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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

BIANCA RAZZANO,
Plaintiff,

-against-

INDEX NO. 111966/09

MOTION SEQ. NO. 001

WOODSTOCK OWNERS CORP., THE BOARD OF DIRECTORS OF WOODSTOCK OWNERS CORP., jointly and severally; ORSID REALTY CORP., and APRIL ANDERSON,
Defendants.

The following papers, numbered 1 to 5, were read on this motion by the defendants to dismiss and cross-motion by the plaintiff for summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1, 2, 3 |
| Answering Affidavits — Exhibits (Memo) | 4 |
| Reply Affidavits — Exhibits (Memo) | 5 |

Cross-Motion: ■ Yes | | No



In this case involving a dispute over the sublet rights of a shareholder in a cooperative, Woodstock Owners Corp., the Board of Directors of Woodstock Owners Corp., Orsid Realty Corp., and April Anderson (collectively, defendants) move, pursuant to CPLR 3211(a)(1) and (7), to dismiss Bianca Razzano's (plaintiff) complaint. Defendants alternatively move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment, pursuant to CPLR 3212, on her complaint.

## BACKGROUND

Plaintiff is a shareholder of a cooperative apartment located at 320 East 42nd Street, Unit 2009, New York, New York. Before purchasing the apartment, on March 19, 2007, plaintiff met with April Anderson (Anderson), co-president of Woodstock Owners Corp., for a board interview. Plaintiff maintains that, at the meeting, she discussed with Anderson the cooperative's no-sublet policy. Plaintiff alleges that she informed Anderson that there was a possibility that she may need to sublet her apartment due to a temporary relocation for work.

Plaintiff contends that Anderson represented to her that the cooperative's sublet policy was flexible if the plaintiff had a financial hardship due to unemployment, illness or health, or if a shareholder had to seek temporary work outside of New York City.

Plaintiff maintains that, based upon Anderson's representations, plaintiff decided to purchase the apartment. The closing for the unit took place on April 16, 2007. On March 9, 2009, plaintiff submitted a formal written request to Eileen Aluska (Aluska) of Orsid Realty Corp., seeking permission to sublet her apartment, because she would be temporarily working abroad due to her job. On March 31, 2009, Aluska informed plaintiff that the request to sublet the apartment was rejected.

On August 21, 2009, plaintiff filed a verified complaint against the defendants, in which she asserts causes of action for breach of the duty of care, violation of the business judgment rule, breach of a fiduciary duty, breach of the duty of good faith, misrepresentation, negligent misrepresentation, fraud, discrimination, and breach of contract. Plaintiff also seeks relief in the form of a declaration that she has an unconditional right to sublet her apartment and/or be subject to the same policy as the shareholders who purchased the units prior to October of 2002, as well as a declaration that defendants misrepresented the sublet policy to plaintiff and violated section 501(c) of the Business Corporation Law and the business judgment rule.

Plaintiff argues that the sublet policy of the cooperative is not equally applied to all shareholders. She maintains that, while shareholders who purchased units prior to October of 2002 were informed of the current sublet policy, the rule unfairly applies only to those shareholders who purchased units after October of 2002. Plaintiff contends that, because her request to sublet was rejected, she had to put her apartment up for sale.

Defendants now move to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), based upon documentary evidence, and for failing to state a valid cause of action, or alternatively, pursuant to CPLR 3212 for summary judgment. Plaintiff cross-moves for summary judgment, pursuant to CPLR 3212.

## STANDARD

CPLR 3211(a), provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> [1] A defense is founded upon documentary evidence;
>
> [7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff's allegations for breach of contract]).

## DISCUSSION

Based upon the documentary evidence submitted by defendants, the complaint must be dismissed. The proprietary lease which defendants provide, outlines the sublet policy for the cooperative. The lease states:

> 15. Except as provided in Paragraphs 17 (b) and 38 of this Lease, the Lessee shall not sublet the whole or any part of the Apartment or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by a resolution of the Directors, or given in writing by a majority of the Directors or, if the Directors shall have failed or refused to give such consent, then by the Lessees owning at least two-thirds (2/3) of the then issued shares of the Lessor . . . There shall be no limitation on the right of Directors or Lessees to grant or withhold consent, for any reason or for no reason, to a subletting (Bowers Affirm., exhibit 11 at 9-10).

On February 16, 2007, prior to closing on the apartment, plaintiff signed an acknowledgment stating that she was aware that a no-sublet amendment had been implemented by the cooperative. The acknowledgment, which defendants also submit, applies to prospective cooperative purchasers, who purchased a unit after October of 2002. It states:

> [t]he Board of Directors of Woodstock Owners Corp. has established an amendment to the sublet policy for the cooperative which states that for the purchase of shares subsequent to October, 2002, subletting of such apartment is not permitted. The prospective purchaser(s) acknowledge notification of this policy (Bowers Affirm., exhibit 4).

Although plaintiff maintains that Anderson misrepresented the sublet policy, defendants submit an affidavit from Anderson, in which Anderson states that she did not indicate to plaintiff that the sublet policy was flexible, or that it could be amended for certain situations. Regardless, the Appellate Division, First Department, has held that "[w]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). Here, despite plaintiff's assertions, the submitted documents clearly indicate that plaintiff was aware of, and acknowledged, that the cooperative

had a no-sublet policy.

While plaintiff also contends that she was not being treated equally with other shareholders, pursuant to section 501(c) of the New York Business Corporations Law, defendants submit a copy of the minutes from the June 8, 2009 shareholders meeting and a survey which was distributed to shareholders which explains the necessity of the sublet restrictions. The documents specifically discuss that the sublet policy was instituted in 2002 because the owner occupancy rate of the cooperative was low, and the building was run down, and in need of several repairs. The survey explains that the board made the decision to prohibit subleasing in an effort to increase the owner-occupant percentage rate, and to assist in the renegotiation phase of refinancing the cooperative's mortgage.

Defendants also contend that the business judgement rule, which discusses the role of judicial inquiry into actions of corporate directors, supports the dismissal of this action. The Court of Appeals explains that when a "board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). "[U]nless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available" (*id.*). Furthermore, the Appellate Division, First Department, has recently held that:

> while a board may not deliberately single out individuals for harmful treatment, if a board of directors becomes aware of a situation or conduct of a particular shareholder that it considers contrary to the interests of the cooperative generally, there is no prohibition against the board's adoption of a policy protective of those broader interests, even if the policy is responsive to a single shareholder's situation or conduct (*Bregman v 111 Tenants Corp.*, 97 AD3d 75, 84 [1st Dept 2012] [internal citation omitted]).

Here, the cooperative board's sublet policy was instituted because of the legitimate concern and interest of the welfare of the cooperative. Plaintiff has failed to demonstrate that the board deliberately singled her out for harmful treatment, discriminated against her, or that the decision of the board was based upon fraud, self-dealing, or was unconscionable (*see*

*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009] [the business judgment rule does not "shield boards from actions . . . that deliberately single out individuals for harmful treatment"]). Furthermore, as the documentary evidence indicates, plaintiff was aware of the cooperative's sublet policy, and agreed to the restriction by signing the acknowledgment form on February 16, 2007. Therefore, because defendants have met their burden, and have presented sufficient documentary evidence to dismiss plaintiff's complaint, defendants motion to dismiss, pursuant to CPLR 3211(a)(1), must be granted.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that defendants Woodstock Owners Corp., the Board of Directors of Woodstock Owners Corp., Orsid Realty Corp., and April Anderson's motion is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that plaintiff's cross-motion for an order granting summary judgment is denied as moot; and it is further,

ORDERED that within 30 days of Entry, counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED

OCT 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/5/12

PAUL WOOTEN *J.S.C.*

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE