time, Shalshina had automatically been removed as a director by operation of the bylaws and,

therefore, completely lacked authority to call, lead, or vote at that meeting. She alleges that Shalshina improperly used corporate funds to assert her personal claims, and that Shalshina dominated the board.

The court finds that Shlivko's answer alleges facts with sufficient particularity to meet the demand futility requirement of Business Corporation Law § 626 (c) (*see Bansbach*, 1 NY3d at 11; *Marx*, 88 NY2d at 200; *Guzman v Kordonsky*, 177 AD3d 708, 710 [2d Dept 2019]). Consequently, dismissal of Shlivko's seventh counterclaim must be denied.

Conclusion

Accordingly, it is hereby

ORDERED that with regard to the second, third and sixth counterclaims, plaintiffs' motion to dismiss is granted; and it is further

ORDERED that with regard to the fourth counterclaim, plaintiffs' motion to dismiss is granted with respect to plaintiff Shalshina and is otherwise denied; and it is further

ORDERED that with regard to the fifth counterclaim, plaintiffs' motion to dismiss is denied, to the extent that the counterclaim seeks attorneys fees pursuant to Real Property Law § 223-b (3) and is otherwise granted; and it is further

ORDERED that with regard to the seventh counterclaim, plaintiffs' motion

to dismiss is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.