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

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 102597/2010
COGUT, CRAIG
vs
1220 PARK AVENUE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 102597/10
MOTION DATE
MOTION SEQ. NO. 5/8/12
MOTION CAL. NO. 001

The following papers, numbered 1 to 55 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + Memo of Law	1-21
Answering Affidavits — Exhibits + Memo of Law	22-48
Replying Affidavits + Memo of Law	49-55

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

AUG 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 24, 2012

JOAN M. KENNEY J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG ☐ SETTLE ORDER / JUDG

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

CRAIG COGUT and DEBORAH COGUT,
Plaintiffs,

-against-

1220 PARK AVENUE CORPORATION and
BROWN HARRIS STEVENS, LLC,
Defendants.

DECISION & ORDER
Index No.: 102597/10

JOAN M. KENNEY, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

FACTUAL BACKGROUND

This is a construction-related dispute between shareholders and the board of a cooperative residence located at 1220 Park Avenue, NYC (the premises). The owner of the premises is 1220 Park Avenue Corporation (the board), and Brown Harris Stevens, LLC (Brown Harris) is the managing agent for the premises.

Plaintiffs are the shareholders and lessees of apartment 16PHB, a triplex located on the premises. Plaintiffs purchased their unit in August, 2006, and two months later informed Brown Harris that they intended to renovate the apartment. Pursuant to the terms of the apartment lease, all alterations which are structural in nature require board approval. Motion, Ex. 5. As a condition of such approval, the board requires the shareholders to execute a standard form alteration agreement, which specifies the terms and conditions of construction. The form executed by plaintiffs is, according to defendants, the standard form used for such alterations. Motion, Ex. 6; Affs. in Support.

According to the cooperative's policy, all alterations must be completed within 120 days, which, according to defendants, is a policy uniformly enforced with respect to every shareholder.

Plaintiffs' architect, Darius Toraby (Toraby), prepared plans for the alterations, which were submitted to Brown Harris and passed along to the cooperative's architect, Walter B. Melvin Architects, LLC (Melvin) for review. Melvin eventually advised the board that Toraby's plans were acceptable, and the board approved the alterations.

While the board approval process was still ongoing, Deborah Cogut submitted a signed, but otherwise blank, pro-forma draft of the alteration agreement to Brown Harris. Motion, Ex. 7. This blank agreement was accompanied by a check for $10,000, which plaintiffs intended as a security deposit. However, the board requires a deposit of 10% of the overall cost of the renovations, and the plaintiffs' proposed renovations exceeded $1,000,000, and so Brown Harris never signed the blank alteration agreement. The court notes that this blank alteration agreement did not specify a start or completion date for the alterations or include any specifics about the apartment or the alterations, but did contain a liquidated damages provision. *Id.*

Once the board approved the project, a finalized version of the alteration agreement was prepared, which included the provision that the alterations be completed within 120 days of the start of the project. This alteration agreement was signed by Deborah Cogut on

March 1, 2007, and returned with a security deposit check for $100,000, work permits, licenses, insurances and notices. Motion. Ex. 6. The agreement was executed on behalf of the coop on March 5, 2007, and plaintiffs were advised that they could begin work on their apartment. The court notes that this agreement did not include a specific start date, but did state that the alterations must be completed within 120 days of its commencement. The executed agreement also included a liquidated damages provision.

At their depositions, plaintiffs and Toraby admitted that they never read the finalized, executed version of the alteration agreement. Motion, Exs. 16 (Deborah Cogut EBT, at 55), 17 (Craig Cogut EBT, at 29) and 18 (Toraby EBT, at 36).

Construction began on March 5, 2007 and, by mid-September, the construction was still ongoing. In September, Brown Harris sent a letter to plaintiffs advising them that they had gone beyond the permitted 120 day period for completing their renovations, and that appropriate charges had been assessed against them, pursuant to the alteration agreement. Motion, Ex. 8. In response, plaintiffs wrote to Brown Harris, claiming that the scope of their alterations exceeded their original plans and that, therefore, the 120-day period was insufficient for their purposes. Motion, Exs. 9 & 10. According to defendants, plaintiffs never sought board approval prior to expanding their proposed alterations.

When the issue was presented to the board, the board decided that plaintiffs must adhere to the 120-day period and pay the

liquidated damages provided for in the alteration agreement. Smith Aff. Defendants assert that when similar problems arose with respect to renovations in two other units in the building, those shareholders were also required to pay liquidated damages. *Id.*

According to the terms of the alteration agreement signed by Deborah Cogut:

> "The work shall commence by _____, the Work Commencement Date, and shall be completed within 120 calendar days. [The Work Completion Date being the date all work has ceased].
>
> . . .
>
> If the work shall not have been completed by the Work Completion Date, the Corporation shall be entitled to apply, from the security funds provided pursuant to paragraph 3 (b) of this Alteration Agreement, $250 per day for the first five working days following the Work Completion Date, $500 per day for the next five (sixth through tenth) working days following the Work Completion Date and $1000 for each additional five days (beyond ten working days) following the Work Completion Date. .... These amounts are acknowledged to be liquidated damages ...
>
> . . .
>
> No additional electrical service may be brought in without the Corporation's prior written approval. ..."

At the same time that plaintiffs commenced their construction project, the building installed a new bank of electrical meters so as to permit shareholders to upgrade the electrical service to their units from 100 amp service to 200 amp service. This project was designed by the coop's electrical consultant, IP Group Consulting Engineers (IP Group).

After the installation of the new electrical bank, 15 apartments in the building were able to upgrade their service to 200 amps, whereas the remaining 40 units were still restricted to 100 amp

service. During the course of their renovations, plaintiffs utilized one of the new meters that provided 200 amp service to their apartment.

While construction was ongoing in the plaintiffs' unit, plaintiffs requested an additional service increase to 300 amps. After receiving plaintiffs' request, the only such request made by any shareholder, Brown Harris engaged IP Group to evaluate the request. The correspondence between IP Group and Toraby regarding the feasibility of this electrical increase has been provided by defendants. Motion, Exs. 11 and 12. Eventually, IP Group determined that the 200 amp service to plaintiffs' unit was sufficient and that the requested 300 amps was unnecessary. In reaching this conclusion, IP Group also observed that there was insufficient room in the building to accommodate additional electrical banks, which would be required if plaintiffs' request were granted. Aff. of Igor Spivak (Spivak), licensed professional engineer for IP Group.

Based on IP Group's recommendations, the board denied plaintiffs' request for additional electrical service. Smith Aff.

Toraby and plaintiffs' electrician, Bill Sanferdino (Sanferdino), disagreed with IP Group's conclusions, and the two sides exchanged numerous correspondence on this point. Motion, Exs. 11 and 12. Although IP Group maintained its position, it suggested that a monitoring device be set up in plaintiffs' apartment, at plaintiffs' expense, to evaluate the situation, but plaintiffs never accepted that offer. Spivak Aff.

Towards the completion of plaintiffs' project, Sanferdino submitted a load letter to the Bureau of Electrical Control, which resulted in the issuance of a violation against plaintiffs' unit. Motion, Ex. 13.

According to IP Group, the violation was issued because the letter submitted by Sanferdino contained some errors, which IP Group offered to assist in redrafting, but such offer was refused. Spivak Aff.

Defendants say that, since the completion of their renovations, plaintiffs have had several large social events in their apartment and that they have never experienced any electrical problems. Defendants claim that the only electrical problem that occurred since construction was complete took place in late 2007, when an outside vendor was using large industrial steam-cleaning machine and equipment in the apartment, which caused a circuit to blow. Motion, Ex. 16.

The complaint alleges the following causes of action against the board: (1) injunctive relief to authorize work necessary to convert the electric service to the apartment to 300 amps; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) misrepresentation, asserted as against 1220; (5) breach of fiduciary duty; (5) attorney's fees and expenses; and (6) declaratory judgment that defendants are not entitled to liquidated damages, pursuant to the alteration agreement. Against Brown Harris, the complaint alleges the following cause of action: (1)

aiding and abetting breach of fiduciary duty; and(2) negligent management.

Defendants contend that the board's decision not to grant plaintiffs' request for additional electric power is protected by the business judgment rule. The board made its determination based upon expert advice and thus defendants argue that the claim for injunctive relief must be dismissed. Defendants further contend that plaintiffs' admitted failure to read the alteration agreement, warrants dismissal of the remaining causes of action against them.

In opposition to the instant motion, plaintiffs state that that the board promised them that there would be sufficient electrical capacity to enable them to make the proposed alterations, which, plaintiffs contend, is not true. According to plaintiffs, when the board reviewed plaintiffs' application, it included a letter from Toraby to Con Ed allegedly indicating that the renovations would require up to 300 amps of electrical service for the apartment. Opp., Exs. F & G. Furthermore, plaintiffs assert that if the business judgment rule were to apply, the board acted in bad faith, which would negate its applicability. In support of this allegation, plaintiffs have submitted the EBT of Janice Negrin (Negrin), a senior vice-president of Brown Harris, who testified that she probably conveyed to the board that she found Toraby unreasonable and arrogant.

Plaintiffs also contend that: (1) there is a factual dispute as to whether they reasonably relied on Brown Harris' indication that

the signed alteration agreement was not significantly different from the initial form agreement submitted by Deborah Cogut; (2) the liquidated damages clause operates as a penalty, rather than a measure of undetermined damages; and (3) Brown Harris is independently liable for knowingly participating in a breach of fiduciary duty by inserting the 120-day completion provision and informing plaintiffs that the agreement was basically the same as the form agreement originally submitted by Deborah Cogut.

In reply, defendants maintain that they never promised or agreed to upgrade plaintiffs' electrical service to 300 amps. Defendants provided the affidavit of Robert C. Bates (Bates), a licensed architect and principal of Melvin, who avers that plaintiffs' plans, reviewed by the board, did not indicate an upgrade to 300 amps, but only reflected an upgrade to 200 amps, which was supplied. Moreover, Bates states that the letter relied upon by plaintiffs as indication of the electrical upgrade does not approve an upgrade to 300 amps, but merely indicates that there had been a request to Con Ed to evaluate the coop's electrical capacity. This letter was never part of the plans submitted for board approval.

At Toraby's EBT, he stated that he inspected the coop's meter room and agreed that there were space limitations for increasing the electrical service to 300 amps. He indicated, however, that there were ways in which this space restriction could be handled. Toraby EBT, at 71-72.

Defendants argue that plaintiffs' allegations of discriminatory

treatment by the board is speculative. Moreover, Negrin testified that she did not believe that the board turned down plaintiffs' request for increased electrical capacity based on her characterization of Toraby. Negrin EBT, at 129.

Lastly, defendants claim that, at all times, Brown Harris was acting as the coop's agent and cannot be held separately liable.

DISCUSSION

"The proponent of a summary judgment motion 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' first cause of action seeks an injunction to permit them to increase the electrical service to their apartment from 200 amps to 300 amps because the board approved such increase when it approved their alteration plan. Plaintiffs contend that the board breached the contract by failing to allow the electrical increase.

The evidentiary basis for plaintiffs' claim is a letter written by Toraby to Con Ed, which defendants' expert has stated is not a request for increased electrical service, but is merely an inquiry as to the electrical capacity of the cooperative building. Moreover, as the exhibits demonstrate, this letter was not part of the alteration application package reviewed by the board.

The court has examined the subject letter and agrees with defendants' expert that there is nothing in this correspondence, nor in the application package, that would lead the board to believe that, in approving plaintiffs' plans, they were agreeing to an increase of electrical service to 300 amps. Further, the alteration agreement, both the executed version and the pro forma version, states that no increase in electrical service is permitted without approval of the board, and such approval is totally discretionary with the board. Under these circumstances, the board did not breach a promise to allow plaintiffs' to increase electrical service to their apartment to 300 amps.

Plaintiffs' argument that the board is not protected by the by the business judgment rule in refusing to increase electrical power because the board acted in bad faith, is unavailing. The business judgment rule has been found applicable to the decisions of the boards of residential cooperatives and condominiums, and "[t]o 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." *40 West 67th Street v Pullman*, 100 NY2d 147, 155 (2003).

In the instant matter the only evidence proffered by plaintiffs that the board acted in bad faith is a portion of Negrin's testimony that she did not like Toraby and that she might have given that impression to the board. However, Negrin went on to say that she did not believe that the board's decision was, in any way, based on her opinion of Toraby. As stated by the Court in *Pelton v 77 Park Avenue Condominium* (38 AD3d 1, 9 [1st Dept 2006]), "[c]onclusory or speculative allegations of discrimination are insufficient to deprive corporate directors of the protection of the rule precluding judicial scrutiny of board decisions." Moreover, the decision of the board was based on the expert opinion of an architect and electrician with regard to the necessary electrical requirements for plaintiffs' apartment, as well as the expense involved and the physical limitations of the building, which was even admitted by Toraby himself. *Woods v 126 Riverside Drive Corp.*, 64 AD3d 422 (1st Dept 2009). Plaintiffs' 1st cause of action is, therefore, dismissed.

Plaintiffs argument that the alteration agreement is unenforceable because of misrepresentation, a violation of the covenant of good faith and fair dealing and breach of a fiduciary duty, is without merit. Plaintiffs admit that they failed to read the contract that they signed and cannot now extricate themselves from a contract they feel was a bad faith bargain. An individual who signs a written contract is conclusively presumed to know its

contents and to assent to them." *Imero Fiorentino Associates, Inc. v Green*, 85 AD2d 419, 420 (1st Dept 1982); *Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assurance, Inc.*, 85 AD3d 680 (1st Dept), *affd* 17 NY3d 930 (2011).

In the case at bar, plaintiffs received the alteration agreement prior to their signing it and were afforded an opportunity to read and review it, and so are "conclusively presumed to have known, understood and assented to its terms (*Busker on the Roof Limited Partnership Co. v Warrington*, 283 AD2d 376, 377 [1st Dept 2001]. Failing to read a contract before signing it is no defense to the contract's enforceability. *Landmark Capital Investments, Inc. v Li-Shan Wang*, 94 AD3d 418 (1st Dept 2012). As such, plaintiff's 2nd, 3rd, 4th and 5th causes of action, are dismissed. Since the court has found that there has been no breach of fiduciary duty, plaintiffs' 6th cause of action, asserted as against Brown Harris for aiding and abetting a breach of fiduciary duty, must also be dismissed. Since the board has not been found to have violated the alteration agreement, and Brown Harris is the board's agent, the 8th cause of action for negligent management in the negligent preparation, execution and implementation of the alteration agreement, is not sustainable. See *Pelton v 77 Park Avenue Condominium*, 38 AD3d 1, supra.

Plaintiffs' 9th cause of action for declaratory judgment that defendants are not entitled to liquidated damages, is dismissed. "[P]arties to a contract may provide for anticipatory damages in the

event of failure to complete performance within the time specified, as long as such agreement is neither unconscionable nor contrary to public policy [internal quotation marks and citation omitted]." *Lease Corporation of America, Inc. v Resnick*, 288 AD2d 533, 534 (3d Dept 2001). Considering the total cost of the renovations and the amount of time that plaintiffs continued to renovate their unit after the contract completion date, the court does not find the amounts appearing in the alteration agreement to be disproportionate or a penalty.

Lastly, since they have not prevailed, plaintiffs are not entitled to attorney's fees. Accordingly, it is hereby

ORDERED that defendants' motion is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 6, 2012

ENTER:

Joan M. Kenney, J.S.C.