

Torres v Lindsay Park Bd. of Directors
2020 NY Slip Op 31352(U)
May 12, 2020
Supreme Court, Kings County
Docket Number: 508967/2019
Judge: Devin P. Cohen
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**Supreme Court of the State of New York
County of Kings**

Index Number 508967/2019

Part 91

DECISION/ORDER

ADEILAIDA TORRES, CARLOS GONZALEZ, CARMEN OLAVARRIA, CARMEN PADILLA, ELZBIETA BLIZINSKA, GRAZYNA BEDKOWSKA, NAOMI CHAPPELLE, NELSON JAIME, REBECCA REXACH, AND TYRONE BENNETT INDIVIDUALLY, AND AS SHAREHOLDERS OF LINDSAY PARK HOUSING CORP., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED SHAREHOLDERS OF LINDSAY PARK HOUSING CORP., IN THE RIGHT OF LINDSAY PARK HOUSING CORP.,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	_____
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	_____
Other.....	_____

Plaintiffs,

against

LINDSAY PARK BOARD OF DIRECTORS, CORA DIX-AUSTIN, TOMIKA AUSTIN, VINAY VOHRA, JAY SILVERBERG, MARVIN J. DANIEL, CARLOS RODRIGUEZ, JOSEPH FRANCIS, BAYSIDE PAINTING & MAINTENANCE CORP., BAYVIEW PAINTING, JONATHAN MOLINAS, JANITORIAL SUPPLIES, CENTRAL CONTRACTING CORP, PRO-MAX SUPPLIES, J&J CONSTRUCTION, ATS MECHANICAL, ZENITH PROPERTIES, INC., AMERICAN POOL, JOHN DOE, AND JANE DOE,

Defendants.

Upon the foregoing papers, defendant Lindsay Park Housing Corp. Board of Directors's motion to dismiss is decided as follows:

Plaintiffs' Allegations

Plaintiffs allege that they are shareholders of Lindsay Park Housing Corp., a Mitchell-Lama housing cooperative for low and middle-income families (Complaint at ¶ 1 and 11). Plaintiffs allege that, under the leadership and control of certain former members of the Lindsay Park Board of Directors, namely defendants Dix-Austin, Zenith, Vohra, and Silverberg, the defendant Board excessively increased maintenance fees, engaged in self-dealing, personal

profiteering, waste and misuse (*id.* at ¶¶ 37-44). Specifically, plaintiffs allege that the board increased maintenance fees by 75 percent; incurred more than \$70 million in debt; took out additional, unsecured loans; fell behind on maintenance and repair of the premises; and was fined for defects in the premises (*id.*).

Plaintiffs allege that Dix-Austin was the Board president from 2002 to 2017 (*id.* at ¶ 45). Plaintiffs allege that she and other defendants submitted “fraudulently inflated contractor and vendor bills for maintenance, repair, supplies, and other work throughout Lindsay Park Housing Corp.” and then collected bribes from those same contractors and vendors (*id.* at ¶¶ 46-48, and 62). Plaintiffs allege that among those contractors was a pool cleaning business operated by Dix-Austin’s daughter, defendant Tomeka Austin (*id.* at ¶ 49). Plaintiffs also allege that Dix-Austin, Vohra, and Silverberg took bribes from applicants for vacant apartments in exchange for special treatment (*id.* at ¶¶ 50 and 63). In addition, plaintiffs allege that Dix-Austin retaliated against residents who opposed her election or complained about her (*id.* at ¶ 51).

Plaintiffs allege that Dix-Austin and other former board members, including Silverberg and Vohra, pled guilty to the charge of commercial bribery in the first degree, received jail sentences, and were each ordered to return \$100,000 to Lindsay Park Housing Corp. (*id.* at ¶¶ 52, 67, and 68).

Plaintiffs also allege that Lindsay Park Housing Corp. entered into agreements with certain contractors, whose principals were also affiliated with Lindsay Park, and wrongfully profited from Lindsay Park at the expense of Lindsay Park tenants (*id.* at ¶¶ 86-143). Plaintiffs further allege that some of these contractors were investigated and charged, pled guilty, and were ordered to pay restitution to Lindsay Park (*id.*).

With regard to the current board of directors as a whole, plaintiffs allege that any demand on the board to commence an action against defendants would have been futile (*id.* at ¶ 5).

Plaintiffs allege that defendant Dix-Austin was interested in the subject transactions, some of which involved her family and from which she purportedly received kickbacks (*id.* at ¶ 5 and 46-49).

Plaintiffs allege that defendant Dix-Austin dominated the board, a majority of which has served with her while she was on the board (*id.* at ¶ 5, 77). Plaintiffs allege that the board delegated its responsibility to her, and that the board committees ceased to function (*id.* at ¶ 5). Plaintiffs allege that defendant Dix-Austin admitted as such in a 2011 letter to the shareholders in which she stated she wanted to "avoid the significant extra expense associated with an election" (*id.* at ¶ 6).

Plaintiffs further allege that the board failed to inform itself about the subject transactions (*id.* at ¶ 5, 7, 79). Plaintiffs allege that the board knew, or should have known, that the Kings County District Attorney's office had commenced an investigation into Lindsay Park Housing Corp. on or about July of 2015, and that the DA's office had taken files and computers from Lindsay Park Housing Corp. offices (*id.* at ¶ 80). Plaintiffs further allege that the board knew that the defendant former board members had pled guilty to their wrongdoing (*id.* at ¶ 81). Plaintiffs allege that the board of directors "considered, but did not pass, a resolution that would have commenced eviction proceedings against Defendant Dix-Austin after she entered her plea deal in 2018" (*id.* at ¶ 82). Plaintiffs allege that certain plaintiffs made complaints to the board, including a complaint by Plaintiffs Adelaida Torres and Nelson Jaime on December 21, 2017 (*id.* at ¶ 83). In their complaints, plaintiffs requested "eviction proceedings, an end to use of

management facilities, and other penalties against Defendant Dix-Austin” (*id.*). Plaintiffs allege that the board never responded to their complaints or otherwise took action to stop defendants’ purported wrongdoing, and have continued to work with some of the same contractors named in this action (*id.* at ¶¶ 84-85).

Analysis

Defendant Lindsay Park Housing Corp. Board of Directors moves to dismiss, pursuant to CPLR 3211(a)(7), on the basis that the complaint does not “set forth with particularity the plaintiff[s]’ efforts to secure the initiation of [the present] action by the board of directors or the reasons for not making such effort” (*Malkinson v Kordonsky*, 56 AD3d 734, 735 [2d Dept 2008]; *see also* Business Corporation Law § 626[c]). “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]).

The parties do not dispute that plaintiffs made no demand on the board. Consequently, plaintiffs were required to plead that such a demand would have been futile (*Walsh v Wwebnet, Inc.*, 116 AD3d 845, 846 [2d Dept 2014]). To plead futility, plaintiffs must allege with particularity: (1) that a majority of the board of directors is interested in the challenged transaction; or (2) that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; or (3) that the challenged transaction was so egregious on its face that it could not have been the product of the sound business judgment of the directors (*Mason-Mahon v Flint*, 166 AD3d 754, 758 [2d Dept 2018]).

As to the first theory of futility, plaintiffs allege that Ms. Dix-Austin “dominated” the

board when she was on the board, and that current and/or former board members have relationships with Ms. Dix-Austin. However, the complaint does not allege with sufficient particularity that the current board was interested in the transactions described in the complaint (*see, e.g., In re Comverse Tech., Inc.*, 56 AD3d 49, 54 [1st Dept 2008]).

As to the third theory of futility, plaintiffs allege that the company overpaid various contractors and otherwise hired family and friends. However, the complaint does not allege with sufficient particularity how the transactions with these contractors were so egregious that they clearly violated sound business judgment (*see, e.g., Walsh*, 116 AD3d at 847-48).

As to the second theory of futility, plaintiffs allege that the board was on notice of the wrongdoings of the defendant board members by virtue of the Kings County District Attorney's investigation in July 2015, "which included the seizure of files and computers from Lindsay Park Housing Corp. offices". Plaintiffs further allege that the board knew of the defendants' alleged malfeasance from the subsequent plea deals and sentencing of those defendants. Additionally, plaintiffs allege that some of them requested "eviction proceedings, an end to use of management facilities, and other penalties against Defendant Dix-Austin, including but not limited to a demand letter for eviction proceedings sent by Plaintiffs Adelaida Torres and Nelson Jaime on December 21, 2017." Plaintiffs allege that the board did not respond to these requests. Finally, plaintiffs allege that the board continued to do business with "some of the same individuals and corporate entities who pled guilty and/or paid restitution to Lindsay Park Housing Corp as part of the criminal investigation."

In *Mason-Mahon v Flint* (166 AD3d 754 [2d Dept 2018]), the Second Department confronted a similar derivative action and allegations of futility. The plaintiff alleged that HSBC

bank, its affiliates and board of directors, failed to implement money laundering safeguards despite knowledge of the illegal activity. Plaintiff sued the defendants for breach of fiduciary duty and corporate waste (*Mason–Mahon*, 166 AD3d at 755). Defendants moved to dismiss for failure to plead futility with particularity (*id.*). Plaintiff alleged that demand upon the board was futile due to the board's failure to inform itself of the alleged malfeasance. Plaintiff alleged that HSBC had a policy that should have alerted its board of directors of the alleged wrongdoings. Plaintiff also alleged that the board failed to monitor hundreds of billions of dollars in illegal transactions spanning a 13-year period, which resulted in defendants' payment of \$1.5 billion in fines and penalties to state and federal authorities (*id.* at 758-59). The Second Department found that the extent and duration of the malfeasance should have alerted the board of directors, and that plaintiff had sufficiently alleged the second theory of futility (*id.* at 759).

Like in *Mason–Mahon*, plaintiffs have sufficiently alleged that the board failed to inform itself of defendants' wrongdoings despite investigation by authorities, plea deals, incarceration and restitution, as well as complaints by certain plaintiffs.

Conclusion

For the foregoing reasons, defendant's motion to dismiss is denied.

This constitutes the decision and order of the court.

May 12, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court