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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Summer Thomas

-v-

Ruckus 85 Core

INDEX NO. 114295-11

MOTION DATE

MOTION SEQ. NO. 3

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/27/12

LBY, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------x

THOMAS SUMMER, SYDNEY LICHT
and ELIZABETH LOGAN HARRIS, individually
and on behalf of RUCKUS 85 CORP.,

Plaintiffs,

Index No 114295/11

-against-

RUCKUS 85 CORP., CHARLES GROOMS,
LYSIANE LUONG GROOMS, and
YVETTE GEORGES DEETON,

Defendants,

----------x

YORK, J.:

Motions sequence number five and six are consolidated for disposition and resolved as follows.

BACKGROUND

Ruckus 85 Corp. ("Ruckus" or "corporation") is the fee owner of 85 Walker Street, a five-story landmark building with four separate artist-studio apartments. Ruckus operates the building as a cooperative. Plaintiffs Thomas Summer and Sydney Licht have been in the building since 2002 and own nine shares of Ruckus' stock. Plaintiff Elizabeth Logan Harris ("Harris") moved into her apartment in 2004 and owns nine shares of stock. Defendants Charles Groom and

Lysiane Luong Grooms ("the Groomses"), the original shareholders of the corporation, own fourteen shares of stock. Defendant Yvette Georges Deeton ("Deeton"), who is a daughter of the original shareholders, owns twelve shares of stock.

Until December 16, 1998 the management of Ruckus was vested in a Board of Directors consisting of four members. In 1998 Ruckus's certificate of incorporation and by-laws were amended to transfer the management to shareholders. The by-laws provide for corporate officers - a President, Vice-President, Treasurer and Secretary. At the time this action started Harris was the President, Deeton Vice President, Lysiane Luong Grooms the Treasurer and Thomas Summer the Secretary . Under the amended articles of incorporation and by-laws shareholders owning at least 75% of the issued and outstanding stock of the corporation were required to agree to the transaction of any item of business by the corporation, except that the affirmative vote of all shareholders was required to change the share allocations. Owners of 75% of stocks were required to be present at any meeting to constitute a quorum.

On April 13, 2011 a piece of the cast-iron water table, weighing approximately 300 pounds, fell from the building façade of 85 Walker Street into the street. The same day the New York City Department of Buildings ("DOB") issued a "class one" violation, calling for emergency scaffolding. The DOB inspector at the site of the accident demanded an engineer's report. Andrews Building Corp. ("Andrews"), the managing agent of the building, brought in SW Engineering ("SW") to prepare a proposal for the scope of work necessary for emergency repairs.

The shareholders met on May 4, 2011to hear SW's report and vote on the scope of work to be performed. There was a unanimous vote approving repair work on the façade necessary to

satisfy DOB requirements. Deeton voted against SW's proposal for repairs on the roof and rear façade, and the proposal was rejected.

On July 7, 2011 the building received a further notice of violation, from the Environmental Control Board of the City of New York, based on the corporation's failure to cure the prior violation. On June 22, 2011 a shareholders' meeting was called to interview contractors. All shareholders, except Deeton, representing 72.70% of the outstanding shares, agreed to hire Deluc, Inc. ("Deluc"). A contract was signed with Deluc on August 17, 2011. Deeton insisted that additional bids should have been considered. The Treasurer notified all shareholders of their proportionate share of the estimated costs of the repair work, which Deeton refused to pay.

Following tropical storm Irene in August 2011, there was water damage to the building, resulting in an accumulation of mold in the stairways and upper hallways. SW determined that the leak originated around the bulkhead on the roof. At a November 22, 2011 shareholders' meeting Deeton and Lysiane Grooms raised the issue of changing contractors and voted against repairing the roof at that time.

Plaintiffs started this action on December 20, 2011. They alleged that the corporation had reached an impasse in running its affairs, in particular, in undertaking necessary steps to complete repairs to cure the DOB violations and remediate the mold condition. In the first cause of action, for declaratory relief, plaintiff asked this court to declare amendments to Ruckus' certificate of incorporation and by-laws transferring the management of the corporation to its shareholders ineffective, null and void to be supplanted by the statutory requirement of Section 701 of the New York Business Corporations Law ("BCL") that the business of the corporation shall be managed under the direction of its board of directors. Their second cause of action is for

a permanent injunction enjoining and restraining the defendant majority shareholders from impeding the corporation's ability to make repairs required by DOB and other necessary works to cure existing hazardous conditions at the building and to direct all shareholders to pay their proportionate share of the cost of repairs. The third cause of action is for breach of fiduciary duty by majority shareholders resulting in damages to minority shareholders.

Deeton answered the complaint and counter-claimed for declaratory judgment that 1) the quorum requirement, shareholder management of Ruckus, and the shareholder voting provisions are valid; 2) the actions to cancel Deeton's proprietary lease by the corporations are unauthorized as premised upon the non-payment of assessments and late fees that themselves were not authorized; 3) the assessments and late fees levied against her are unauthorized acts; 4) the Coop's contract with Deluc was unauthorized and must be cancelled. Her fifth counter-claim is for breach of fiduciary duty by plaintiffs.

After defendant Deeton submitted two motions that sought to enjoin the corporation from terminating her proprietary lease, the parties signed a "so ordered" stipulation on February 24, 2012 ("Order"). Its relevant provisions are:

> 2. In further consideration, Deeton together with all other shareholders of Ruckus 85 Corp. … agree that until the ultimate and final determination of this action, the governance of Ruckus 85 Corp. shall be by majority vote of the issued and outstanding shares of Rockus 85 corp. in lieu and instead of the 75% requirement set forth in the By-laws and Amended Certificate of Incorporation and Proprietary lease, without prejudice to any claims, rights and remedies in the instant action of any party. The provisions of the by-laws except as modified herein shall remain in full force and effect, including those provisions relating to meetings, notice of meetings and waiver of notice of meetings, provided that a simple majority of the issued and outstanding shares must be present in person or by proxy to constitute a quorum, which shall be required before any vote is taken.
>
> 3. Deeton agrees that neither she nor anyone acting on her behalf will interfere with or impede with [sic] the ability of the Corporation to remedy and cure the violations,

including, without limitation, the work unanimously agreed to by shareholders at the may 4, 2011 meeting of the Corporation and that is being carried out by DeLuc Inc. under the August 17, 2011 contract between DeLuc and Ruckus 85 Corp.

4. Any further work beyond the scope of work unanimously approved at the May 4, 2011 meeting shall be subject to a shareholder vote and approval in accordance with the terms hereof, including quorum and voting requirements set forth in this stipulation at paragraph 2.

5. Deeton together with all other shareholders of Ruckus 85 Corp. agree to the outstanding settlement for mold remediation and repairs associated therewith and/or related to the cause thereof, and have no objection to the Corporation cashing those checks and proceeding with the work.

7. Each of the parties shall have a fiduciary duty to act in the best interests of the Corporation, as well as to each other, including but not limited to, the maintenance and repair of the building.

Plaintiffs now move to hold defendant Deeton and her attorney Peter E. Sverd, Esq. ("Sved") in contempt of court for alleged violation of the court order of February 24, 2012 . They state that Peter E. Sved wrote a letter to SW on April 4, 2012 directing SW to "stop work on scoping the roof project until a proper vote of the shareholders can be duly authorized." As a result, SW has stopped all work at the building related to the bulkhead and roof repairs which plaintiffs consider associated with mold remediation, approved and authorized by the Order. The second ground to hold Deeton in contempt, according to plaintiffs, is her attempt to convene a meeting of the shareholders in which she proposed to install herself as President and Assistant Treasurer of the Corporation, and to fire SW and Andrews. Plaintiffs consider this a clear breach of her fiduciary duties to the corporation and to other shareholders.

Plaintiffs ask for a preliminary injunction to prevent Deeton from holding the meeting, suspend Deeton and /or her proxies from acting as an officer of the Corporation, including but not limited to voting either as a shareholder or an officer with respect to day-to-day operations,

and direct that the votes of two-thirds of the remaining issued and outstanding shares of the corporation belonging to the remaining three shareholders authorize any corporate action. Alternatively, they request that the court modify the Order to require the votes of the owners of at least three of the four units in the building to authorize any corporate action.

In opposition to the motion defendant Deeton argues that her attorney's communication with SW did not violate the Order, since it dealt only with repairs to the roof and bulkhead, items not authorized at the May 4, 2011 shareholders meeting. Neither was mold remediation an item on the meeting's agenda. Thus, shareholders had to approve these items by a majority vote, in accordance with paragraph 4 of the Order. Deeton asserts that no meeting was held to discuss hiring SW to evaluate the scope of necessary roof work. She further states that she agrees to the mold remediation and the roof repairs that are associated with it, but wants to discuss competitive bids to perform this work. As to her attempts to convene a shareholders' meeting, she contends that as Vice President of the corporation she has a right to do it, and any agenda items she proposes must still be voted on according to the procedure described in the Order.

Defendant Deeton makes her own motion to hold plaintiff Harris in contempt for violating the same order of the court dated February 24, 2012 (motion sequence number six). This motion is based on the same grounds as Deeton's opposition to Harris' motion for contempt, namely Harris' actions as President of Ruckus to authorize SW to perform additional work on the roof of the building without notice of a meeting, without a quorum, and without a vote.

Plaintiff Harris opposes the motion, and cross-moves, 1) pursuant to Uniform Rule §130.1-1 to impose appropriate sanctions against Deeton and her attorney, Peter E.Sverd for frivolous conduct, 2) pursuant to Judiciary Law §487 against Sverd for false representations to

the court; and 3) pursuant to CPLR 2304, quashing a subpoena duces tecum dated April 19, 2012, directed to Deluc, Inc.

DISCUSSION

The court notes that both parties have been immersed in intricate details of their respective stories, instead of presenting their versions of facts briefly and coherently. With each subsequent application mutual attacks become more acrimonious, and the court is invited to get into minutia of parties' mutual relationships and technical details of the building's repairs. At oral hearings attorneys for both parties did not demonstrate the civility required of legal professionals, and taxed the patience of the court.

These motions for contempt precede plaintiff's motion for summary judgment that address the merits of the case. Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate .State v Unique Ideas, Inc., 44 NY2d 345, 349; 405 N.Y.S.2d 656 [1978].The court will consider the rights of parties that must be protected prior to adjudicating this case on the merits and will go no further.

"In order to find that contempt has occurred in a given case, it must be determined that lawful order of court, clearly expressing an unequivocal mandate, was in effect; it must appear, with reasonable certainty that order has been disobeyed and that the party to be held in contempt had knowledge of the court's order…; finally, prejudice to the right of a party to litigation must be demonstrated." McCormick v. Axelrod, 59 N.Y.2d 574, 583; 466 N.Y.S.2d 279 [1983] (internal quotations omitted).

The order at issue here is a so-ordered stipulation, drafted by attorneys for the parties. While paragraph 3 of the order, concerning repairs to the building unanimously voted for by

shareholders on May 4, 2011 is unequivocal, the same cannot be said of paragraph 5. Mold remediation was added to the scope of work at a later date. Though defendant Deeton explicitly agreed not to interfere with necessary repairs related to the mold condition, the language of that paragraph does not clearly obligate her to accept particular contractors to perform the work . Deeton argues that procedures described in paragraph 4 are applicable to making decisions about mold remediation. This is one possible reading of the stipulation, not precluded by its plain language. On the other hand, Harris considers that the stipulation authorized her, as President of the corporation, to proceed with work to which all shareholders agreed, either on May 4, 2011 or in the stipulation itself. At the very least, she argues, she could request SW, the engineering firm engaged by the corporation, to evaluate what repairs on the roof are related to solving the mold problem. This also is a reasonable reading of the order. The order thus does not express an unequivocal mandate. Given the history of prior dealing between the parties, attorneys could have found a more precise language for the stipulation. Normally neighbors sharing a common interest in maintaining their building can cooperate in good faith on how to proceed with agreed upon agenda. This not being the case, it is not sufficient to invoke mutual fiduciary duties of shareholders in paragraph 7. It was incumbent on lawyers to define in appropriate detail, what kind of decisions require a shareholders vote, and what kind of decisions are better left to the management discretion.

"Unless contempt proceeding is based on clear and precise order, no finding of contempt may be made... [I]f the order disobeyed be capable of a construction consistent with the innocence of the party of any intentional disrespect to the court, an attachment should not be granted." Howard S. Tierney, Inc., v. James 269 A.D. 348, 56 N.Y.S.2d 8 (1 Dep't 1945) (internal quotations omitted). There was no clear and precise order of the court, and thus neither

party can be held in contempt. The stipulation was intended to break a deadlock in arranging necessary and urgent repairs to the building. It was successful in permitting the corporation to remedy the violations cited by DOB, but could not settle other issues. Awaiting resolution of their dispute on the merits, parties are advised to follow paragraph 2 of the stipulation, and decide by a simple majority vote on any outstanding issues.

The court does not have power to change the voting requirements at shareholders meetings, as urged by plaintiffs. This is the subject of shareholders' agreement, and to modify the requirements, parties can resort to mechanisms described in the agreement itself. The most the court can do is to consider a petition to dissolve the corporation, should such petition be submitted to it.

The court denies the plaintiffs' cross-motion to hold the conduct of defendant Deeton and her attorney Sverd frivolous, and to sanction Sverd for misleading the court. The facts, sufficiently alleged by plaintiffs, concerning the conduct of the attorney aré indeed troubling: direct communication with the corporation represented by counsel, misrepresentations about the timely service of papers in opposition to plaintiff's motion. Though both motions for contempt were denied, plaintiffs have ground to call defendant's motion for contempt against Harris retaliatory and thus frivolous. The only action Harris undertook that allegedly violated the Order was to ask SW to submit estimates of work to be done. Shareholders approved the SW report at a meeting on April 16, 2012 and decided how to proceed with the bids. The results of this meeting were known to Deeton when she submitted her motion for contempt by order to show cause on April 20, 2012. However at this stage of the proceedings sanctions against the party or the attorney will not contribute to the speedy resolution of the case.

The subpoena to Deluc is quashed, since all discovery is suspended until the resolution of the motion for summary judgment pending before this court (CPLR 3214(b)).

CONSLUSION

For the reasons stated above it is

ORDERED that plaintiffs' motion to hold defendant Yvette Georges Deeton and her attorney Peter E.Sverd in civil contempt of court is denied; and it is further

ORDERED that defendant Deeton's motion to hold Elizabeth Logan Harris in civil contempt of court is denied; and it is further

ORDERED that the part of plaintiff's cross-motion to quash the subpoena to Deluc Inc. is granted, the remaining cross-motion is denied.

Dated: 6/27/12

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.