

Resnicow v 71 Wash. Place Owners, Inc.

2023 NY Slip Op 33756(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 655566/2021

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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BARBARA RESNICOW, NORMAN J. RESNICOW

Petitioners,

- v -

71 WASHINGTON PLACE OWNERS, INC.,

Respondent.

INDEX NO. 655566/2021

MOTION DATE 07/18/2023,
08/03/2023

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 149, 152, 154, 155, 160

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 148, 157, 158, 159

were read on this motion for DEFAULT JUDGMENT.

Petitioners’ Cross-Motion (NYSCEF 97, 146) filed in Mot. Seq. 003 is denied.¹ The Cross-Motion seeks to enjoin the Co-op from using corporate funds to pay for its defense to Petitioners’ now-dismissed dissolution claims. While the Court agrees with Petitioners that “legal fees incurred by a shareholder in defending a dissolution proceeding are not payable with corporate funds as expenses incurred in the ordinary course of business” (*Matter of Kassab v*

¹ The Court held a hearing on the substance of Mot. Seq. 003 on July 18, 2023, and resolved that motion except for the Cross-Motion. In its July 20, 2023 Decision and Order, Respondent was directed to file a response to the Cross-Motion by August 2, 2023 (*see* NYSCEF 154). Respondent filed its opposition in conjunction with its own Cross-Motion seeking legal fees (NYSCEF 157–159).

Kasab, 137 AD3d 1141, 1142 [2d Dept 2016]), here, the Co-op is the only named respondent, and none of the individual shareholders were named as respondents in the Petition and Order to Show Cause (NYSCEF 42, 56). In these circumstances, the Co-op is permitted to use corporate funds to pay for its defense (*Petition of Levitt*, 109 AD2d 502, 511 [1st Dept 1985] [noting that while the corporation should only be a nominal defendant, “to the extent counsel fees were incurred by the corporation in its own defense, the corporation being a party respondent, corporate funds may be utilized for [dissolution proceeding]”).

Respondents’ Cross-Motion (NYSCEF 157–159) for attorneys’ fees and costs is granted. The Co-op is entitled to its attorneys’ fees and costs pursuant to the Proprietary Lease, Paragraph 28 of which provides:

If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, 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 3 ¶28). The Co-op has submitted evidence demonstrating that Petitioners are in default of their obligations under the Proprietary Lease due to their objectionable conduct (*see* NYSCEF 61, Exhibit P [First Objectionable Conduct Letter], Exhibit S [Second Objectionable Conduct Letter], Exhibit AA [Notice of Termination]). Moreover, the Co-op successfully “defend[ed]” and defeated their claims in this action. Thus, the Co-op satisfied both requirements of Paragraph 28 of the Proprietary Lease and is therefore entitled to its attorneys’ fees and costs (*see Zuckerman v 33072 Owners Corp.*, 97 AD2d 736, 738 [1st Dept 1983] [directing individual shareholders to reimburse co-op for its attorneys’ fees and costs under paragraph 28 of the

proprietary lease])). Separately, the Court finds that Petitioners' filing and maintenance of this baseless proceeding to unilaterally dissolve the Co-op – which has been seeking to eject Petitioners (see *71 Washington Place Owners, Inc. v Norman Resnicow et al.*, Index No. 151602/2022) – was frivolous. Thus, 22 NYCRR 130-1.1 provides a separate and independent basis for requiring Petitioners to reimburse Respondent for legal fees and costs incurred in this action.

Accordingly, it is

ORDERED that Petitioners' Cross-Motion (NYSCEF 97, 146) filed in Mot. Seq. 003 is **DENIED**; it is further

ORDERED that Petitioners' motion for Default Judgment (Mot. Seq. 004) is **DENIED AS MOOT** as set forth in the Decision and Order on Mot. Seq. 002 and 003 (NYSCEF 154); it is further

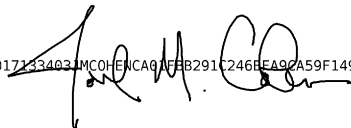
ORDERED that Respondent's Cross-Motion (NYSCEF 157–159) filed in Mot. Seq. 004 is **GRANTED**; it is further

ORDERED that within fourteen days of this Decision and Order, Respondent may submit an application with supporting evidence with respect to its reasonable attorneys' fees and costs, together with a proposed judgment. Petitioners shall have fourteen days thereafter to submit any objections to Respondent's application and proposed judgment. The Court will then determine whether to decide the matter (and enter judgment) on the papers or schedule oral argument or an evidentiary hearing, as appropriate; and it is further

ORDERED that all motions having been resolved, the Amended Petition for Dissolution (NYSCEF 42) is dismissed in its entirety as against Respondent, with costs and disbursements to

Respondent as taxed by the Clerk of the Court. The Clerk is directed to enter judgment accordingly in favor of Respondent.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

10/17/2023
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE