

**Sagacious Minds, Inc. v Board of Mgrs. of the
Brighton Tower II Condominium**

2020 NY Slip Op 32706(U)

August 18, 2020

Supreme Court, Kings County

Docket Number: 502566/2020

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

SAGACIOUS MINDS, INC.,

Plaintiff,

-against-

BOARD OF MANAGERS OF THE BRIGHTON
TOWER II CONDOMINIUM,

Defendant.

X

DECISION/ORDER

Index No. 502566/2020

Motion Seq. No. 1 and 2

Date Submitted: 08/6/2020

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's pre-answer motion to dismiss and plaintiff's cross motion to amend the complaint

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	5-19
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	21-30
Reply Affirmation.....	31

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant moves, pre-answer, to dismiss the complaint in this action, pursuant to CPLR 3211 (a) (3), on the basis that plaintiff lacks standing to bring the action. Plaintiff cross-moves to amend the complaint.

The complaint sets forth seven causes of action, including negligence and breach of fiduciary duty, all related to property damage, mold, and other conditions at the commercial condominiums which plaintiff, a not for profit corporation, purchased in 2019. Plaintiff seeks, inter alia, damages and a declaratory judgment that the defendant condominium must make certain repairs to the common elements of the property to prevent his commercial units from sustaining further damage, including but not limited to water damage.

Defendant moves to dismiss the complaint, claiming that plaintiff does not have standing to sue. Defendant offers two reasons for this opinion. The first is that the By-Laws of the Condominium do not permit units to be transferred without the satisfaction of any lien filed by the condo against the former owner for unpaid common charges. Therefore, defendant's counsel avers, the conveyance to plaintiff was void and he does not own the property. The second basis for the defendant's claim that plaintiff does not have standing is that plaintiff is a tenant in common with the other unit owners, so he cannot sue them.

Plaintiff has cross-moved to amend the complaint. The proposed amended complaint with the proposed changes highlighted (NYSCEF Doc. 30) does not add any new parties or new causes of action but does add language to explain the claims more clearly. Because plaintiff's claims are not changed in a material way, the court will consider the defendant's motion to dismiss. If the proposed amended complaint was materially different from the original complaint, the motion to dismiss would have to be denied with leave to renew after the amended complaint was served. That is not applicable here.

Defendant's motion to dismiss the complaint must be denied. Standing is a threshold determination that the plaintiff has "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (CPLR 3211 [a] [3]; see *Caprer v Nussbaum*, 36 AD3d 176, 182, [2d Dept 2006]). "A plaintiff generally has standing only to assert claims on behalf of himself or herself" (*Caprer*, 36 AD3d at 182). Under long-standing common law, a court has "no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in

the action or the petitioner in the proceeding are affected" (*Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772 [1991] [internal citations omitted]).

Here, plaintiff has established that it purchased all four commercial condominium units at the property in 2019 with documents annexed to the motion papers. If there was a lien for common charges that was not discharged at the closing, it would seem that it remains a lien on the Units, and the condominium can either sue on the lien or foreclose on the lien, but the conveyance of the deed is not, as argued, "void ab initio." A requirement in the By-Laws of the Condominium that liens for common charges be satisfied at closing does not render the deed void. The condo documents specifically state that transfers of commercial units are not subject to the condominium's right of first refusal, so apparently the condominium was unaware of the impending transfer and did not have an opportunity to attempt to collect the unpaid common charges in connection with the sale. This does not affect the purchaser's title.

With regard to defendant's claim that the condominium cannot be sued by a Unit Owner for property damage and related claims, the court recommends that counsel read up on condominium law. A unit owner who is unable to settle a dispute with the board of managers of his or her condominium has an absolute right to sue unless the condo documents require arbitration, which is rare in New York and is not claimed here (*see e.g. Etkin v Sherwood 21 Assoc., LLC*, 176 AD3d 442 [1st Dept 2019]; *Gordon v Board of Mgrs. of the E. 12th St. Condominium*, 102 AD3d 521 [1st Dept 2013]; *AIG Prop. Cas. Co. v Prop. Mkts. Group, Inc.*, 2016 NY Slip Op 31558[U] [Sup Ct, NY County 2016]).

The condominium form of ownership of real property is established by dividing a parcel of real property into individual units and their appurtenant common elements. A unit owner holds title in fee to his or her individual unit as well as to an undivided interest in the

common elements (see *Residential Comm. of Bd. of Managers of the Sycamore v 250 East 30th Street Owners, LLC*, 17 Misc 3d 1139[A] [Sup Ct, NY County 2007]; see *Murphy v State of New York*, 14 AD3d 127 [2d Dept 2004]). When a parcel of real property becomes a condominium, it is subject to the jurisdiction of the New York Condominium Act (Real Property Law Article 9-B, § 339-d et seq.)¹ through the filing of a Declaration of Condominium (RPL § 339-n). Once created, the administration of the condominium's affairs is governed principally by its Declaration and By-Laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of the unit owners concerning their units and the condominium's common elements (see *Gennis v Pomona Park Bd. of Mgrs.*, 36 AD3d 661 [2d Dept 2007]; *Schoninger v Yardarm Beach Homeowners' Assoc., Inc.*, 134 AD2d 1 [2d Dept 1987]). Every unit owner executes a Unit Owner Power of Attorney at closing, which gives the board of managers the authority to represent the unit owner in accordance with the terms of the Declaration and By-laws.

Notwithstanding the consent to represent in the Unit Power of Attorney, which is for issues between the condominium association and third parties, the unit owners are not tenants in common. The courts interpreting the Condominium Act have essentially analogized suits against a board of managers to suits against a cooperative's board of directors and have applied the "business judgment rule." As the court explained in *Schoninger v Yardarm Beach Homeowners' Association* (134 AD2d 1 [2d Dept 1987]):

"[W]e hold that where a challenge is made by an individual owner to an action of a condominium board of managers, whether incorporated or not, absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium"

¹ New York has not adopted the Uniform Condominium Act.

(*id.* at 10).

Pleadings are freely amendable, and plaintiff's cross motion is granted. However, plaintiff needs to name the defendant properly in the amended pleading. When a lawsuit is brought against a condominium, the applicable statute requires the named party to be the president or treasurer of the board of managers of the condominium:

"An action or special proceeding may be maintained against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section"

(see General Associations Law § 13).

The plaintiff herein has improperly brought suit against the defendant board of managers, an unincorporated association, and has failed to name either the defendant's president or treasurer, in his or her representative capacity, as a party to this action as is required by General Associations Law § 13. However, that error, by itself, is not jurisdictional and can be corrected by amendment (*see Montalvo v Bakery & Confectionary Workers Intl. Union Local No. 3*, 137 AD2d 506, 508 [2d Dept 1988]; *see also Matter of Motor Haulage Co. (Teamsters' Union)*, 298 NY 208 [1948]; *Bohl Contr. Co. v IUE, AFL-CIO Dist. No. 3*, 73 AD2d 1023 [3d Dept], *lv dismissed* 51 NY2d 704 [1980]). The fact that the condominium's board of managers was sued without naming a proper officer in his or her capacity as such, in violation of Section 13 of the General Associations Law, is not a fatal defect but a correctable error (*see Bohl Contracting Co*, 73 AD2d at 1024).

Accordingly, it is **ORDERED** that defendant's motion to dismiss the complaint is denied and the plaintiff's cross motion to amend the complaint is granted.

It is further **ORDERED** that the amended complaint in the form annexed to the moving papers, but with the caption corrected as provided above, shall be filed within 20 days, and shall be deemed to have been served on the defendant upon service by plaintiff of a copy of this order with notice of entry; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 30 days of being served.

This constitutes the decision and order of the court.

Dated: August 18, 2020

ENTER:



Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER
JSC