

Jacoby v Board of Directors 85 8th Ave. Tenants Corp.
2023 NY Slip Op 32145(U)
June 30, 2023
Supreme Court, New York County
Docket Number: Index No. 151151/2023
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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DAVID B JACOBY,

Plaintiff,

- v -

BOARD OF DIRECTORS 85 8TH AVENUE TENANTS
CORP.,

Defendant.

-----X

INDEX NO. 151151/2023

MOTION DATE 06/21/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41

were read on this motion to/for DISMISSAL.

Plaintiff’s motion to dismiss defendant Board of Directors 85 8th Avenue Tenants Corp. (“Board”)’s counterclaims is granted in part and denied in part. The cross-motion by the Board to dismiss is denied.

Background

Plaintiff claims he has lived in a building owned by the Board since the 1980s. Allegedly, the unit in which he lives was purchased by his mother in 1989. He contends that after his mom secured the purchase loan, the owner of the building at the time provided plaintiff with a stock certificate dated June 23, 1989 signed by two board members that shows he owns 734 shares related to the subject unit (Unit 1G). Plaintiff maintains that he has paid maintenance each month for this unit. He complains that the Board has refused to issue plaintiff a proprietary lease and will not change the monthly billing statement to his name. Plaintiff apparently tried to sell

the apartment a few years ago but was unable to do so because he does not have a proprietary lease issued in his name.

The Board offers a different account of the instant dispute. It claims that non-parties Jack Robinson and Betty L. Levy (plaintiff's mother) purchased the shares for the subject apartment in 1989. The Board insists that they purchased the unit as tenants in common and that no entity has ever recognized plaintiff's alleged ownership interest in the apartment. The Board maintains that stock certificates were issued to Robinson and Levy as well as a proprietary lease. It claims that any stock certificate issued to plaintiff is fraudulent.

The Board claims that plaintiff obtained possession of the Board's stock book and issued himself a stock certificate. The Board observes that because Ms. Levy is now deceased, her ½ ownership stake in the apartment is now owned by her estate and the other half is owned by Robinson. The Board claims that no fiduciary of her estate has stepped forward to assert an ownership claim in the apartment.

Plaintiff now moves to dismiss the Board's counterclaims for a judicial determination about the ownership of the unit and for sanctions. He claims that Mr. Robinson was his mother's boyfriend from 1989 and that he has "given a full statement" in which he says the apartment belongs to plaintiff (although no affidavit from Mr. Robinson was included).

Plaintiff explains that he tried to sell this apartment two years ago and that he was unable to do so because he did not have the proprietary lease. He observes that he learned from his attorney that he should probate his mother's will (she died in 2005) and he filed the application recently.

The Board opposes and cross-moves to dismiss. It explains that there was an offering plan from 1987, which permitted non-occupying purchasers to have an immediate relative live in

the unit. The Board surmises that is how plaintiff lived in the apartment. It argues that a mortgage loan was obtained based upon the shares owned by Robinson and Levy, as indicated in the UCC financing statement attached to the Board's moving papers. The Board insists that the stock certificate and the proprietary lease were the collateral for the loan.

The Board argues that plaintiff did not explain how much he paid for the shares and that plaintiff admits he never executed a proprietary lease. It points out that plaintiff owned other apartments in the building and even served as president of the Board between 1990 and 1993. The Board claims that the only way it could issue a proprietary lease to plaintiff is if he acquired the ownership interests from both Robinson and his mother's estate.

In reply, plaintiff insists that he did nothing wrong and simply wants a declaration that he is the owner of the shares related to unit 1G and is entitled to a proprietary lease.

Discussion

The Court denies plaintiff's motion to the extent that it seek to dismiss defendant's first counterclaim. This counterclaim seeks, essentially, a judicial declaration about who owns the shares in dispute. As that is the central unresolved issue in this case, there is no reason to dismiss it. Plaintiff's assertion that the Board lacks standing is wholly without merit. Plaintiff sued the Board to require it to issue a proprietary lease. The Board certainly has an interest in this case. And the Board is correct that it is hesitant to simply issue a proprietary lease given that it has records that show a loan was procured based on Robinson and Levy's ownership of the subject shares. The Board raised a valid argument that it wants to avoid competing proprietary leases.

The Court also denies defendant's cross-motion to dismiss. The fact is that at this stage of the proceedings, the Court is unable to make factual findings about the authenticity of the competing stock certificates. Plaintiff submitted a stock certificate that suggest he owns the shares related to unit 1G (NYSCEF Doc. No. 17) and contains the number 144. And the Board submitted another stock certificate issued to Robinson and Levy for the same exact shares dated the very same day (NYSCEF Doc. No. 26) with the number 21. The Court cannot summarily conclude on a motion to dismiss which stock certificate is valid and which should be discarded. For example, the Court cannot embrace the Board's theory (which, at this point, is mere speculation), that plaintiff forged his stock certificate. And, obviously, something is clearly odd when two stock certificates dated the same day are more than 100 numbers apart (number 21 vs. number 144).

The Court recognizes that the Board demanded that the Court convert the cross-motion, if necessary, to one for summary judgment but that is inappropriate particularly because the Board did not attach anything from someone with personal knowledge (only papers from the Board's attorney were submitted).

The Court also observes that plaintiff's attempt to cite to Mr. Robinson's "statement" is of no moment. No sworn statement from him was included in the moving papers. Even if one was, a vague assertion that the apartment belongs to plaintiff is not conclusive proof that plaintiff is entitled to a proprietary lease for the subject apartment. Nor did the Court consider the purported expert report (NYSCEF Doc. No. 18) about plaintiff's stock certificate. This document was not signed nor did plaintiff establish a proper foundation in order for the Court to consider it. And it does not mean that the Court must disregard the stock certificate issued to Robinson and Levy.

The Court does, however, sever and dismiss the second counterclaim for sanctions. “New York does not recognize a separate cause of action to impose sanctions pursuant to 22 NYCRR 130–1.1” (*Licalzi v Wells Fargo Bank, N.A.*, 125 AD3d 942, 943, 5 NYS3d 158 [2d Dept 2015]). The Board’s second counterclaim seeks sanctions and explicitly cites 22 NYCRR 130-1.1. Accordingly, it is dismissed.

Summary


This case is about the two competing stock certificates dated the same day for the same shares and are numbered more than 100 certificates apart. One was purportedly issued to plaintiff and the other to Robinson and Levy. Discovery is needed to explore the origins of these documents and their interplay with the other documents submitted on this record, including the UCC Financing statement and the proprietary lease issued to Robinson and Levy. And the entire certificate book is relevant – what were the dates of the certificates after number 21 and before 144? In other words, there appears to be a lot more to this story than what was presented on this record and the Court cannot make a conclusive determination on competing cross-motions to dismiss.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted only to the extent that the counterclaim for sanctions is severed and dismissed and denied with respect to the remaining relief requested; and it is further

ORDERED that defendant’s cross-motion to dismiss is denied.

CONFERENCE: August 1, 2023 at 11:30 p.m. By July 25, 2023, the parties shall upload 1) a discovery stipulation signed by all remaining parties, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by July 25, 2023 will result in an adjournment of the conference.

6/30/2023 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE