

Jarmuth v Nunnerley

2023 NY Slip Op 31394(U)

April 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156255/2022

Judge: Mary V. Rosado

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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

SANDRA JARMUTH,

Plaintiff,

- v -

SANDRA NUNNERLEY, MICHAEL MURPHY, KENNETH
LOVETT, PERRY ROSEN, MITCH UNGER, 36 EAST 69TH
CORP

Defendant.

-----X

INDEX NO. 156255/2022

MOTION DATE 10/21/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on February 7, 2023, where Errol Brett, Esq. appeared for Plaintiff Sandra Jarmuth (“Plaintiff” or “Jarmuth”), and Amanda Nelson appeared on behalf of Defendants Sandra Nunnerley (“Nunnerley”), Michael Murphy, Kenneth Lovett, Perry Rosen, Mitch Unger (collectively the “Individual Defendants”), and 36 East 69th Corp. (the “Corporation”) (collectively “Defendants”), the Defendants’ motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7) is granted.

I. Background

This action arises out of a dispute over attorneys’ fees between Plaintiff and Defendants. There are various other disputes which Plaintiff has brought before other judges in New York County Supreme Court and the First Department, which this Court briefly describes herein. Some of these disputes have given rise to the attorneys’ fees at issue in the pending litigation.

In 2014, Plaintiff sued Defendant Nunnerley for defamation (*see Jarmuth v Nunnerley*, Supreme Court, New York County Index No. 153095/2014). That action was dismissed, by Justice

Kelly O'Neill Levy by Decision and Order dated April 5, 2019, as the Court found Nunnerley's statements were true, and therefore there was no defamation. Also in 2014, Plaintiff sued Nunnerley, the Corporation, and an individual named Michael Leonard, alleging waste, breach of fiduciary duty, and "bad faith" (*see Jarmuth v Leonard*, Supreme Court, New York County Index No. 152754/2014). That action settled.

In 2018, Plaintiff initiated an action alleging legal malpractice against the Corporation's counsel and the Corporation (*see Jarmuth v Wagner*, Supreme Court, New York County Index No. 155922/2018). By Decision and Order dated June 10, 2019, Justice Andrew Borrok granted Defendants' motion to dismiss. Plaintiff's appeal of this decision was dismissed as moot (*Jarmuth v Wagner*, 190 AD3d 527 [1st Dept 2021]).

Also in 2018, Plaintiff initiated an action against individual board members alleging breach of fiduciary duty for rejecting Plaintiff's attempt to purchase the shares of another unit (*see Jarmuth v Leonard*, Supreme Court, New York County Index No. 152535/2018). By Decision and Order dated October 4, 2019, Justice Kelly O'Neill Levy dismissed Plaintiff's action. Justice O'Neill Levy's Decision was affirmed by the First Department (*see Jarmuth v Leonard*, 187 AD3d 407 [1st Dept 2020]).

Plaintiff initiated yet another action in 2019 against both the Corporation and Corporation's counsel (*see Jarmuth v Wagner*, Supreme court, New York County Index No. 161816/2019). By Decision and Order dated October 28, 2022, Justice Dakota D. Ramseur dismissed Plaintiff's Complaint.

In 2021, Plaintiff initiated a special proceeding against various individual members of the board, including almost all Individual Defendants in this action¹, to set aside a "purported election"

¹ Defendant Kenneth Lovett was not named in the Special Proceeding.

of the Board of the Corporation (*see Jarmuth v Nunnerley*, Supreme Court, New York County, Index No. 156911/2021). By Decision and Order dated July 29, 2022, Justice Verna L. Saunders dismissed the proceeding as moot and dismissed the petition, as the next regularly-scheduled election had already been held.

On July 27, 2022, Plaintiff initiated this action, alleging breach of fiduciary duty, damages for “harassment”, and a declaratory judgment voiding any legal fees invoiced to Plaintiff (*see* NYSCEF Doc. 1 at ¶ 2). Plaintiff also seeks a permanent injunction preventing Defendants from placing “any other unauthorized, illegal or improper, legal fees, and late charges against Plaintiff’s account (*id.*). Plaintiff alleges that the invoicing of attorneys’ fees to Plaintiff as a result of the aforesaid actions is “totally unwarranted and in violation of her rights as a shareholder” (*id.* at ¶ 13). Plaintiff alleges the invoicing is being done in breach of the Individual Defendants fiduciary duties (*id.* at ¶ 14).

On September 23, 2022, Defendants filed the instant motion to dismiss (NYSCEF Doc. 10). Defendants provide numerous arguments for dismissal (NYSCEF Doc. 17). First, Defendants argue that this action should be dismissed as to the Individual Defendants since the allegations against them are solely related to actions they have undertaken as members of the Board. Defendants argue that Plaintiff should be aware of this, as her prior action against Individual defendants, which was disposed of on a pre-answer motion to dismiss, was unanimously affirmed by the First Department (*see Jarmuth v Wagner*, 187 AD3d 407 [1st Dept 2020]).

Defendants argue the declaratory judgment cause of action should be dismissed because there is not yet a justiciable controversy regarding the invoices sent to Plaintiff. In particular, Defendants argue that they have not foreclosed on the fees, sent a rent demand for outstanding rent, or commenced a non-payment proceeding, and as such, there is no justiciable dispute over

the attorneys' fees. Defendants also highlight that as Plaintiff has not paid any of the invoices, she has suffered no injury. Defendants assert the third cause of action alleging harassment should be dismissed because New York does not recognize a common-law cause of action for harassment. Defendants argue that if Plaintiff seeks to rely on RPL § 235-d as a statutory basis for her third cause of action, that provision only applies to a building being used for residential purposes which used to be occupied for manufacturing or warehouse purposes, which is inapplicable in this case. Defendants argue that Plaintiff's fourth cause of action for a permanent injunction fails to the extent it relies on RPL § 235-d(4). This is because § 235-d only applies to buildings which used to be occupied "for manufacturing or warehouse purposes" which is inapplicable to our case. Further, Defendants argue that Plaintiff has not pled a serious and irreparable harm, and therefore this cause of action must be dismissed. Defendants argue that should this Court dismiss all other causes of action, this Court should also dismiss Plaintiff's cause of action seeking attorneys' fees.

Plaintiff withdrew her third cause of action "as a result of a misreading of the Real Property Law §235d" (*see* NYSCEF Doc. 28). Plaintiff opposed Defendant's motion to dismiss her cause of action seeking declaratory judgment. Plaintiff also argued that she has provided sufficient allegations to withstand a motion to dismiss. Plaintiff asserts that there is no documentary evidence that conclusively establishes a defense to Plaintiff's claims.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as

true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). In opposing a motion to dismiss for failure to state a claim, a plaintiff may amplify the allegations in the Complaint through affidavits (*Mulder v Donaldson, Lifkin & Jenrette*, 208 AD2d 301, 307 [1st Dept 1995]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

B. First Cause of Action: Declaratory Judgment

Plaintiff's first cause of action seeking a declaratory judgment is dismissed. Declaratory judgment is intended to deal with actual problems, not remote possibilities which may never occur (*Prashker v U.S. Guarantee Co.*, 1 NY2d 584 [1956] ["The courts do not make mere hypothetical adjudications, where there is no present, justiciable controversy before the court and where existence of controversy is dependent upon happening of future events"]; *see also Fairhaven Props. v Garden City Plaza*, 119 AD2d 796 [2d Dept 1986]; *Aydin v Board of Managers of Decora Condominium*, 76 Misc.3d 1217[A] [Sup. Ct., Kings Co. 2022]). This principle has been recently reiterated by Justice Singh, who held that where a defendant had not commenced a

foreclosure action or declared a default regarding the failure to pay certain sums, there is no justiciable controversy, and a declaratory judgment action is premature (*see Rowland v HSBC Bank USA*, 2014 NY Slip. Op. 32479[U] [Sup. Ct. NY Co. 2014]). Here, the only allegation is that Plaintiff has been sent invoices reflecting legal fees owed. There is no allegation that Defendants have submitted a rent demand, or even threatened to initiate foreclosure proceedings. Simply put, the facts alleged are not yet ripe for adjudication, and therefore the declaratory judgment action is premature.

Plaintiff has also failed to allege any damages which would give rise to a declaratory judgment action. Plaintiff has not actually paid any of the fees in the invoices sent to her. As recently held by the Court of Appeals, “[i]n light of the absence of actual injury...there is neither a justiciable controversy upon which a declaratory judgment can be rendered, nor the irreparable harm necessary for injunctive relief” (*Ovitz v Bloomberg L.P.*, 18 NY3d 753, 760 [2012]; *see also Asimov v Trident Media Group, LLC*, 44 Misc.3d 1223[A] [Sup. Ct. NY Co. 2014]).

C. Second Cause of Action: Breach of Fiduciary Duty

The second cause of action is dismissed. As Plaintiff is well aware, individual defendants cannot be sued for breach of fiduciary duties absent allegations that individual members “acted tortiously other than in their capacity as board members” (*Jarmuth v Leonard*, 187 AD3d 407 [1st Dept 2020] quoting *Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]). Plaintiff alleges breach of fiduciary duty because Defendants “knew or should have known that there were no legal fees owed the apartment corporation from the Plaintiff” (NYSCEF Doc. 1 at ¶¶ 67-68). However, the proprietary lease expressly provides at paragraph 28:

“If: ... (ii) the Lessor shall incur any expense (whether paid or not) in defending against, or asserting a counterclaim in, any legal action or proceeding brought by the Lessee, and Lessor is the prevailing party in such action or proceeding, then the expense thereof to the Lessor, including reasonable attorneys’

fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent” (NYSCEF Doc. 15 at ¶ 28).

As detailed above, there were numerous lawsuits initiated by Plaintiff against Defendants, and Defendants prevailed in many of those lawsuits. As such, pursuant to the proprietary lease, which Plaintiff is a party to, she agreed she would pay reasonable attorneys’ fees and disbursements. Thus, the Individual Defendants were acting within their capacity as members of the Board when they committed the allegedly tortious act of sending attorneys’ fee invoices. Any allegations of “bad faith” or “harassment” are conclusory and speculative. Therefore, this cause of action is dismissed.

D. Third and Fourth Causes of Action

Plaintiff has withdrawn her third cause of action alleging harassment, as she admits she misread RPAPL § 235-d. Plaintiff’s fourth cause of action seeks a permanent injunction based on the language of RPL § 235-d(4). However, as Defendant has argued and Plaintiff has conceded, RPL § 235-d is wholly inapplicable to the case at bar, since the building at issue does not meet the necessary criteria. Namely, the building was never utilized for “manufacturing or warehouse purposes.” Rather, at all relevant times, the building always had a residential certificate of occupancy (*see* NYSCEF Doc. 13). Therefore, for the same reason Plaintiff withdrew her third cause of action, so too should her fourth cause of action be dismissed.²

² The Court agrees with Defendants that there are also other grounds to dismiss the fourth cause of action. For instance, there was no serious and irreparable harm where, as here, all Defendants have done is put Plaintiff on notice of potential legal fees she may owe. There is no allegation that there has been a rent demand or foreclosure action seeking payment of the invoices. Moreover, as previously mentioned, the terms of the lease expressly allow for Defendants to issue legal fee invoices incurred from defending the numerous lawsuits Plaintiff has commenced. Plaintiff basically seeks to void her otherwise valid and binding contract through injunctive relief. Therefore, this cause of action is without merit and should be dismissed.

E. Attorneys' Fees

As Plaintiff has not prevailed in any of her actions, let alone this one, there is no basis for her cause of action seeking attorneys' fees. Rather, as all other causes of action have been dismissed, Plaintiff cannot seek attorneys' fees. However, pursuant to paragraph 28 of the proprietary lease, Defendants, having successfully dismissing Plaintiff's Complaint, are entitled to attorneys' fees incurred in defending this action.

Accordingly, it is hereby,

ORDERED that Defendants' motion to dismiss is granted, and Plaintiff's Complaint is dismissed; and it is further

ORDERED that within twenty-one (21) days of entry of this Decision and Order, counsel for Defendants' shall submit an affirmation of attorneys' fees, along with accompanying invoices and time entries. Fourteen (14) days thereafter, Plaintiff is permitted to submit opposition, if any, to Defendants' application for attorneys' fees. Seven (7) days thereafter, Defendants will be permitted a reply to Plaintiff's affirmation. The parties are directed to upload all documents in support or in opposition to NYSCEF, and via e-mail to SFC-Part33-Clerk@nycourts.gov. The parties shall also deliver courtesy copies of documents in support or opposition to Defendants' application for attorneys' fees to 60 Centre Street, Room 442. Failure to abide by this order may result in waiver of an award of attorneys' fees; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/26/2023

DATE

Mary V Rosado JSC

HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE