100 Colfax Assocs. v Board of Mgrs. of Grant Terrace Condominium
2012 NY Slip Op 30760(U)
March 22, 2012
Sup Ct, Queens County
Docket Number: 7952/2010
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS Part 14
Justice

100 COLFAX ASSOCIATES, etc.,
Plaintiff,

-against-

THE BOARD OF MANAGERS OF GRANT TERRACE CONDOMINIUM, et ano.,
Defendants.

Index No. 7952 2010

Motion Date January 3, 2012

Motion Cal. No. 37

Motion Seq. No. 4

The following papers numbered 1 to 21 read on this motion by defendants for summary judgment in their favor pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 8
Answering Affidavits - Exhibits.....	9 - 14
Reply Affidavits.....	15-18
Other	19-21

Upon the foregoing papers it is ordered that the motion is decided as follows:

Plaintiff commenced the instant action to recover for breach of fiduciary duty, waste and mismanagement, and negligent misrepresentation. The gist of plaintiff's complaint is that defendants negligently misrepresented to plaintiff, and all of the unit owners of the Condominium, information concerning Local Law 11- 1998 requirements as they relate to the condominium building, and that defendants reported to the condominium owners that there were violations imposed against the Condominium for failing to file Local Law 11-1998 reports. As a result of the alleged misrepresentations, plaintiff contends that defendants were able to convince 66% of the Unit Owners to pass a resolution to authorize the Board

to obtain an $850,000 loan to have a Local Law 11/98 report prepared and filed prior to the end of 2009, and to perform exterior façade work in order to cure Local Law 11/98 violations that were alleged to have been filed against the Condominium. Defendants move for summary judgment dismissing the complaint on the ground that they made no misrepresentations to convince the unit owners to vote to authorize the $850,000 loan, and the information upon which plaintiff relies, concerning the inapplicability of Local Law 11/98, is incorrect. Plaintiff opposes the motion.

Facts

Plaintiff is the owner of thirteen (13) units at Grant Terrace Condominium (hereinafter either "Grant Terrace" or "the Condominium"), located at 100 Colfax Avenue, Staten Island, New York. The complaint alleges that the Certificate of Occupancy of Grant Terrace provides that the building contains six stories plus a cellar, and that Local Law 11/98 applies to buildings with more than six stories. Local Law 11 is a local statue enacted in 1998 in relation to the inspection of the exterior walls of buildings greater than six stories in height. It is designed to ensure the safety of exterior walls and appurtenances thereof. Local Law 11/98 requires that the exterior of such buildings be inspected periodically by a licensed architect or engineer, and that the results of such inspection be filed with the Department of Buildings (DOB). Unsafe conditions found upon any applicable buildings shall be repaired within thirty days of filing the examination report. Under the law, after the repairs to correct the unsafe condition have been completed, the architect or engineer shall file another report of the condition of the building.

According to the complaint, buildings like Grant Terrace are generally exempt from Local Law 11/98 requirements. Plaintiff alleges that under the "Property Profile Overview" for Grant Terrace on the DOB website, there is an applicability entry which reads "Local Law: NO", and that the DOB has not issued any violation to Grant Terrace as a result of not filing a Local Law 11/98 façade inspection report despite an April 2008 violation issued to the building for wood blocks found under the air conditioner units.

The complaint further alleges that in or about May 2009, defendants (mis)represented the following to the unit owners: that the building was required to file a Local Law report before the end of 2009; that several areas of the building facade had to be repaired and or replaced in order to comply with Local Law 11/98; and that the Condominium was cited for not filing Local Law 11/98 in April 2008. Plaintiff instead alleges that the following is true: that the building (without consequence) had never filed a Local 11/98 Report; the Condominium was not on the DOB Local Law 11/98 list of buildings at the time that defendants were representing to plaintiff and other unit owners that the Condominium was required to file a Local Law 11/98 report by the end of 2009; at the end of 2009, defendants

voluntarily chose to delay the commencement of the Local Law 11/98 work until Spring 2010 (thus, even if a Local Law 11/98 report was required to be filed, it was not required for the then current cycle until February 20, 2010); and, in fact, a Local Law 11/98 report was not filed with the DOB until April 30, 2010. Furthermore, plaintiff submits that the Condominium was never cited for failing to file a Local Law 11/98 report and the April 2008 violation pertained to window air conditioners being improperly "braced" with wood blocks. Finally, plaintiff submits, in opposition to the motion, that after spending approximately $800,000 of the loan proceeds on exterior façade work "so that the building can pass Local Law 11," the April 2008 violation is still open, as is a May 3, 2010 violation for hazardous façade conditions, which violation was imposed only after the Condominium filed the Local Law 11 report.

The record reveals that defendants retained an architect, Robert A. Lenahan, to investigate whether the requirements of Local Law 11/98 apply to the Grant Terrace Condominium, and to prepare and file a Local Law 11 report with the DOB. Based upon his visual inspection of the building, Lenahan determined that the building falls under the requirements of Local Law 11/98. Lenahan states that any building that is greater than six stories tall falls under Local Law 11/98. A story is defined by the building department as any floor level having at least ½ of its floor-to-ceiling height above grade. As applicable to the instant case, since the cellar is 100% above grade, Lenahan determined that the cellar qualifies as an additional floor. To the contrary, the Certificate of Occupancy indicates that the building is only six stories. However, Lenahan explains that the latest update to the law states that the information listed in the certificate of occupancy is irrelevant for purposes of determining the number of stories to a building.

Ultimately, the DOB classified the building as a Local Law 11/98 building and accepted architect Lenahan's filing in April 2010.

There are eight (8) cause of action in the complaint. The first two causes of action are identical in language. Plaintiff alleges that the Board owed a fiduciary duty to plaintiff as a unit owner of Grant Terrace and that the Board failed to conduct a reasonable and prudent investigation into the issue of whether Grant Terrace was in fact required to file a Local Law 11/98 report. As a result of the Board's negligence, plaintiff alleges, the estimated monthly pay back for plaintiff on the $850,000 loan obtained by the Board is approximately $56.00 per unit for a ten year period which amounts to damages for plaintiff in the amount of $87,360. In the third cause of action, plaintiff alleges that J.A.L. Diversified Management Corp. ("JAL"), the Condominium management company, aided and abetted the Board in breaching its fiduciary duty, as noted above. The fourth cause of action alleges that the Board's action constituted waste and mismanagement (i.e., that the Board gave the unit owners a misleading sense of urgency, thereby allowing the former to immediately obtain an

$850,000 loan). The fifth cause of action alleges that JAL's conduct in aiding and abetting the Board constituted waste and mismanagement. The sixth cause of action is for negligent misrepresentation based upon the Board's statements to the unit owners that a Local Law 11/98 report had to be filed before the end of 2009 when in fact it did not have to be filed until February 2012. Plaintiff also alleges that Board negligently misrepresented that the $850,000 loan was needed in order to make the Local Law 11/98 repairs. The seventh cause of action alleges that JAL also negligently misrepresented the same information provided in the sixth cause of action. Finally, the eighth cause of action seeks to permanently enjoin defendants from using any of the $850,000 loan proceeds to rectify Local Law 11/98 violations unless and until there is verification from the DOB that Grant Terrace is, in fact subject to Local Law 11/98, as well as a statement is obtained from DOB as to what work Grant Terrace is required to perform and a time frame within which Grant Terrace is required to perform the said work.

Discussion

In moving for summary judgment, defendants argue, inter alia, that they were acting in good faith within the scope of their authority, discretion and judgment and in the best interests of the Unit Owners in conducting their investigation into the requirements of Local Law 11/98, and in making renovations and repairs to the building in order to comply with Local Law 11/98. Accordingly, defendants argue, their judgment to proceed with the façade renovations and repairs and to file a Local Law 11/98 report is protected by the Business Judgment rule and cannot be challenged by plaintiff or second-guessed by the court.

The Court of Appeals defines, in *Auerbach v Bennett* (47 NY2d 619, 629 [1979]), the business judgment doctrine, as follows: "That doctrine bars 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." Further, "[s]o long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient' " (*Matter of Levandusky v One Fifth Ave. Apt. Corp.,* 75 NY2d 530, 538 [1990] [citations omitted]).

Recognizing the competing interests among unit owners that are often at issue in board decisions, the *Levandusky* court cautioned:

> "A . . . condominium is by nature a myriad of often competing views regarding personal living space, and decisions taken to benefit the collective interest may be unpalatable to one resident or another, creating the prospect that board

> decisions will be subjected to undue court involvement and judicial second-guessing. Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court, which—generally without knowing the property—may or may not agree with the reasonableness of the board's determination, threatens the stability of the common living arrangement.
>
> "Moreover, the prospect that each board decision may be subjected to full judicial review hampers the effectiveness of the board's managing authority" (*id.* at 539-540).

Thus, the Court of Appeals decided that the appropriate standard for judicial review of decisions of boards of managers of residential condominiums and cooperative corporations "is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors" (*id.* at 537). This "deferential standard" that has become the hallmark of the business judgment rule (*40 W. 67th St. v Pullman,* 100 NY2d 147, 155 [2003]) requires the courts to "exercise restraint and defer to good faith decisions made by boards of directors in business settings" (*id.* at 153). Thus, in *Pullman*, where a residential cooperative corporation terminated the tenancy of a shareholder-tenant, the Court of Appeals held: "To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (*id.* at 155).

Here plaintiff has failed to make a showing of any of the three elements that would trigger judicial scrutiny of the Board's action. Distilled to its essence, the alleged wrongdoing is the Board's examination and investigation of the issue of whether the building is subject to Local Law 11/98. But, as the Board demonstrated in moving for summary judgment, it reasonably acted in investigating the issue by hiring an architect who prepared a report which sets forth his finding, which includes a finding that the building is subject to Local Law 11/98 and was subject to the imposition of building code violations for failing to file the said report earlier. The Board thereupon prepared to file the Local Law 11/98 report and to make repairs to the building related thereto. The business judgment rule protects a condominium board from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority *(see Matter of Levandusky v One Fifth Ave. Apt. Corp.,* 75 NY2d 530 [1990]; *cf. Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium,* 65 AD3d 985 [2009]). Absent a showing of discrimination, self-dealing or misconduct, the Board, like corporate directors, is presumed to act in good faith and in the exercise of honest judgment in the legitimate furtherance of corporate purposes (*Jones v Surrey Cooperative Apartments, Inc.*, 263AD2d 33 [1999]).

Furthermore, the burden is on the plaintiff seeking review of the Board's decision to demonstrate a breach of fiduciary duty; the burden is not on the Board to demonstrate that its decision was reasonable (*Levandusky v One Fifth Avenue Apartment Corp.*, *supra*). Examining the merits or wisdom of the Board's decision is an improper inquiry. "So long as the board acts for the purposes of the [condominium], within the scope of its authority and in good faith, courts will not substitute their judgment for the board's" (*Id.* at 538). Accordingly, the branches of the motion for summary judgment dismissing plaintiff's first five causes of action which claim that defendants' failed to conduct a reasonable and prudent investigation into the issue of whether Grant Terrace was in fact required to file a Local Law 11/98 report, are granted.

Turning now to the claim of negligent misrepresentation, plaintiff alleges in the complaint the following: that the DOB issued a violation in April 2008 for failing to file a Local Law 11/98 report, and that a Local Law 11/98 report had to be filed before the end of 2009 (when in fact the latest it could have been filed was 2012), all for the purpose of inducing unit owners to allow the Board to immediately obtain an $850,000 loan to address the repairs, "which repairs may not be required and, if required, are not required until 2012."

A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]; *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 [2000]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). The law imposes upon the defendant a duty to use reasonable care to impart correct information (*see Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706 [2009]; *Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2004]). As to the first element, there is no question here that the defendants owed a fiduciary duty to plaintiff and all of the unit owners (*see Board of Mgrs. Of Acorn Ponds at N. Hills Condominium I v Long Pond Investors*, 233 AD2d 472 [1996]; *Board of Mgrs. Of Whispering Pines at Colonial Woods Condominium II v Whispering Pines Assocs.*, 204 AD2d 376 [1994]).

As to the first alleged misstatement, defendants conclusively established their entitlement to judgment as a matter of law by demonstrating that a violation was issued to the Condominium in April 2008 with respect to the Local Law. The Board, by its managing agent Jennifer Ogman, explained that it received information regarding the April 2008 violation from the actual Notice of Violation issued by the DOB. A review of the violation – while the subject of which was wood blocks found underneath the air conditioning units – reveals that *the basis of the violation was Local Law 11/98*, a fact which cannot be disputed (*see Reilly Green Mtn. Platform Tennis v Cortese*, 59 AD3d 695 [2009]). Although the

violation was not for failing to file a report at that time, based upon the actual configuration of the building, a report *should* have been filed.

Even assuming that the information was incorrect, there can be no reasonable reliance in light of the fact that the information was easily discoverable: (1) plaintiff admits, and there is evidence demonstrating, that it performed its own research as to the applicability of Local Law 11/98 and conveyed same to the unit owners; (2) plaintiff had access to relevant information which was available in the superintendent's office; and (3) Ogman's June 9, 2009 letter to plaintiff's managing agent specifically addresses the fact that the April 2008 violation was readily available for viewing from the DOB (*see e.g. Vasquez v Soto*, 61 AD3d 968 [2009]; *Reilly Green Mtn. Platform Tennis*, 59 AD3d at 696; *Breen v Law Off. of Bruce A. Barket, P.C.*, 52 AD3d 635 [2008]). Thus, plaintiff has not met the third element of the test to establish a claim for negligent misrepresentation.

It should be noted that, notwithstanding the above, and contrary to plaintiff's claim that defendants "acted with absolute and utter disregard for the truth or accuracy of their statements," defendants demonstrated that they exercised reasonable care in imparting the information regarding Local Law 11/98 by, among other things, researching whether same applied to the Condominium, speaking with representatives from the DOB, speaking with persons who worked at the Local Law desk, and hiring an architect. Further, any claim by plaintiff that Local Law 11/98 did not apply is belied by the DOB's ultimate acceptance of the Local Law 11/98 report. In fact, it appears that plaintiff is simply aggrieved by the fact that it had escaped the Local Law 11/98 filing requirement for several years (based upon an apparently erroneous description of the building in the Certificate of Occupancy), and that it may not have been required to file a report had defendants not so quickly taken action to comply with the law (*see* Complaint at ¶ 83, in which plaintiff alleges, inter alia, "which repairs may not be required and, if required, are not required until 2012").

With respect to the second statement, in addition to the discussion above, defendant acted with due care in imparting the information as to when the Local Law 11/98 report had to be filed, which was based upon the architect's opinion, as well as representations from the Local Law desk itself. Defendants have shown that any sense of urgency that was conveyed to plaintiff was with the Condominium's best interest in mind. Accordingly, the branches of the motion which seek summary judgment dismissing the negligent misrepresentation allegations in the complaint, to wit, the sixth and seventh causes of action, are granted.

The eighth cause of action is dismissed as moot. This issue was the subject of an application via Order to Show Cause submitted by plaintiff and resulting preliminary injunction by Order of Justice Lee A. Mayersohn, dated April 15, 2010. The injunction has

since been lifted after defendants submitted paperwork demonstrating approval of such work by the DOB.

Conclusion

Defendants' motion for summary judgment is granted. Plaintiff's complaint is hereby dismissed.

Dated: March 22, 2012

J.S.C.