

Foster v 219-229 W. 144th St. HDFC
2020 NY Slip Op 33972(U)
December 1, 2020
Supreme Court, New York County
Docket Number: 161239/2019
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. LAURENCE L. LOVE

PART

IAS MOTION 63M

Justice

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INDEX NO. 161239/2019

AYOKA FOSTER,

MOTION DATE 10/22/2020

Plaintiff,

MOTION SEQ. NO. 001

- V -

219-229 WEST 144TH STREET HDFC, LOIS BAYNHAM,
PATRICIA HORSFORD, KELLY DOWNINGDECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

The following read on defendants' motion to dismiss, CPLR 3211(a)(1), a defense is founded upon documentary evidence, and CPLR 3211(a)(7), the pleading fails to state a cause of action. Plaintiff's complaint states causes of action for 1) a mandatory injunction requiring defendants to issue documents to effectuate a formal transfer of title of apartment six to plaintiff; 2) violation of the Multiple Dwelling Law and Housing and Maintenance Code for the City of New York; 3) breach of the warranty of habitability by failing to provide repairs to apartment six; and 4) legal fees pursuant to the proprietary lease and Real Property Law 234.

Plaintiff cross-moves to amend the complaint to drop defendants Lois Baynham, Patricia Horsford, and Kelly Downing.

This action involves building 219 West 144th Street, NY, NY, 10030, where plaintiff seeks to receive the shares of stock to apartment six, by virtue of her claim as a beneficiary of Margie McCray, her mother, through decedent McCray's Last Will and Testament.

Plaintiff filed a summons on November 19, 2019, and an amended verified complaint on June 29, 2020. Defendants have not answered.

Pursuant to CPLR 3211(a)(1), a motion to dismiss “is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (see *Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]). Additionally, pursuant to CPLR 3211(a)(7), a motion to dismiss “must be granted where the pleadings fail to state a valid cause of action (see *Campaign for Fiscal Equity, Inc. v. State of N.Y.*, 86 N.Y.2d 307, 318 [1995]). The facts pleaded are presumed to be true and are generally accorded favorable inferences. However, allegations that consist of “bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (see *Caniglia v. Chicago Tribune – New York News Syndicate, Inc.*, 204 A.D.2d 233, 233 – 234 [1st Dept 1994]).

Defendant states that the Corporations’ Proprietary Lease and governing documents allow the Corporation’s governing body to evaluate and determine requests to transfer shares. “Defendants, due to plaintiff’s unwillingness to provide it with crucial probate documentation, have been unable to fully conduct their due diligence and ascertain whether transferring such shares to plaintiff would be economically prudent and in the best interests of the Corporation and its shareholders.”

Defendant cites the business judgment rule which prohibits judicial inquiry into actions of corporate directors “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes” (see *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 537 – 538 [1990]). The *Levandusky* Court states that “[a]s applied in condominium and cooperative cases, review of a board’s decision under a reasonableness standard has much in common with the rule we adopt today. A primary focus of the inquiry is

whether board action is in furtherance of a legitimate purpose of the cooperative or condominium, in which case it will generally be upheld” (*Id.*).

Defendants site the proprietary lease, section V, paragraph 5.01(b)(ii)(B), which deals with lease assignments and share transfers:

The Directors or Shareholders, as the case may be, may not grant or unreasonably withhold consent to assignment of the lease and a transfer of the Shares to a *financially responsible* member of the Shareholder’s family (other than the Shareholder’s spouse, as to whom no consent is required) who shall have accepted all the terms and conditions of this lease.

Defendants states, “[p]laintiff is attempting to expedite the share transfer approval process despite her failure to provide the Board with critical probate documents that would otherwise display her rightful claim to the Shares. Defendants have no reason to believe that Plaintiff would be a financially responsible shareholder if the shares were transferred to her. Particularly, plaintiff, in her capacity as Executor of the McCray Estate, has a duty [to] manage and oversee the McCray estate and act with its best interests in mind. Such a duty extends to tending to the financial obligation of the McCray Estate. Despite this duty, Plaintiff has a far-reaching history of failing to make maintenance payments on the premises that the McCray estates, which still holds an ownership interest in the premises, is required to pay. This neglect raises a strong inference that plaintiff may very well be financially irresponsibl[e], and such irresponsibility may also extend to her payments to the premises and conduct towards the Corporation if she were ever to become a shareholder therein” (see NYSCEF Doc. No. 24 p.7).

The affidavit of plaintiff, Ayoka Foster affirms, “I have repeatedly requested the transfer, ... [t]he Court will note the most recent letter from Mr. Donaldson, dated July 9, 2019, ... , once again gives no specific reason for denying the transfer, but only claims – falsely – that the

requested papers were not provided. Notably, I continued to pay the maintenance for nine years and one month from my own funds. The subject apartment was damaged by a broken water pipe, which has resulted in a pervasive mold condition. Defendant continues to demand maintenance payments from me personally, when it has never effectuated the transfer of the shares that would allow me to take possession. I believe that the defendant is responsible for the cost of repairs, and that this is an issue for the Court to determine on all the evidence, which is not yet before the Court” (see NYSCEF Doc. No. 9, 10 12, 15, 16).

The individually named defendants seek dismissal as they are members of the board of directors for the Housing Development Cooperative. While unequal treatment of shareholders is sufficient to overcome the directors’ insulation from liability under the business judgment rule, individual directors and officers may not be subject to liability absent the allegation that they committed separate tortious acts. That the cooperative corporation’s board of directors may have taken action that ‘deliberately singles out individuals for harmful treatment does not, ipso facto, expose the individual board members to liability (see *DeCastro v. Bhokari*, 201 A.D.2d 382, 383 [1st Dept. 1994]). The individual defendants made decisions and conducted themselves in their capacity as officers of the Corporation, and not as individuals.

It is well settled that on a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff’s allegations are accepted as true and afforded the benefit of every possible favorable inference (see *Eisner v. Cusumano Const., Inc.*, 132 A.D. 940, 941 [2nd Dept 2010]).

Plaintiff presents the death certificate of Margie McCray with a date of death on November 24, 2019. Defendants cite the business judgment rule, but this Court cannot determine what business judgment the Board came up with regards to apartment six at 219 West

144th Street, NY, NY, 10030. It has been over ten years since the death of Margie McCray and questions remain on why the apartment has not been transferred. Plaintiff has provided probate material to the Board along with emails requesting what additional information remains outstanding.

ORDERED that defendant, 219 – 229 West 144th Street HDFC's motion to dismiss against AYOKA FOSTER is denied; and it is further

ORDERED that plaintiff's cross-motion to amend the caption to read "Ayoka Foster, Individually and as Executor of the Estate of Margie McCray v. 219 – 229 West 144th Street HDFC" is granted; and it is further

ORDERED that the motion of defendants LOIS BAYNHAM, PATRICIA HORSFORD, and KELLY DOWNING to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the amended caption shall bear the following:

Ayoka Foster, Individually and as Executor
of the Estate of Margie McCray
Plaintiff,

-against-

219 – 229 West 144th Street HDFC
Defendant.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

12/1/2020

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: