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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. PART 39

Index Number : 106380/2002

BAKER, ALIXANDRA C.

vs

16 SUTTON PLACE APT. CORP.

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. 106380/02

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**



MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/5/12

BARBARA R. KAPNICK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IA PART 39**

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ALIXANDRA C. BAKER and STUART D. BAKER,

Plaintiffs,

-against-

16 SUTTON PLACE APARTMENT CORPORATION,

Defendant.

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**DECISION/ORDER**
Index No. 106380/02
Motion Seq. No. 005
Action No. 1

ALIXANDRA C. BAKER and STUART D. BAKER,

Plaintiffs,

-against-

16 SUTTON PLACE APARTMENT CORPORATION,

Defendant.

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Index No. 110697/10
Action No. 2



**BARBARA R. KAPNICK, J.:**

Plaintiffs are the owners of a penthouse apartment (the "Apartment") in the residential building (the "Building") owned by defendant 16 Sutton Place Apartment Corporation (the "Cooperative"). The Apartment is located directly underneath the roof of the building and includes a large wrap-around private terrace. Plaintiffs and defendant are parties to an Amended and Restated Proprietary Lease (the "Lease"), dated as of March 4, 1998.

Background

Plaintiffs have commenced two separate actions: the original

action bearing Index No. 106380/02 (the "First Action") and the newer action bearing Index No. 110697/10 (the "Second Action").

In the First Action, there is only one remaining cause of action (the fifth cause of action) which seeks an order permanently enjoining the Cooperative from constructing or contracting to construct a garden on the roof of the Building. This Court, by Decision/Order dated February 26, 2008, granted summary judgment dismissing that cause of action. However, in a Decision dated April 13, 2010, the Appellate Division, First Department modified, holding that the Lease, Article 1, Section SEVENTH, is "ambiguous [and that] the parties should be permitted to introduce extrinsic proof bearing on its intended meaning." *Baker v. 16 Sutton Place Apt. Corp.*, 72 AD3d 500, 501 (1st Dep't 2010). The Appellate Division also stated, albeit in dicta, "that a permanent injunction would appear to be unwarranted if defendant could defeat plaintiffs' claim by amending paragraph 7 (a subject about which we express no opinion)." *Id.*

The Lease reserves to the shareholders the right to make amendments that are effective as to all shareholders, including those who oppose the amendment. Specifically, Article I, Section SIXTH of the Lease provides that:

> ... the form and provisions of all the proprietary leases in effect and thereafter to

> be executed may be changed by the approval of lessees owning at least two-thirds of the Lessor's shares then issued, and such changes shall be binding on all lessees even if they did not vote for such changes, except that the proportionate share of rent or cash requirements payable by any lessee may not be increased nor may his right to cancel the lease pursuant to Article IV be eliminated or impaired without his or her express consent.

Furthermore, Article V, Section SEVENTH provides that: "[t]he provisions of this lease cannot be changed orally."

On April 22, 2010, the Board of Directors of the Cooperative sent a letter (the "April Letter") to all shareholders seeking their agreement to an amendment of Article I, Section SEVENTH, to make it "clear and explicit . . . that the common area roof of the building may be accessed and used for any purpose needed or authorized by the Board of Directors."

According to defendant, Article I, Section SEVENTH of the Lease was amended (the "Amendment") by written consent of shareholders owning 91% of the shares of the Cooperative Corporation and subsequent resolution of the Board of Directors dated May 10, 2010, to provide, in relevant part:

> Lessor, for itself and lessees of the building, retains and shall have the right to use all portions of the roof of the building

> that are not part of a Terrace for any purpose, including but not limited to, erection of equipment on the roof, and it and the lessees of the building shall have the right of access thereto, all subject to such rules as shall be enacted by the Board of Directors of the Lessor.[1]

Plaintiffs did not approve the Amendment.

Although there seems to be no dispute among the parties that the Cooperative has no immediate plans to construct a roof garden, plaintiffs, nonetheless, commenced the Second Action in August 2010, which asserts the following causes of action:

(1) breach of covenant of good faith and fair dealing/ rescission based on the allegation that the Board sought the amendment of the Lease to harass and discriminate against the plaintiffs;

(2) breach of fiduciary duty/rescission based on the same allegations as the first cause of action;

(3) failure of consideration/rescission based on the allegation that the promise not to construct the roof

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[1] Article I, Section SEVENTH of the Lease, previously provided in relevant part:

> Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the building and shall have the right of access thereto for such installations and for the maintenance and repair thereof.

garden constituted the consideration for plaintiffs' contract to buy the apartment and the new amendment constitutes a failure of that consideration;

(4) declaratory relief seeking a judgment with respect to whether the construction of a roof garden on the Building would constitute a breach of the Lease and whether the putative Lease amendment binds the plaintiffs;

(5) a permanent injunction enjoining the construction of a roof garden because it adversely affects plaintiffs' right to occupy and enjoy their apartment and would defeat the object of the Lease and constitute failure of consideration; and

(6) promissory estoppel based on the allegation that plaintiffs relied on the statements of two previous board members that no roof garden would be constructed on the Building.

Defendant now moves for an order (1) pursuant to CPLR 602(a) consolidating the First and Second Actions and, upon consolidation; (2) pursuant to CPLR 3212 granting summary judgment dismissing the sole remaining cause of action in the First Action; and (3) pursuant to CPLR 3211(a)(1) and (7) dismissing the Complaint in the Second Action.

The cases are consolidated, on consent, for purposes of this decision.

Discussion

*Motion for Summary Judgment Dismissing the First Action*

To prevail on its motion, defendant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Defendant argues that the remaining claim for an order permanently enjoining the Cooperative from constructing or contracting to construct a garden on the roof of the Building, based on Article I, Section SEVENTH must now be dismissed, because the provision has been amended to clarify the shareholders' right to use of the common area roof.

Plaintiffs oppose the motion for summary judgment on the grounds that there are "controverted material facts concerning whether enforcing the amendment to allow construction of a roof garden would frustrate the object of the lease" (Plaintiffs' Mem. in Opp., at 7-8), given that plaintiffs contend that when they purchased the Apartment in May 1998, they were told that a prior

roof garden had resulted in water damage to the Apartment and were promised by two then board members that a new roof garden would never be constructed. Based on the frustration of purpose doctrine, plaintiffs argue that the Amendment must be rescinded.

Defendant argues in reply that the frustration of purpose doctrine is inapplicable here because the essential purpose of the Lease, which is to transfer an interest in the Apartment, has not been frustrated. Defendant also points out that the potential construction of a roof garden in no way prevents the plaintiffs' ability to use, reside in, or access the Apartment.

The frustration of purpose doctrine "is a narrow one which does not apply 'unless the frustration is substantial.'" *Crown IT Servs, Inc. v. Koval-Olsen*, 11 AD3d 263, 265 (1st Dep't 2004) (internal citation omitted). To invoke the doctrine, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Id.* (internal citation omitted).

> In New York, 'frustration of purpose refers to a situation where an unforseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible, thus operating to discharge a party's duties of performance.

*Sage Realty Corp. v. Omnicom Group*, 183 Misc2d 574, 579 (Sup Ct. NY Co. 2000), *app wdn.* 270 AD2d 973 (2000).

Here, even assuming that the Amendment may eventually lead to the construction of a roof garden, the Court finds that such result would clearly not frustrate the object of the Lease. In any event, plaintiffs are not seeking to discharge their obligations under their Lease; instead they are seeking to permanently enjoin enforcement of the Amendment, which was enacted by a vote of 91% of the shareholders. Accordingly, the Court finds that there is no authority to apply the frustration of purpose doctrine in the instant case.[2]

Next, plaintiffs argue that the Amendment does not bind them, pursuant to Article I, Section SIXTH, because a roof garden would increase their proportionate costs since access to it would be through the hallway that plaintiffs maintain for access to their

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[2] The Court has considered *Arons v. Charpentier*, 36 AD3d 636 (2d Dep't 2007), cited by plaintiffs, and finds that it is distinguishable from the instant case. In *Arons*, the Appellate Division, Second Department found that the purpose of a contract to recover expert witness fees in an underlying Individuals with Disabilities Education Act ("IDEA") case, was frustrated and could not be enforced, in light of a United States Supreme Court decision, decided during the pendency of the appeal, which held that the IDEA's fee-shifting provision did not allow for a prevailing plaintiff to recover expert witness fees from a defendant.

Apartment, and maintenance costs would increase as the hallway suffers additional wear-and-tear from partial roof garden traffic.

In reply, defendant asserts that this argument is contravened by the plain language of the Lease. Furthermore, even assuming it is true that there will be increased wear-and-tear and thus increased cost, defendant argues that this would not *disproportionately* increase plaintiffs' share of the Cooperative's cash requirements[3] because any additional maintenance would be paid proportionateley, as rent, by plaintiffs, based on their ownership of 1500 shares in the Cooperative.

First, this Court finds that defendant has met its prima facie burden by tendering sufficient evidence to establish that the Amendment was executed in accordance with Article I, Section SIXTH, "by the approval of lessees owning at least two-thirds of the Lessor's shares then issued."[4] As a result, under Article I,

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[3] Article A, Section FIRST defines "cash requirements" as "such aggregate sum as the Board of Directors of the Lessor from time to time, by a resolution or resolutions adopted during such year or portion of year or the preceding year, shall determine, in its judgment, is to be paid by the Lessees under proprietary leases then in force ... to enable Lessor to pay all estimated expenses and outlays of the Lessor to the close of such year, growing out of or connected with the ownership, maintenance and operation of such land and building."

[4] The Court is cognizant of the fact that plaintiffs pointed out in their opposition papers that defendant did not provide copies of the shareholder approval documents or any other details

Section SIXTH, the Amendment "shall be binding on all lessees even if they did not vote for such changes."

Although plaintiffs challenge the binding effect of the Amendment, this Court finds that plaintiffs have not produced evidentiary proof sufficient to establish the existence of a triable issue of fact as to whether the Amendment is binding.

The only exception to the shareholders' power to change the Lease by a two-thirds vote is "that the proportionate share of rent or cash requirements payable by any lessee may not be increased . . . ." Article I, Section SIXTH. It is evident from the plain language of the Amendment, that it addresses the lessor's/lessee's "right to use all portions of the roof of the building . . . for any purpose," and does not impose or even discuss any increase in "the proportionate share of rent or cash requirements payable by any lessee." Plaintiffs' argument that *if* a roof garden was

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in its moving papers, and that the Affidavit of Lee A. Forlenza is not sufficient evidence to determine whether the Board complied with the requisite approval process. In its reply, defendant contends that the proper way for plaintiffs to have contested the validity of the Amendment was through an Article 78 proceeding. Notwithstanding this argument, the Court notes that defendant did provide copies of the consent forms in favor of the Amendment with its reply papers. Moreover, during oral argument held on the record on March 2, 2011, counsel for plaintiffs stated that plaintiffs "concede there are consents from numerous shareholders and there is a tally at the front that seems to indicate the percentage of shares . . . ." (Tr. 12:26-13:3).

constructed as a result of the Amendment, there would be an increase in their proportionate maintenance costs, is insufficient to defeat the instant motion for summary judgment.

Accordingly, defendant's motion for summary judgment dismissing the fifth cause of action in the First Action is granted.

*Motion to Dismiss the Second Action*

Defendants also seek dismissal of the Verified Complaint in the Second Action, pursuant to CPLR 3211(a)(1) and (7).

*First, Second and Third Causes of Action*

The first cause of action seeks to rescind the Amendment on the ground that in enacting the Amendment, defendant breached the covenant of good faith and fair dealing. "While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." *Fesseha v. TD Waterhouse Inv. Servs.*, 305 AD2d 268 (1st Dep't 2003). Here, Article I, Section SIXTH of the Lease expressly sets forth the procedure for changing the terms and conditions of the Proprietary Lease.

It is also clear from the April Letter, that the defendant sought to enact the Amendment to clarify the previous, ambiguous language of the proprietary lease. It cannot be said that the mere solicitation or enactment of the Amendment is a breach of the implied covenant of good faith and fair dealing, when these very acts are clearly contemplated by the express terms of the Lease. Accordingly, the first cause of action is dismissed.

The second cause of action seeks to rescind the Amendment on the ground that defendant breached its fiduciary duties owed to plaintiffs. It is well settled that "'a corporation does not owe fiduciary duties to its members or shareholders.'" *Peacock v. Herald Square Loft Corp.*, 67 AD3d 442, 443 (1st Dep't 2009) (quoting *Hyman v. New York Stock Exch., Inc.*, 46 AD3d 335, 337 (1st Dep't 2007). Accordingly, the second cause of action is dismissed.

The third cause of action, which seeks to rescind the Amendment on the ground of failure of consideration, also fails. It is black letter law that the doctrine of "failure of consideration gives the aggrieved party the right to rescind the contract." 28 NY Prac., § 12:3; *see also Sciuto v. Iannucci Food Corp.*, 219 AD2d 635 (2d Dep't 1995). Here, plaintiffs are not seeking to rescind their proprietary lease; rather, they are attempting to rescind the Amendment, which was enacted by a vote of

the Cooperative's shareholders. Plaintiffs do not offer any authority to support their request for such relief, nor does there appear to be any authority for this Court to broaden the reach of this equitable doctrine to rescind something other than a *contract*, to which the aggrieved party is actually a party to.

Additionally, each of the first three causes of action allege that "plaintiffs are entitled to rescission of the putative Lease amendment," because it serves "no legitimate corporate purpose but to harass and disadvantage plaintiffs, . . . arguably defeat[s] the object of the Lease . . . singles out and discriminates against plaintiffs, and treats them differently than the other tenant-shareholders."

Although not pled as a distinct cause of action, the Court will consider whether these allegations may form the basis of any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83, 88 (1994).

The Court recognizes, as defendant argues, that "'the business judgment rule prohibits judicial inquiry into actions of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."'" *Pelton v. 77 Park Ave. Condominium*, 38 AD3d 1, 7-8 (1st Dep't 2006) (*quoting Levandusky v. One Fifth Ave. Apt. Corp.*,

75 NY2d 530, 537-538 (1990). Stated differently, "unless a resident challenging the board's action is able to demonstrate a breach of [the] duty [of loyalty, which is owed to the cooperative by the board], judicial review is not available." *Levandusky, supra* at 538.

Here, plaintiffs fail to allege that defendant breached the duty of loyalty owed to the Cooperative and their conclusory and speculative allegations of discrimination "are insufficient to deprive [the defendant] of the protection of the rule precluding judicial scrutiny of board decisions." *Pelton, supra* at 9.

*Declaratory and Injunctive Relief*

In the fourth cause of action, plaintiffs seek declaratory relief and allege that "justiciable controversies exist with respect to whether the construction of a roof garden would constitute a breach of the Lease, and whether the putative Lease amendment binds plaintiffs."

Pursuant to CPLR 3001, a declaratory judgment may be granted ". . . as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

With respect to whether the construction of a roof garden would constitute a breach of the Lease, the Court finds that this request for a declaratory judgement is premature because "the future event is beyond the control of the parties and may never occur." *Combustion Engineering, Inc. v. Travelers Indem. Co.*, 75 AD2d 777, 778 (1st Dep't 1980) (citation omitted), *aff'd* 53 NY2d 875 (1981). Therefore, any determination this Court may make "would be merely advisory since it can have no immediate effect and may never resolve anything." *Id.*

With respect to whether the Amendment binds plaintiffs, it is clear from the express language of the Lease, Article I, Section SIXTH that the Amendment is "binding on all lessees even if they did not vote for such changes," with one exception, which this Court has already determined, *supra*, does not apply here. Therefore, no justiciable controversy exists.

Accordingly, the fourth cause of action is dismissed.

*Permanent Injunction*

The fifth cause of action for a permanent injunction enjoining the construction of a roof garden because it would adversely affect plaintiffs' rights to occupy and enjoy their Apartment, defeat the

object of the Lease and constitute a failure of consideration is also denied in accordance with this Court's prior determinations.

*Promissory Estoppel*

The elements of a promissory estoppel claim are "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 AD3d 836, 841-842 (1st Dep't 2011).

Here, the alleged promise was made by "two different members of defendant's Board, Gerald Keller, who was defendant's President at the time, and Fred Cavanagh, who was an engineer who worked closely with Keller in overseeing the maintenance of the Building." (Complaint ¶ 13.) According to the Complaint, Keller and Cavanagh assured Ms. Baker that defendant would not build a new roof garden because of the damage it previously caused to the roof, "which in turn led to water leaks into the Apartment" (*Id.*). Plaintiffs further allege that in purchasing the Apartment, they relied on the restrictive language in Article I., Section SEVENTH of the Lease at the time, as well as the oral assurances of Keller and Cavanagh that a roof garden would not be constructed.

Plaintiffs argue in opposition to the motion to dismiss that they are entitled to relief under the theory of promissory estoppel because in amending the Lease to eliminate the previous language, defendant breached the promises of two of its former board members, which plaintiffs relied on in their decision to purchase the Apartment.

The sixth cause of action for promissory estoppel must also be dismissed. Even assuming Keller and/or Cavanagh made the alleged promise to plaintiffs, it was not reasonable for plaintiffs to rely on such a promise given the express language in the Lease that its terms were subject to change based on Article I, Section SIXTH. *See Knight Sec. v. Fiduciary Trust Co.*, 5 AD3d 172, 174 (1st Dep't 2004). *See also, Xenopoulos v Board of Mgrs. of 150 E. 56th St. Condominium*, 221 AD2d 257 (1st Dep't 1995), in which the Court held that the plaintiff "could not justifiably rely on alleged oral representations" which were contrary to the terms of the condominium offering plan. Moreover, plaintiff Stuart D. Baker is a sophisticated businessman and attorney, with expertise, *inter alia*, in commercial law and real estate matters, who also served at one time on the Cooperative Board and thus cannot reasonably claim that he did not understand that the Lease could only be changed by a super majority vote of the Shareholders, and not by the informal oral statements of two Board members.

*Supplemental Papers*

During oral argument held on the record on March 2, 2011, counsel for plaintiffs raised an argument that was not previously made in their papers, and which defendant did not have an opportunity to address. Accordingly, this Court granted leave to both parties to file supplemental papers on this discrete issue.

Plaintiffs argue that the Amendment cannot be enforced to allow construction of a roof garden, regardless of Article I, Section SIXTH, because it would destroy a vested right, *citing Vernon Manor Co-op. Apartments, Section I v. Salatino*, 15 Misc.2d 491, 495-96 (1st Dep't 1958).[5] Here, plaintiffs claim that although it is not pled in the Complaint, they have "a vested right consisting of a substantial property interest arising from the proprietary lease they executed in 1998 in which they acquired an interest in an apartment, subject to defendant's use of the roof over the apartment only for equipment, and not for any garden." (Plaintiffs' Supp. Mem. at 3.)

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[5] A vested right is generally defined as "a property interest so substantial in character that its destruction or deprivation cannot be justified by the objectives in view. No vested right may be built on a permission granted, just as no vested right is established under the enjoyment of a rule of law." *Vernon, supra* at 496. (internal citations omitted).

The Court finds plaintiffs' reliance on *Vernon* misguided. Although the *Vernon* Court acknowledged the general principle that "a by-law which disturbs a vested right is *ipso facto* not reasonable, even though the power to change the by-laws has been reserved[,]" *Vernon*, *supra* at 495, the Court ultimately held that "no vested right could have been acquired by the defendants for the use of such an appliance (i.e., a washing machine] in an apartment house owned and occupied cooperatively, and where the rights of enjoyment by tenant-members must be exercised in the light of mutual benefit and understanding [] . . . ." *Id.* at 495-96. The Court went on to say:

> [t]he conclusion that a vested right did not arise is reinforced by a consideration of the cases in which it was held that the by-law involved could not invade the prior right of a stockholder. These cases concern either property rights in stock . . ., or the manner of voting stock . . ., or a change in the manner of terminating property rights . . . . In no case was the vested right constituted of less than a substantial property right based on a contract.

*Id.* at 496. Therefore, *Vernon* does not provide a basis for this Court to find that plaintiffs had a vested right in the roof not being used as a garden.

Accordingly, based on the foregoing, both Actions No. 1 and No. 2 are dismissed, with prejudice and without costs or disbursements. The Clerk may enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: March 5, 2012

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

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