

Gilbert v Winston

2023 NY Slip Op 33500(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 650374/2023

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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STEPHEN GILBERT, DINO MARCANTONIO, LIANA
MOUNT, NEIL RIFKIND,

Plaintiff,

- v -

BRADFORD WINSTON, KARYN BECK, CURT
GOLDMAN, ROBERT I. GOLDY, BARBARA HAYES,
RICHARD HUNNINGS, RICHARD LEIBNER, ANITA
MCDONAGH, SIGRID STROPNIK, PARC VENDOME
CONDOMINIUM

Defendant.

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INDEX NO. 650374/2023

MOTION DATE 09/27/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for DISMISSAL.

The motion to dismiss the claims sounding in breach of fiduciary duty and for declaratory judgment is denied in its entirety.

Reference is made to two decisions and orders (the **Prior Decisions**; Index No. 653550/2021, NYSCEF Doc. Nos. 215, 307) of this Court in a case captioned (*Parc 56, LLC v Board of Managers of Parc Vendome Condominium*, 2022 WL 2066918 [Sup Ct, NY County 2022], 76 Misc3d 1225[A] [Sup Ct, NY County 2022], *mod* 217 AD3d 416 [1st Dept 2023] (the **Prior Action**)).

In the Prior Action, the Appellate Division held:

The motion court also properly determined that *the board violated the bylaws and the settlement agreement with plaintiff's predecessor by unreasonably*

withholding and delaying its waiver of the right of first refusal with respect to plaintiff's lease with its prospective tenant . . . What the board was not permitted to do, however, was to refuse to waive or exercise the right of first refusal well beyond the duration set forth in the bylaws based on its own unreasonable refusal to execute the documents to permit the ministerial change to the CO that its experts had already approved, and indeed, the board had approved for plaintiff's predecessor in 2008. Thus, the motion court correctly determined that the board's failure to act within the bylaw's timeframe constituted a waiver of its right of first refusal.

The court's finding of bad faith that warranted striking defendants' answer was conclusively established throughout the record (see e.g. CDR Créances S.A.S. v Cohen, 23 NY3d 307, 318 [2014]). As the motion court determined as early as February 2022, *the board's refusal to consent to a change in the CO to a use that the board had approved in 2008 was unjustified, bad-faith conduct, and was further exacerbated when the board's attorney frivolously asserted that the board could not exercise or waive the right of first refusal until it decided whether or not to approve the change in the CO, which it was refusing to do. In addition to the above frivolous legal positions, the court properly determined that defendants misled the court by evasively denying the existence of plaintiff's predecessor's \$10,000 alteration fee, and by insisting that the obligations the board sought to impose on plaintiff were taken from the governing documents, when in fact, defendants took that language directly from a provision in an unadopted eighth amendment to the declaration. That the board violated the express terms of the settlement agreement by refusing to allow plaintiff to install its HVAC unit on the roof is further indicia of bad faith.* Thus, the court was warranted in striking defendants' answer, and upon granting defendants' motion for reargument, granting summary judgment to plaintiff (*see* CPLR 3212 [b]).

(217 AD3d at 418-419 [emphasis added]).

The Defendant Board's conduct is discussed extensively in the Prior Action and forms the basis for this lawsuit alleging breach of fiduciary duty and seeking a declaration judgment as to the plaintiff's individual obligations and the Condominium's obligations. Given the findings in the Prior Action which are discussed in the amended complaint, not only is CPLR 3211(a)(7) satisfied, it would appear that discovery may well be unnecessary as the Board has already had a full and fair opportunity to litigate whether it complied with the condominium's governing documents and whether it acted in good faith (*Montoute v Wells Fargo Bank, N.A.*, 208 AD3d

474, 474-475 [2d Dept 2022]). To be clear, the allegations set forth in the amended complaint well satisfy CPLR 3016(b) (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491-492 [2008]).

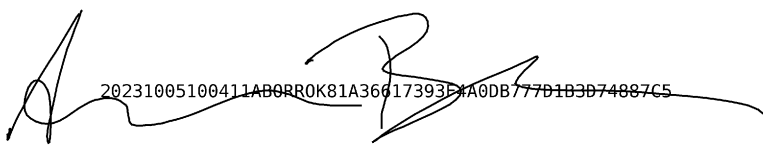
The Defendant Board Members are just wrong that it is legally significant that they may have had different levels of knowledge or involvement in the actions taken by the Board (of which they each are a part) or that they may have been misled by each other or their lawyer. Simply put, each individual board member owed the condominium fiduciary duties which included performing adequate due diligence to reasonably apprise themselves of the relevant facts and to cause the Board to act in a manner which did not violate the Settlement Agreement, the Condominium's governing documents, and to otherwise avoid taking frivolous positions both with the unit owner (which frivolous positions the unit owners as a whole had previously not accepted when the Board circulated the proposed Eight Amendment which the unit owners did not adopt) and with this Court. In any event the Court notes that apportionment is generally a remedy available to plaintiffs in a class action where they are unable to assign respective fault not a shield to be used by defendants to avoid liability. To be clear, this says nothing as to any claims that the individual board members may have as against each other or as against the condominium's attorney.

The Defendant Board members are also not correct that the Plaintiffs do not have standing to bring a direct claim for a declaratory judgment or that the amended complaint impermissibly comingles direct and indirect claims. The bylaws require both the Condominium and the unit owners to jointly and severally indemnify the Board except when the Board acted in bad faith (as

here). Thus, both are entitled to the declaration that indemnification is not required and the motion is denied in its entirety.

The Court has considered the defendant’s remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that the motion to dismiss is denied.



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10/5/2023

DATE

ANDREW BORROK, 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