**JWS Family Trust v Midwood Coop. Inc.**

2020 NY Slip Op 32922(U)

August 28, 2020

Supreme Court, Kings County

Docket Number: 511124/18

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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JWS FAMILY TRUST AND MIDWOOD
COOPERATIVE INC.,
Plaintiff,

Decision and order

- against -

Index No. 511124/18

MIDWOOD COOPERATIVE INC., JOSHUA
PROTTAS D/B/A WORKING REALTY, LTD.,
JOSHUA PROTTAS, MIDWOOD COOP
GROUP, LLC, and NINA PLATZER-ROSEN,
Defendants,

August 28, 2020
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The defendant Midwood Cooperative Inc., has moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds it fails to state any cause of action. The remaining defendants likewise cross-move seeking to dismiss the complaint. The plaintiff has cross-moved seeking to amend the complaint. The motions have been opposed respectively and after reviewing all the arguments this court now makes the following determination.

According to the Amended Complaint the plaintiff Midwood Cooperative Inc., [hereinafter 'Midwood'] is a cooperative building in Kings County that has forty two units. JWS Family Trust a member of the corporation has sued in its individual capacity and on behalf of the corporation alleging the defendants, the managing members of the corporation, breached various duties and essentially mismanaged the corporation causing financial difficulties. The Amended Complaint also alleges the defendants engaged in self dealing and breached duties. Specifically, the Amended Complaint alleges that property and

water bills were not paid by defendant Prottas and Working Realty the managing agents of the coop. Further, as a result of a shortfall paying these bills the board of directors approved a plan to sell seven apartments to Prottas. The Amended Complaint alleges many improprieties took place including the fact Prottas misstated the value of the apartments, failed to pay necessary taxes and maintenance fees. The seven apartments were purchased by defendant Midwood Coop Group LLC [hereinafter 'MCG'] owned by Prottas and defendant Platzer-Rosen. The Amended Complaint alleges the sale of the seven apartments was a breach of a fiduciary duty. The Amended Complaint contains numerous causes of action including breach of contract, declaratory judgement, attorney's fees and breach of fiduciary duty against Midwood, breach of covenant of good faith and fair dealing, negligence and gross negligence, breach of warranty of habitability, corporate waste, an accounting, conversion and discrimination against Midwood and Prottas, Working Realty and Midwood Coop Group LLC, and Platzer-Rosen (as to some of the counts) and injunction and oppression against all defendants.

The defendants have now moved seeking to dismiss the Amended Complaint on the grounds it fails to state any cause of action. The plaintiff seeks to amend the complaint to substitute Rachel and Rebecca Weingarten instead of JWS Family Trust and some minor changes to the complaint.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

Preliminarily, the motion seeking to amend the complaint to substitute Rachel and Rebecca Weingarten instead of JWS Family Trust is granted. Likewise, the motion seeking to amend the second count to include claims against Prottas instead of Midwood is granted.

The first issue that must be addressed is whether the plaintiff maintains standing to sue in an individual capacity. In Serino v. Lipper, 123 AD3d 34, 994 NYS2d 64 [1st Dept., 2014] the court explained that to distinguish a derivative claim from a direct claim the court must engage in two inquiries. First, whether any harm was suffered by the corporation or an individual stockholder and whether the corporation or the individual

stockholder would receive the benefit of any recovery. As the court stated "if there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action…On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand" (id). Thus, where the alleged injury affects all shareholders not just the plaintiff then the action is only derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]). Consequently, while a complaint may contain both derivative claims and individual claims such claims cannot be intermingled within the same cause of action (see, Greenberg v. Falco Construction Corp., 29 Misc3d 1202(A), 958 NYS2d 307 [Supreme Court Kings County, 2010]).

In this case the first cause of action alleging breach of contract states that "the Court should issue a judgment against Defendant Midwood Coop to Plaintiffs individually and derivatively for damages, costs, statutory penalties, interest, punitive damages, exemplary damages, and attorneys' fees in an amount to be determined at trial" (see, Amended Complaint, ¶132). The Amended Complaint impermissibly mixes derivative claims and individual claims in the same cause of action. To be sure, if any breach of contract took place it would constitute a derivative claim since it is a wrong that affects every

shareholder. The plaintiff argues there are individual claims as well such as making it harder to refinance a mortgage or sell their shares. However, those are not individual harms, they are harms that really affect the entire corporation. Indeed, any recovery would accrue to the corporation, not individual shareholders.

Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The Amended Complaint in this case merely states the "defendant Midwood Coop breached their obligations under the Proprietary Lease and Bylaws as alleged" (see, Amended Complaint, ¶130). However, the complaint does not describe the actual terms of the contract, nor which provisions of any contract that were breached, nor how any contract was breached. Therefore, even if the Amended Complaint properly and exclusively contained only a derivative claim the first count fails sufficiently allege a breach of contract and is dismissed.

The second cause of action alleges a breach of a fiduciary duty and considering the new Amended Complaint, this cause of action only implicates Protass. This cause of action also intermingles individual and derivative claims. It is clear that any breach of fiduciary duty is really only a derivative claim

since such wrong, if true, affects all shareholders. The plaintiffs assert that they maintain individual claims against Protass but they are really no different in kind or impact from harms suffered by the corporation as a whole. The harm caused by any breach of a fiduciary duty in this case is a harm to the entire corporation not individual shareholders (see, Phoenix Light SF Ltd., v. U.S. Bank N.A., 2015 WL 2359358 [S.D.N.Y. 2015]). The new Amended Complaint asserts that "the Court should issue a judgment against Defendant Joshua Protass to Plaintiffs individually and derivatively for damages, costs, statutory penalties, interest, punitive damages, exemplary damages, and attorneys' fees in an amount to be determined at trial" (see, Amended Complaint, ¶139). Again, these allegations are derivative, however, the new Amended Complaint impermissibly conflates individual and derivative claims.

In addition, the evidence presented in opposition to the motion demonstrates the board of directors approved the sale of the apartments to Protass. To succeed on a motion to dismiss based upon documentary evidence such evidence must utterly refute the plaintiff's allegations (Gould v. Decolator, 121 AD3d 845, 994 NYS2d 368 [2d Dept., 2014]). Thus, a contract or other document, which is "unambiguous, authentic and undeniable" is documentary evidence which can support a motion to dismiss (Attias v. Costeria, 120 AD3d 1281, 993 NYS2d 59 [2d Dept.,

2014]). The defendants have introduced documentary evidence the board of directors was aware of the sale of the apartments to Protass and unanimously affirmed the sales. This evidence consists of the minutes of a board meeting that took place February 11, 2015. Plaintiffs merely allege the documents are forged and the individuals who attested to them should not be believed. That is an improper basis upon which to raise any question of fact in the face of documentary evidence. Therefore, the second cause of action is dismissed.

The third cause of action alleges breaches of the covenant of good faith and fair dealing. It is well settled this cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). Since the conduct which comprises this claim is the same as the breach of contract claim it is consequently dismissed (CSI Group LLP v. Harper, 153 AD3d 1314, 61 NYS3d 592 [2d Dept., 2017]).

The fourth cause of action alleges negligence and gross negligence. Gross negligence is defined as a failure to use even slight care or involves conduct that is so careless as to demonstrate a complete disregard for the rights of others (Greenwood v. Daily News, Inc., 8 Misc3d 1002A, 2005 WL 1389052 [Nassau County 2005]). As stated in Sutton Park Development

Corp. v. Guerin &Guerin Agency, 297 AD2d 430, 745 NYS2d 622 [3rd Dept., 2002] where the plaintiff's cause of action for gross negligence was dismissed, the court there addressed the lack of any "factual averments alleging conduct of such aggravated character" (id). The Amended Complaint alleges the defendants committed such negligence and gross negligence by failing to properly manage, repair and maintain the premises and by permitting numerous Department of Building violations to remain on the property leaving the building unsafe. Those contentions, even if proven true, do not allege gross negligence at all. Moreover, concerning negligence, it is well settled that merely alleging the breach of a contract duty arose from a lack of due care will not transform a breach of contract claim into a tort claim (Sommer v. Federal Signal Corp., 79 NY2d 540, 583 NYS2d 957 [1992]). The court in Sommer explained that legal duties independent of contract claims could be imposed upon professionals, common carries and bailees as a matter of policy. However, the defendants do not fit into any of those categories. Moreover, even if they did, any duty they owed must be independent of the duty imposed by the contract. The duties allegedly not fulfilled by the defendants are no different than the duties that flow from the contract (see, Board of Managers of Beacon Tower Condominium v. 85 Adams Street LLC, 136 AD3d 680, 25 NYS3d 233 [2d Dept., 2016]). Therefore, no negligence claim is

possible and the motions seeking to dismiss the fourth count is granted.

The next cause of action alleges a breach of the warranty of habitability. First, this cause of action is only applicable to a landlord, therefore, this cause of action is dismissed as to Prottas, Working Realty and MCG. Concerning Midwood, the paragraphs of the Amended Complaint supporting this cause of action are ¶¶104-122. The basis for the claim is that Midwood allowed HPD and DOB violations to be filed against the building (¶107), there were "filthy" conditions in the common areas of the building (¶109), broken building lights (¶111), the heat and hot water were frequently not working (¶116) and there was vermin in the building (¶121). These contentions, which must be accepted as true for purposes of a motion to dismiss, sufficiently allege a breach of warranty of habitability (see, Hillside Place LLC v. Lewis, 29 Misc3d 139(A), 920 NYS2d 241 [2d Dept., Appellate Term 2010]). Further, the breach of a warranty of habitability applies to a residential premises (Disunno v. WRH Properties, 97 AD3d 780, 949 NYS2d 127 [2d Dept., 2012]) but includes the common areas as well (see, Maxwell Development L.P., 61 Misc3d 1221(A), 111 NYS3d 517 [Civil Court City of New York, 2018]). Therefore, the motion seeking to dismiss this cause of action is denied.

The next cause of action alleges conversion. It is well settled that to establish a claim for conversion the party must

show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. The allegation that Prottas has not paid the full price for the seven apartments does not state a claim for conversion. The plaintiff has no possessory interest in those apartments. Therefore, that cause of action is dismissed.

The next cause of action is for corporate waste. First, a claim for corporate waste is only derivative in nature (see, Tzolis v. Wolff, 12 Misc3d 1151 (A), 819 NYS2d 852 [Supreme Court Kings County 2006]). Moreover, pursuant to BCL §720(a) a claim

for corporate waste may only be asserted against a director or officer of a corporation. Since Protass and his entities are not officers or directors of Midwood and the claim has not been brought derivatively the cause of action cannot proceed. Consequently, the motions seeking to dismiss this claim is granted.

The next cause of action is for an accounting. It is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). There is no confidential or fiduciary relationship between Prottas or his entities and the plaintiffs. Therefore, the motion seeking to dismiss this claim as to them is granted. There is such a relationship between Midwood and the plaintiffs. Consequently, the motion as to Midwood seeking to dismiss the accounting claim is denied.

The ninth and tenth causes of action seek a preliminary injunction and a declaratory judgement. It is well settled that a motion to dismiss the complaint in an action for a declaratory judgment "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable

declaration" (DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 AD3d 725, 958 NYS2d 417 [2d Dept., 2013]). However, this cause of action is admittedly time barred. Moreover, the Amended Complaint cannot simply incorporate further facts and events. Therefore, the motions seeking to dismiss this cause of action is granted.

A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]). Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the fact the board of directors are not duly elected and they should cease acting as such and had no right to approve the sale of the apartments to Prottas. Of course, the defendants deny these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally

disputed. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]). As already noted, the defendants have presented substantial evidence they did no wrongdoing and all their activities were confirmed by the board of directors. Thus, at this juncture there are factual disputes undermining the availability of any injunction. Consequently, the motion seeking to dismiss this cause of action is granted.

The next cause of action is for oppression. To the extent the cause of action is based upon any improper conduct (see, Maxon v. Mirror Show Management Inc., 7 Misc3d 1015(A), 801 NYS2d 236 [Supreme Court Monroe County 2005]), this court has already dismissed the causes of action concerning those improprieties. Thus, the cause of action for oppression is similarly dismissed. Further, to the extent the cause of action is based upon minority shareholders being frozen out of management the Amended Complaint does not provide anything other than conclusory assertions in

this regard. The Amended Complaint fails to describe the nature of any freeze-out, the intent of such conduct and the harms caused by the oppressors. The Amended Complaint fails to adequately describe the components that comprise this cause of action. Therefore, the motions seeking to dismiss this cause of action are granted.

The motions seeking to dismiss the cause of action for discrimination based on age and gender are granted. The Amended Complaint fails to allege any conduct that could be considered discriminatory.

Lastly, the motion seeking to dismiss the cause of action for attorney's fees is granted.

Thus, in conclusion all causes of action are dismissed against all defendants except two causes of action remain against Midwood, namely a breach of warranty of habitability and an accounting.

So ordered.

ENTER:

DATED: August 28, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC