Baer v 825 Ocean Corp.
2022 NY Slip Op 32157(U)
June 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 505493/2015
Judge: Carl J. Landicino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of June 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

----------X

SARA BAER,
Plaintiff,

- against -

825 OCEAN CORP.,
Defendant,

----------X

Index No.: 505493/2015

DECISION AND ORDER

Motion Sequence #11, #12

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

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	159-172, 174-197,
Opposing Affidavits (Affirmations)	198,
Reply Affidavits (Affirmations)	199

After a review of the papers and oral argument the Court finds as follows:

The Plaintiff Sara Baer (hereinafter the "Plaintiff") raises causes of action for a declaratory judgment, breach of contract, and trespass to chattel, and seeks a permanent injunction as against Defendant 825 Ocean Corp. (hereinafter the "Defendant"). The Plaintiff alleges in her complaint that she is the proprietary lessee and holder of cooperative shares for unit 2D at 930 East 7th Street Brooklyn, N.Y. (hereinafter the "Premises"). The Plaintiff also alleges that in 2004, when she purchased these shares, she was told that a parking space was provided, which was ancillary to the Premises (hereinafter the "Parking Space"). The Plaintiff further alleges that the Parking Space was provided for in the proprietary lease and that her decision to purchase shares within the building was based upon her right of continuing use of the Parking Space. The Plaintiff contends that on or around February 2011, the Defendant sought to allow

another person to use the Parking Space and sought to keep the Plaintiff from continuing to use the Parking Space.

The Defendant now moves (motion sequence #11) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The Defendant contends that the complaint should be dismissed as the Plaintiff's causes of action are all premised on the claim that she has a possessory right and interest in the Parking Space. The Defendant contends that as a non-resident shareholder, pursuant to the Defendant's policy regarding the use and distribution of parking spaces, Plaintiff is not entitled to utilize a Parking Space. The Defendant therefore argues that insofar as the Plaintiff does not reside in the Premises, she is not entitled to use of the Parking Space. Further, the Defendant argues that the decision to reassign the Parking Space, once Defendant became aware that the Plaintiff no longer resided at the Premises, was a product of the policy of the cooperative Board of Directors (hereinafter the "Board") as contained in a Parking License Agreement that assigns parking spaces to resident shareholders only. The Defendant further contends that use of a parking space is based upon placement on a Parking Space Waiting List. (generally referred to as the "Parking Policy"). The Defendant contends that this Parking Policy is a result of board governance and is protected and not generally reviewable by the court in accordance with the business judgment rule.

The Plaintiff opposes the Defendant's motion and cross moves (motion sequence #12) for separate relief. In opposition to the Defendant's motion, the Plaintiff argues that summary judgment should be denied as the Defendants have failed to meet their *prima facie* burden requiring Defendants to establish that the Parking Policy at issue was in fact a product of the Board of Director's governance. The Plaintiff also argues that summary judgment should be granted in her favor given that the Proprietary Lease does reflect that the Parking Space is part of the Premises. Additionally, the Plaintiff contends that even assuming, *arguendo*, that the Proprietary Lease does not provide for Plaintiff's exclusive use and right of

possession of the Parking Space, the parties nevertheless orally modified the Proprietary Lease to confer upon the Plaintiff exclusive rights to the Parking Space.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N..E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination '[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith.'" *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 150, 790 N.E.2d 1174, 1176 [2003], *quoting Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 534, 553 N.E.2d 1317, 1319 [1990]. However, "decision making tainted by discriminatory considerations is not protected by the business judgment rule." *Cohen v. Kings Point Tenant Corp.*, 126 AD3d 843, 845, 6 N.Y.S.3d 93, 95 [2d Dept 2015], *quoting Fletcher v. Dakota, Inc.*, 99 AD3d 43, 48, 948 N.Y.S.2d 263, 266 [1st Dept 2012].

Turning to the merits of the Defendant's motion (motion sequence #11), the Court finds that the Defendant has met its *prima facie* burden. The Defendant contends that the Plaintiff does not have a right to the Parking Space, given that it was not provided for in her proprietary lease or by means of the ownership of her shares in the cooperative corporation. In addition, the Defendant argues that the Plaintiff has no claim to the Parking Space because she no longer resides at the Premises. The Defendant further contends that its Parking Policy is based upon the fact that there are fewer parking spaces than units and parking spaces can only be provided to resident shareholders based upon their position on a waiting list. In support of this position, the Defendant relies upon the deposition of the Plaintiff, the proprietary lease, the deposition and affidavit of building manager Elie Gabay, and the Parking License Agreement. Elie Gabay, as part of his affidavit, states that (See Defendant's Motion, Exhibit K, Paragraph 3) the proprietary lease for the cooperative does not provide for exclusive use of a parking space and that "only resident shareholders are assigned parking spaces and when a resident shareholder moves out, the parking space assigned to the resident shareholder is given to another resident shareholder on the cooperative's Parking Space Waiting List." A review of the subject proprietary lease confirms that exclusive use of a parking space is not provided. The Parking License Agreement provides that the "Licensee resides in Apartment

pursuant and subject to the terms of a Proprietary Lease (the "Apartment Lease") entered into with Licensor by the holder(s) of the Licensor's shares allocated to the Apartment (collectively the "Shareholders")." This evidence is sufficient for the Defendant to meet its *prima facie* burden showing. The policy is clear. Residence at the unit is required to obtain a right to utilize a parking space. The Defendant's position supports its contention that the Parking Policy "was within its authority, made in good faith, and in furtherance of the cooperative's legitimate interests." *See Oakwood On The Sound, Inc. v. David*, 63 A.D.3d 893, 894, 883 N.Y.S.2d 54, 55 [2d Dept 2009]; *see also Buccellato v. High View Ests. Owners, Corp.*, 131 AD3d 912, 913, 16 N.Y.S.3d 577, 579 [2d Dept 2015]. In *Skouras v. Victoria Hall Condo*, the Court held that the board policy in that case "was done in good faith, and in furtherance of the condominium's legitimate interests." *Skouras v. Victoria Hall Condo.*, 73 AD3d 902, 903, 902 N.Y.S.2d 111 [2d Dept 2010].

In opposition, the Plaintiff argues several points. The Plaintiff contends that she has raised a material issue of fact regarding whether Defendant's pattern of conduct, in continuing to allow the Plaintiff to use the Parking Space and billing her for its use, confirms that there was an oral modification of the Proprietary Lease resulting in conferring exclusive rights to use and possession of the Parking Space to the Plaintiff. The Plaintiff also argues that the Proprietary Lease does indicate that the Parking Space is part of the Premises. Finally, Plaintiff contends that the prior unit lessee and shareholder agreed that the Parking Space would be exclusive to her and that this constitutes an oral modification of the relevant documents. In support of her position, the Plaintiff relies on the Proprietary Lease, the deposition and an affidavit of the Plaintiff, an affidavit from the prior shareholder lessee Steven E. Ginsburg, and other documents related to fees paid in relation to the Parking Space.

The Plaintiff's affidavit states (see Plaintiff's Cross-Motion, Affidavit of Plaintiff, Paragraph 8) "I believe that the Parking Space is and was included with my purchase of cooperative shares for the

Premises, as the Proprietary Lease defines "the apartment" as "the rooms in the building as [partitioned] on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, maid's rooms, balconies, roof or portion thereof outside of said [partitioned] rooms, which are allocated exclusively to the occupant of the apartment."

As part of his affidavit, the prior unit lessee and shareholder Steven E. Ginsburg stated (see Plaintiff's Cross-Motion, Affidavit of Stephen E. Ginsburg, Paragraph 6) that the Parking Space was included with the purchase of the cooperative shares for the Premises because he "attempted to exchange it for another [parking] space in the Building, and was informed by the Board of Directors of the cooperative that [he] could not do this as that particular Parking Space (#30) was assigned to and included as a part of the shares and lease for Unit 2D." The Plaintiff contends, in the alternative, that it was the understanding of both her and Stephen E. Ginsburg that the Parking Space was included in the sale of the shares in the cooperative and that this understanding should be considered as an oral modification of the relevant documentation.

Notwithstanding this testimony, Mr. Ginsburg and the Plaintiff, without the approval of the Defendant, did not have the authority to amend the Proprietary Lease. The Proprietary Lease does not provide for an exclusive parking space, Mr. Ginsburg cannot transfer an interest he does not have, and Mr. Ginsburg and the Plaintiff cannot unilaterally modify the Lease. Moreover, the Proprietary Lease in section 50 entitled "Changes to Be in Writing" states that "[t]he provisions of this lease cannot be changed orally." The Plaintiff raises the existence of the no oral modification clause. (See Affirmation in Support of Plaintiff's Motion and in Opposition to Defendant's Motion, Paragraph 70) However, the Plaintiff contends that the parties' course of conduct reflects "the parties' intent that rights in and to the Parking Space be conferred upon Plaintiff attendant to her purchase and ownership of cooperative shares."

The Court of Appeals held in *Eujoy Realty Corp. v. Van Wagner*, that "a party can overcome such a clause and enforce an oral modification to a written agreement by demonstrating either that the oral modification 'has in fact been acted upon to completion'; or, where there is only partial performance, that 'the partial performance [is] unequivocally referable' to the alleged oral modification.'" *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 N.Y.3d 413, 425, 4 N.E.3d 336, 344 [2013], *quoting Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 366 N.E.2d 1279 [1977]. The Plaintiff's testimony, taken together with the Defendant's failure to address the allegation that it continued to allow the Plaintiff to use the Parking Space and billed her for its use, creates a material issue of fact regarding whether there was an oral modification of the Proprietary Lease in relation to the Plaintiff's rights in the Parking Space. Further, although Plaintiff has successfully raised issues of fact in opposition to Defendant's motion, the Plaintiff has failed to show, as a matter of law, that there was an oral modification and what the terms of that modification are. Accordingly, both parties' motions for summary judgment are denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion (motion sequence #11) for summary judgment is denied.
The Plaintiff's motion (motion sequence #12) for summary judgment is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

2022 JUL -1 AM 11:25
KINGS COUNTY CLERK
FILED