

Medley v 540 W. 146th St. Hous. Dev. Fund Corp.

2023 NY Slip Op 34593(U)

December 29, 2023

Supreme Court, New York County

Docket Number: Index No. 651261/2023

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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LUCY C MEDLEY and MARY E COLLINS,

Plaintiff,

- v -

INDEX NO. 651261/2023

MOTION DATE 08/29/2023

MOTION SEQ. NO. 003

540 WEST 146TH STREET HOUSING DEVELOPMENT
FUND CORPORATION, URBAN MANAGEMENT &
DEVELOPMENT INC., JOSHUA CLENNON, THOMAS
BYNUM, BIANCA BAPTISTE, MARTIN ROSAMILIA, and
FAITH ALLEN,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

The two plaintiffs in this action, purported proprietary lessees and shareholders of the defendant 540 West 146th Street Housing Development Fund Corporation (HDFC), commenced this action against the HDFC, a managing agent of the HDFC, and several individuals who are managers and officers of the HDFC, alleging, in essence, that the affairs of the HDFC are being mishandled. The defendants now move, pre-answer, to dismiss the complaint, *inter alia*, pursuant to CPLR 3211(a) (3) and (a)(7). No opposition is submitted. The motion is granted.

II. BACKGROUND

Defendant HDFC is a Housing Development Fund Corporation, organized pursuant to Section 573 of the Private Housing Finance Law for the purpose of developing the building at 540 West 146th Street, New York, New York (the Building), a housing project for persons of low income. According to the by-laws (By-Laws) of the HDFC, shares of the HDFC are allocated to each apartment in the Building and leased to the tenants of each apartment. Urban Management and Development, Inc. (UMDI) is the property manager for the HDFC and the Building, and Clennon is the managing agent for the HDFC.

Plaintiffs Lucy Medley and Mary Collins claim to be proprietary lessees and owners of shares allocated to Units 63 and 62, respectively, of the Building and the HDFC, and claim to bring this action individually and derivatively for the benefit of the HDFC. The defendants dispute that the plaintiffs are lessees or shareholders and maintain that, in any event, individuals may not maintain this action in that capacity as it is in the nature of derivative action and, even if they had capacity, their complaint fails to state any cognizable derivative claim.

Pursuant to the By-Laws, the HDFC is governed by a Board, consisting of Directors elected for one-year terms at annual shareholder meetings. The Officers of the HDFC, including the President, Vice President, Secretary, and Treasurer, are elected by the Board for one-year terms at regular or special meetings of the Board. Special meetings may be called by the President on one day notice to each Director, which notice must state the time, place, and purpose of the meeting. The plaintiffs allege that Bynum, Baptiste, Rosamilia, and Allen (the defendant Officers) are respectively the President, Vice President, Secretary, and Treasurer of the HDFC.

The By-Laws further provide that the books and records of the HDFC shall be audited annually by a Certified Public Accountant (CPA) or another person approved by the Board or shareholders. The HDFC must also furnish the shareholders with an annual financial statement, including the income and disbursements of the corporation. The books, records, documents, and accounts of the HDFC are required to be open to inspection by shareholders, at reasonable times, at the office of the HDFC. The plaintiffs claim that UMDI, Clennon, and the defendant Officers held election meetings or special shareholder meetings in violation of the By-Laws and the will of the majority of the shareholders of the HDFC. The plaintiffs also claim that UMDI, Clennon, and the defendant Officers have “conspired to frustrate” efforts by the shareholders of HDFC to unseat them, refusing to step down from their roles after election votes by the shareholders that allegedly occurred on February 2022 and August 2022, which resulted in the election of other shareholders as the new directors on the Board of the HDFC. In addition, the plaintiffs claim that the defendant Officers have held themselves out as the Officers of HDFC for over a year in contravention of the By-Laws. Furthermore, the plaintiffs claim that the defendants have failed to have the HDFC’s books and records for the years 2019 to 2022 audited by a CPA or provide annual financial statements to the shareholders for the years 2019 to 2022, in violation of the By-Laws. The plaintiffs also claim that UMDI and Clennon have refused numerous requests from various shareholders to provide access to the books and records of the HDFC. The plaintiffs additionally claim that the defendants have caused the

HDFC to be in arrears to the New York City Department of Taxation and Finance in the amount of \$328,175.57.

The plaintiffs commenced the instant action on March 9, 2023, purporting to sue both “individually and derivatively in the right and for the benefit of [the HDFC]” and “on behalf of themselves and all other shareholders of the HDFC who are similarly situated.” In the two causes of action in the complaint, the plaintiffs allege multiple violations of the HDFC’s By-Laws by the defendants. In the first cause of action, the plaintiffs allege the above violations and demand a permanent injunction restraining UMDI, Clennon, and the defendant Officers from continued interference with the orderly functioning of the HDFC and from holding elections, restraining the defendant Officers from acting as officers of the HDFC, and restraining UMDI and Clennon from acting in any capacity for the HDFC, and also demand an order requiring UMDI and Clennon to provide the HDFC’s shareholders with financial documents of the HDFC. In the second cause of action, the plaintiffs specifically demand that the defendants provide them with financial statements from the years 2019 to 2022 and subject the HDFC to an audit as required by its by-laws.

On March 13, 2023, the plaintiffs moved by Order to Show Cause for a preliminary injunction and temporary restraining order (TRO) enjoining the defendant Officers from acting as Officers of the HDFC and restraining all defendants from harassing the plaintiffs (MOT SEQ 001). The court denied the TRO. The plaintiffs thereafter withdrew MOT SEQ 001.

The plaintiffs moved a second time by Order to Show Cause seeking injunctive relief (MOT SEQ 002). The court denied the application for a TRO and scheduled oral argument on the motion. By an order dated May 5, 2023, the court denied the plaintiffs’ motion for a preliminary injunction in its entirety and directed the HDFC to provide to the plaintiffs’ counsel the financial statements of the HDFC for the years 2019 to 2022, on consent. The court stated in part:

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 (2005); Doe v Axelrod, 73 NY2d 748, 750 (1988). The plaintiffs’ submissions establish none of these requirements. While they challenge the performance of the current board, the plaintiffs are not entitled to any order divesting the board of all authority to act as a board to manage the building while

this action proceeds. Even if the plaintiff ultimately established some misconduct, there is no basis alleged to support such a remedy at this juncture and would, in any event, leave the building without management ... Finally, the plaintiffs wholly fail to provide factual support for their claim of harassment by the defendants.

On May 30, 2023, the defendants provided the plaintiffs with the financial documents for the years 2019 to 2022, as directed by the court. The defendants filed the instant motion to dismiss on the same day. The plaintiffs have not opposed the motion.

III. DISCUSSION

The defendants move to dismiss both causes of action in the complaint pursuant to CPLR 3211(a). Although in the Notice of Motion the defendants do not identify specific subsections of CPLR 3211(a) on which their motion is based, their Memorandum of Law in support of their motion clarifies that they base their motion, *inter alia*, on CPLR 3211(a)(3) and (a)(7). The complaint is dismissed on those grounds. In brief, as correctly argued by the defendants, the plaintiff's lack any capacity (CPLR 3211[a][3]) as they failed to allege their status as proprietary lessees and shareholders, and, as the complaint alleges claims that are derivative in nature, the plaintiffs failed to support their claims with the particularity required for derivative actions (Business Corporation Law § 626[c]). Therefore, the plaintiffs do not allege any cognizable legal theory against the defendants (CPLR 3211[a][7]), and their claim for financial statements is moot.

Under New York law, a derivative action "may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates." Business Corporation Law § 626(a). In determining whether a claim is derivative or direct, a court should consider "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually) and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." Yudell v Gilbert, 99 AD3d 108, 114 (1st Dept. 2012); Sajust, LLC v Mendelow, 198 AD3d 582, 582 (1st Dept. 2021). That is, as to capacity to sue, "[a] derivative action proceeds not on the basis of any individual right but as an assertion of the interest of the entity by one or more of its owners or members when the management of the entity fails to act to protect that interest." Caprer v Nussbaum, 36 AD3d 176, 187 (2nd Dept. 2006); see Bibbo v Arvanitakas, 145 AD3d 657 (2nd Dept. 2016).

Here, although the plaintiffs claim to bring this complaint both “individually and derivatively in the right and for the benefit of [the HDFC]” and “on behalf of themselves and all other shareholders of the HDFC who are similarly situated,” upon consideration of the alleged harms and demands, their claims are solely derivative. See Yudell v Gilbert, supra. The harms the plaintiffs allege are those suffered by the corporation, not the plaintiffs as individuals. See id. Further, the remedies they request, which are (1) an injunction preventing the officers from continuing in their roles, (2) an order requiring the defendants to provide any financial statements required under the By-Laws, and (3) an order requiring the defendants to perform audits with a CPA, are also benefits the corporation would receive. As the plaintiffs have alleged no harm they suffered or benefits they would receive as individuals, the claim is unmistakably derivative in nature. See Yudell v Gilbert, supra; Sajust, LLC v Mendelow, supra.

To support their derivative claims, the plaintiffs must “set forth in the complaint—with particularity—an attempt to ‘secure the initiation of such action by the board or the reasons for not making such effort’ (Business Corporation Law § 626 [c]).” Bansbach v Zinn, 1 NY3d 1, 8 (2003); see Tzolis v Wolff, 10 NY3d 100, 108-109 (2008). This requirement of Section 626 of the Business Corporation Law applies equally to derivative suits against Officers. See Conant v Schnall, 33 AD2d 326 (3rd Dept. 1970). Making such a “[d]emand is futile, and excused, when . . . (1) . . . a majority of the board of directors is interested in the challenged transaction[;] (2) . . . the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances[; or] (3) . . . the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors.” Bansbach v Zinn, supra at 9; see Marx v Akers, 88 NY2d 189 (1996). Furthermore, “[m]ere conclusory allegations of wrongdoing or control by wrongdoers is insufficient to justify failure to make a demand.” Barr v Wackman, 36 NY2d 371, 379 (1975); see, e.g., Avramides v Moussa, 158 AD3d 499 (1st Dept. 2018).

As to capacity, the plaintiffs allege in their complaint only that they are “proprietary lessees of and, upon information and belief, owners of shares allocated to Units 63 and 62.” The complaint is not verified by the plaintiffs and, to the extent it alleges that the plaintiffs are shareholders *upon information and belief*, “without the slightest reference to the source of the information or the grounds for the belief” (Zelnik v Bidermann Indus. U.S.A., 242 AD2d 227, 228 [1st Dept. 1997]), it is wholly insufficient to establish capacity. Nor did the plaintiff provide any additional submission, such as lease or stock certificate or other proof and, by failing to oppose the motion, they failed to dispute the defendants’ assertion that they lack capacity. Indeed,

although the plaintiffs' claims consist of five alleged violations of the By-Laws by the defendants, the plaintiffs never submitted the By-Laws to the court. Nonetheless, the defendants submitted an authenticated copy of the By-Laws in support of their motion.

Of the five By-Laws violations alleged the plaintiffs first assert that the defendant Officers have refused to step down from their roles despite two duly held shareholder elections electing new directors. Second, the plaintiffs allege that the defendants have failed to have the HDFC's books and records audited by a CPA for the years 2019 to 2022. Third, they allege that the defendants failed to provide annual financial statements to the shareholders for the years 2019 to 2022. Fourth, the plaintiffs allege that UMDI and Clennon have refused numerous requests from various shareholders to provide access to the books and records of the HDFC. Fifth, the plaintiffs allege that the defendants have caused the HDFC to be in arrears to the New York City Department of Taxation and Finance in the amount of \$328,175.57.

As to the first alleged violation of the By-Laws, the plaintiffs allege that UMDI, Clennon, and the defendant Officers have participated in improper requests for elections or special meetings "designed to maintain their positions of influence and power with respect to the HDFC, without regard to honoring their fiduciary duties to the HDFC." Further, the plaintiffs allege that these defendants have "conspired to frustrate any efforts by the shareholders to unseat them, up to, and including, their refusal to step down after a[n] election vote by the shareholders in February of 2022 and another election vote by the shareholders in August of 2022, both of which resulted in the election of other shareholders as the new board [of] directors for the HDFC."

Contrary to the plaintiffs' assertions, the defendants' actions in holding elections and special meetings and maintaining their roles as Officers are not in violation of the By-Laws. The By-Laws permit the President to hold special meetings, including for elections. In addition, the By-Laws explicitly provide that the officers of the HDFC are to be elected by the *Board* of the HDFC. Even accepting as true that the shareholders elected new directors to the Board at the two elections in 2022 (511 W. 232nd Owners Corp. v Jennifer Realty Co., *supra*), the plaintiffs have not alleged that the newly comprised Board have elected new officers to replace the defendant Officers.

The plaintiffs fail to allege sufficient facts to support their remaining claims with the particularity required for derivative actions. See Business Corporation Law § 626(c). The

plaintiffs do not allege with the requisite “particularity” that they ever submitted a written demand to the defendants to take action, nor their reasons for not making such effort. See Business Corporation Law § 626(c); Bansbach v Zinn, supra at 8; Tzolis v Wolff, supra. The plaintiffs do not allege that they ever requested any of the defendants to have the HDFC’s books and records audited, provide annual financial statements, or pay taxes. The plaintiffs merely allege that various unidentified shareholders, at an unspecified time, have made requests for books and records and that defendants UMDI and Clennon refused. Their allegations lack the requisite “particularity.” See Business Corporation Law § 626; Bansbach v Zinn, supra; Tzolis v Wolff, supra. Such conclusory allegations are insufficient to justify failure to make a demand. Barr v Wackman, supra; see, e.g., Avramides v Moussa, supra. Nor do the plaintiffs demonstrate that such demands would have been futile. Bansbach v Zinn, supra at 9; Tzolis v Wolff, supra.

As to the provision of annual financial records, the subject of the second cause of action, the defendants have complied with the court order dated May 5, 2023, and provided the plaintiffs with the HDFC’s financial statements. That claim is therefore moot. See Dreikausen v Zoning Bd. of Appeals, 98 NY2d 165, 172 (2002). Indeed, the defendants have provided proof that they produced the financial statements.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of NY, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. Even applying this liberal standard, no cognizable legal theory is alleged by these plaintiffs in their complaint.

IV. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the defendants' motion to dismiss the complaint is granted, without opposition, pursuant to CPLR 3211(a)(3) and (a)(7), and the complaint is dismissed in its entirety, and it is further

ORDERED that the Clerk shall enter the judgment accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/29/2023
DATE

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