

Matter of Schulte

2022 NY Slip Op 34000(U)

November 23, 2022

Surrogate's Court, New York County

Docket Number: File No. 2005-4582/C

Judge: Rita Mella

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of SANDRA SCHULTE,
as Co-Trustee with Fiduciary Trust Company
International of the Marital Trust Created for the Benefit
of Sandra Schulte under Article V of the Trust Agreement
dated April 8, 2002, as Restated and Amended by

DAVID A. SCHULTE, JR.,
Deceased, as Settlor,

DECISION and ORDER

File No.: 2005-4582/C

for an Order Compelling the Estate of David A.
Schulte, Jr., to Distribute Certain Assets and for Other Relief.
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M E L L A, S.:

The following papers were considered in determining two motions before the court:

<u>Papers Considered</u>	<u>Numbered</u>
On Motion to Amend Cross-Claim:	
Notice of Motion to File Second Amended Answer and Cross-Claim by Sandra Schulte, as Limited Administrator CTA, with Affirmation of Elliot J. Coz, Esq., and Affidavit of Sandra Schulte, Attaching Exhibits	1,2,3
Memorandum of Law in Support of Motion to Amend	4
Affirmation of Scott S. Greenspun, Esq., in Opposition to Motion to Amend, Attaching Exhibits	5
Memorandum of Law in Opposition to Motion to Amend	6
Reply Affirmation of Elliot J. Coz, Esq., in Support of Motion to Amend, Attaching Exhibits, Reply Affidavit of Sandra Schulte	7, 8
Reply Memorandum of Law in Support of Motion to Amend	9
Sur-Reply Letter of Scott S. Greenspun (allowed as part of record)	10
On Motion for Summary Judgment:	
Notice of Motion for Summary Judgment Dismissing Answer and Cross-Claim by Respondent 1125 Park Avenue Corp., with Affirmation of Scott S. Greenspun, Esq., Attaching Exhibits, and Affidavit of Steven A. Rosenblum	1,2, 3
Memorandum of Law in Support of Motion for Summary Judgment	4
Affirmation of Alan M. Goldberg, Esq., in Opposition to Motion for Summary Judgment, Attaching Exhibits	5
Memorandum of Law in Opposition to Motion for Summary Judgment	6
Reply Affirmation of Scott S. Greenspun, Esq., Attaching Exhibits	7
Reply Affidavit of Steven A. Rosenblum, Attaching Exhibit	8

<u>Papers Considered (cont.)</u>	<u>Numbered</u>
Affidavit of Daniel Wollman, Attaching Exhibits	9
Reply Memorandum of Law in Further Support of Motion for Summary Judgment	10

This is a proceeding involving a claim that a cooperative corporation, 1125 Park Avenue Corporation (“1125 Park”), denied, in bad faith, the transfer of shares appurtenant to a residential apartment to a trust benefiting Sandra Schulte (“Sandra”). She is the surviving spouse of decedent David Schulte, who established the marital trust for her lifetime benefit (the “Trust”).

At the call of the April 13, 2021 calendar, the court denied the motion by Sandra, as Limited Administrator CTA of decedent’s estate, to amend the estate’s cross-claim against 1125 Park. The court also granted the summary judgment motion of 1125 Park to dismiss the estate’s cross-claim which alleges that 1125 Park acted in bad faith and breached its fiduciary duties by failing to approve the transfer of the shares to the Trust in accordance with the terms of decedent’s will. Sandra’s motion to amend sought to add new factual allegations of purported bad faith to the cross-claim, including instances where 1125 Park’s Board had demonstrated personal animus and dislike of Sandra.

This proceeding has a lengthy and somewhat complicated history that need not be fully recounted here. For present purposes, the following is relevant.

Sandra, as co-trustee of the Trust, commenced the underlying proceeding against decedent’s Executor, his daughter from a prior relationship, and against 1125 Park to compel the transfer of the cooperative shares to the Trust. The Executor then cross-claimed against 1125 Park, mirroring the allegations that Sandra, as co-trustee, had made in her petition. This centered on the assertion that 1125 Park denied the share transfer in bad faith to favor a Board member of 1125 Park, who, it was alleged, wanted to purchase the estate’s shares and possibly combine the

apartment with one which that Board member already owned.

Thereafter, 1125 Park moved to dismiss the petition. In a 2016 decision, this court, among other things, granted the motion, holding that the Trust lacked standing to assert claims on behalf of the decedent shareholder (*see Matter of Schulte*, NYLJ, Apr. 18, 2016, at 19, col 2 [Sur Ct, NY County 2016]). Although the court denied 1125 Park's motion to dismiss the estate's cross-claim and the cross-claim remained, the Executor did not prosecute it. Sandra eventually petitioned for and was granted Limited Letters of Administration CTA and was substituted for the Executor as the party asserting the cross-claim in 2018.¹

1125 Park filed the instant motion for summary judgment prior to the filing of Sandra's motion to amend; however, the court scheduled the motion to amend to be heard first. The motion to amend was precipitated by Sandra's assertion that over a dozen additional depositions were required in this matter so that she could pursue unpled claims of personal animus and bad faith despite the period of discovery having concluded long before.

Sandra, as Limited Administrator CTA, sought to amend the estate's cross-claim by adding allegations that after decedent's death in 2005, and commencing sometime in late 2006 or 2007, 1125 Park had treated her unfairly and abusively in connection with apartment repairs and other matters.² She claimed such treatment, unequal in her view in comparison to the way other residents were treated, amounted to bad faith motivated by the cooperative Board's personal animus toward her.

Although motions to amend should be freely granted in the absence of prejudicial delay

¹ This was done in response to and in resolution of the Executor's motion to discontinue the cross-claim.

² Specifically, the new contentions centered on delays regarding the completion of repairs due to leaks and water damage (resulting in years of unpleasant odors and unsightly walls and ceilings, she asserted) and certain capital improvements, like the painting of exterior walls. She also claimed unfair treatment regarding the siting of HVAC units and the enforcement of rules regarding the size of planters permitted on her terrace.

(CPLR 3025[b]; *see e.g. Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046 [2d Dept 2016]), here, significant prejudice to 1125 Park would result if the motion were granted. In addition, where there has been an extended delay, the movant should establish a reasonable excuse (*see Perricone v City of New York*, 96 Ad2d 531 [2d Dept 1983]). The facts underlying the allegations that Sandra sought to include in the cross-claim were known to her years before she filed her original petition in 2011. Under these circumstances, Sandra has not sufficiently justified her decision to wait two years after receiving Limited Letters before seeking amendment of the estate's cross-claim³ (*see Jablonski v County of Erie*, 286 AD2d 927 [4th Dept 2001]).

Given this inexcusable delay⁴ in seeking to assert these claims, 1125 Park would be prejudiced if the court permitted the amendment now (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 291 [1st Dept 2004] [delays in amending must be justified]). In particular, 1125 Park would be forced to re-do or engage in additional discovery after having completed discovery and then filing the instant motion for summary judgment. Reopening discovery at this point would also have a negative impact on 1125 Park's ability to present its case as a result of the fading of witnesses' memories (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 181 AD3d 488 [1st Dept 2020]; *Clark v State*, 302 AD2d 942 [4th Dept 2003]).

3 In October of 2020, Sandra had moved for leave to amend her original petition as co-trustee to add her own individual claims for damages against 1125 Park based on similar allegations of bad faith and unfair treatment of her by the Board. Her motion was denied because her individual claims did not relate to "the affairs of the decedent" and this court had no jurisdiction to hear them. The motion was also denied because the proposed amendment ran afoul of the court's 2016 decision that only the estate's fiduciary had standing to pursue the claim that 1125 Park acted in bad faith when it denied the request to transfer the shares to the Trust. The current motion to amend the cross-claim was filed in January of 2021.

4 While the court acknowledges Sandra's assertion that certain medical conditions in 2018 and 2019 prevented her from litigating this matter, including hampering her ability to retain new counsel, as 1125 Park demonstrates, such conditions did not prevent her, during this same time period, from engaging in unrelated litigations in other courts.

In any event, the proposed additions are devoid of merit and thus are “palpably insufficient” to warrant this court’s granting leave to amend the estate’s cross-claim (*see e.g. Avail 1 LLC v Acquafredda Enterprises LLC*, 184 AD3d 476 [1st Dept 2020]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). As noted in the court’s 2016 decision resolving 1125 Park’s motion to dismiss the co-Trustee’s petition, the fiduciary duties of 1125 Park run, not to the general public or any possible transferees, but instead to its shareholders. Although Sandra, as limited administrator CTA, now “stands in the shoes” of decedent as his estate fiduciary, her proposed additional allegations that 1125 Park’s Board members harbored personal animus towards her in her individual capacity do not provide support for the estate’s cross-claim for breach of fiduciary duty (*see Bolofsky v City of New York*, 205 AD3d 515, 515 [1st Dept 2022] [leave to amend pleading properly denied when proposed new claims are palpably insufficient]).

In short, Sandra has not sought to add any factual allegations which establish that bad faith personal animus toward a shareholder motivated 1125 Park’s Board to deny the share transfer to the Trust. To the contrary, the new allegations state that the Board denied the Trust the opportunity of becoming a shareholder because of its dislike of Sandra during a period when she was a non-shareholder resident. Under these circumstances, absent discriminatory conduct – which is not alleged here, the cooperative corporation may deny transfer of the shares for any reason or no reason at all (*see e.g. Rossi v Simms*, 119 AD2d 137 [1st Dept 1986]; *Simpson v Berkley Owner’s Corp.*, 213 AD2d 207 [1st Dept 1995]; *see also Weisner v 791 Park Avenue Corp.*, 6 NY2d 426 [1959]).

As this court held in its April 2016 decision, the Board’s determination of the request to transfer the shares here was governed by the business judgment rule which prohibits judicial

inquiry into cooperative board actions “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes” (*Gonzalez v Been*, 145 AD3d 434, 435 [1st Dept 2016]). To permit general, but non-discriminatory, assertions of dislike of a possible transferee of cooperative shares (or here, a possible resident as a beneficiary of a trust to which the shares were to be transferred) to form the basis for a claim of bad faith if a board fails to approve a share transfer would change the business judgment rule beyond recognition. Here, Sandra has provided no authority for such a dramatic alteration of the rule and the court is aware of none that supports her view (*see Cahill v Jordan Home Services, LLC*, 145 AD3d 847 [2d Dept 2016] [legally unviable claim properly denied as pleading amendment]).⁵ Because Sandra did not seek to add allegations supporting a conclusion of improper or discriminatory conduct, but merely personal dislike of her individually as a non-shareholder, and in light of the prejudicial delay noted above, the court accordingly denied her leave to amend the cross-claim.

The motion for summary judgment by 1125 Park sought an order dismissing the Executor’s original cross-claim, which sounded in breach of fiduciary duty based on improper favoritism towards a Board member who was interested in purchasing decedent’s shares. As the court held on the record on April 20, 2021, on this issue, 1125 Park established, *prima facie*, its entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557

⁵ The cases relied on by Sandra are not to the contrary and all involve claims of improper discriminatory actions against actual shareholders (*Smolinsky v 46 Rampasture Owners, Inc.*, 230 AD2d 620 [1st Dept 1996] [improper retaliation against plaintiff-shareholder]; *Pilipovic v Laight Coop. Corp.*, 137 AD3d 710 [1st Dept 2016] [alleged improper denial of apartment alteration application by shareholder-tenant]; *Aronson v Crane*, 139 Misc 2d 744 [Sup Ct, Nassau County 1988], *affd* 145 AD2d 455 [2d Dept 1988] [alleged improper actions by board to break sales contract to existing shareholder-tenants]; *Feld v 710 Park Ave. Corp.*, 2002 WL 32063115 [Sup Ct, NY County 2002] [alleged improper enactment of bylaw precluding shareholder from running for seat on board]; *Louis & Anne Abrons Found. Inc. v 29 E. 64th St. Corp.*, 297 AD2d 258 [1st Dept 2002] [subletting fee that only applied to shareholder-plaintiff]; *Cohen v Seward Park Hous. Corp.*, 7 Misc 3d 1015[A] [Sup Ct, NY County 2005] [alleged improper denial of shareholder’s effort to purchase fourth unit in building]).

[1980] [setting forth the summary judgment standard]), by offering admissible evidence that 1125 Park's Board had no knowledge that a Board member desired to purchase the shares allocated to decedent's apartment.⁶ Thus, 1125 Park demonstrated that, even if a member of the Board had wanted to purchase decedent's shares, such fact could not have had an impact on the Board's decision to deny the transfer of the shares to the Trust (*see Park Royal Owners, Inc. v Glasgow*, 19 AD3d 246 [1st Dept 2005]). In opposition, despite discovery on this issue, Sandra failed to provide evidence raising a material question of fact that the Board sought to favor such member improperly. Her self-serving speculation and conclusory allegations are insufficient to forestall summary dismissal of the cross-claim (*see e.g. Schloss v Steinberg*, 100 AD3d 476 [1st Dept 2012]; *Beer Sheva Realty Corp. v Ponjnitayapanu*, 214 AD2d 352 [1st Dept 1995]; *X.L.O. Concrete Corp. v O'Connor*, 183 AD2d 487 [1st Dept 1992]).

Consequently, the summary judgment motion of 1125 Park was granted and the sole remaining claim in this proceeding, the cross-claim, was dismissed.

This decision, together with the transcripts of the April 13, 2021 and April 20, 2021 proceedings, constitutes the order of the court.

Clerk to notify.

Dated: November 23, 2022



SURROGATE

⁶ 1125 Park's filings established that in 2007, before becoming a Board member, a shareholder apparently informally contacted Sandra about such a purchase. That person has since left the building.