

199 E. 7th St., LLC v ABC Realty Corp.

2012 NY Slip Op 32914(U)

October 23, 2012

Sup Ct, New York County

Docket Number: 600558/10

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

199 E. 7th Street, LLC

INDEX NO.: 600558/10

Plaintiff, **FILED**

MOTION DATE:

- v -

OCT 25 2012

ABC Rully, et al

NEW YORK COUNTY CLERKS OFFICE

MOTION SEQ. NO.:

MOTION CAL. NO.:

Defendant.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: [] Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

Dated: October 23, 2012



J.S.C.

Check one: [] FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
199 E. 7TH STREET, LLC,

Plaintiff,

-against-

Index No. 600558/10

ABC REALTY CORP. AND BOARD OF DIRECTORS
OF E. 7TH STREET DEVELOPMENT CORP.,

Defendants.

-----X
JOAN A. MADDEN, J.S.C.:

Defendants move for summary judgment dismissing the complaint and awarding them summary judgment on their first and third counterclaims. Plaintiff opposes the motion, which is granted in part and denied in part.

FILED

Background

OCT 25 2012

Plaintiff is the proprietor of, and owns the shares appurtenant to, five residential apartments (Apartments), to wit, apartments 1A, 1C, 1D, 2E, and 4C, in the cooperative building (Building) located at 199 East 7th Street in Manhattan. The residents of those apartments are rent-stabilized tenants who chose not to purchase their apartments when the Building was converted to cooperative ownership. Defendant East 7th Street Development Corp. (Development Corp.) is the fee owner of the Building and the proprietary lessor of the Apartments. Defendant ABC Management Corp. (ABC), sued herein as ABC Realty Corp., is the managing agent of the Building and does business under the name "ABC Realty."

NEW YORK
COUNTY CLERK'S OFFICE

The gravamen of this action is that the maintenance fees

imposed upon the shareholders in the Building, including plaintiff, may have been larger than justified by financial need, and that ABC does not maintain separate bank account solely for cooperative corporation and may not have credited to Development Corp. all the sums that were due to it. Plaintiff asserts four causes of action. The first cause of action seeks an order requiring defendants to permit plaintiff to examine the Building's books and records. The second cause of action alleges that plaintiff is entitled to a seat on the Board. The third cause of action seeks an order requiring the Board to retain a new managing agent. The fourth cause of action seeks to hold the Board and its directors and officers personally liable for their failure to replace ABC as the managing agent for the Building.

Development Corp. and ABC now move pursuant to CPLR 3212 (a), for an order dismissing the complaint and granting Development Corp. summary judgment on the first and third counterclaims alleged in defendants' amended answer, awarding Development Corp. a money judgment in the amount of \$102,940.55, allegedly representing unpaid maintenance, additional maintenance and use and occupancy; and granting Development Corp. its attorney's fees, or alternatively, ordering a hearing on the amount of maintenance, additional maintenance, use and occupancy, and attorney's fees due to Development Corp. The first counterclaim, as to which Development Corp. seeks summary judgment, alleges breach of plaintiff's five proprietary leases based on plaintiff's alleged failure to pay maintenance fees. The third counterclaim seeks a

judgment declaring that plaintiff is in default of its obligations under the proprietary leases, and that the leases shall be terminated, and the stock certificates attributable to each of the apartments cancelled.¹

The procedural history of this action, insofar as it is relevant here, is as follows. Plaintiff commenced this action on March 4, 2010, and then on or about April 29, 2010, commenced a second action identical to this one, except that it named only Development Corp. as a defendant. On or about April 16, 2010, plaintiff was served with five 10-day notices to cure, one for each of the Apartments, demanding that plaintiff cure its failure to pay the sums due for each of the apartments. Plaintiff, thereupon, moved for a "Yellowstone" injunction to toll the expiration of the 10-day periods. By order dated July 8, 2010, Justice Emily Jane Goodman denied the motion and dismissed the (second) complaint on the ground that it improperly sought a Yellowstone injunction for residential apartments, and that the issue of overcharges are not proper for injunctive relief as money damages would suffice. Justice Goodman added that the issues raised in the complaint could be litigated in Civil Court.

On or about September 17, 2010, plaintiff was served with five notices stating that plaintiff's proprietary leases would terminate effective September 28, 2010, based on plaintiff's failure to cure its default pursuant to the notices to cure. The following month,

¹The second counterclaim seeks an order of ejectment and the fourth counterclaim is for attorneys' fees.

Development Corp. commenced five holdover proceedings in Civil Court, seeking to terminate the five proprietary leases. By order dated June 8, 2010, the Honorable Andrea Maisley dismissed the petitions on the ground that Civil Court lacked jurisdiction, inasmuch as Development Corp. was not seeking possession of the Apartments but only the termination of the respondent's (plaintiff, here) interest in them. The order recited that the dismissal was "without prejudice to refile in the proper court." After further motion practice in this action, defendants served their answer, and then their amended answer.

The proprietary lease for each Apartment provides that, upon the happening of any of a number of events, including that

the Lessee shall be in default for a period of one month in the payment of any rent or additional rent ... and shall fail to cure such default within ten days after written notice from the Lessor,

the Lessor shall give to the lessee a notice stating that the term hereof shall expire on a date at least five days thereafter ... it being the intention of the parties hereto to create a conditional limitation, and thereupon the Lessor shall have the right to re-enter the apartment and to remove all persons and property therefrom, either by summary dispossess proceedings, ... or by force or otherwise,

Fleishell Aff., Exh. L, at B19 and 18.

Defendants argue that based on the conditional limitation in the proprietary leases, the leases terminated on September 28, 2010, the date set forth in the termination notices that were served upon plaintiff after its time to cure had expired, and therefore they are entitled to summary judgment on their first and third counterclaims. They also argue that summary judgment should

be granted an order dismissing the complaint against them since plaintiff's claims are predicated on its status as lessees, which ended with the automatic termination of their leases based on the uncured default. Defendants also argue that the evidence submitted on the motion establishes that plaintiff has no basis for its claims.

Plaintiff counters that since the five holdover proceedings were dismissed, defendant may not seek the relief that it sought in those proceedings, to wit, the termination of the proprietary leases, without, first, serving new notices to cure. Plaintiff also submits the affidavit of Jim Guarino, one of its managing members, who states that he has "repeatedly requested access to the corporate books and records [and has] never been given access [or] received an accurate and fair accounting of the maintenance assessment." (Guarino Aff., ¶'s 6-8).

By interim order dated May 24, 2012, this court directed that defendants make available to plaintiff the books and records of the cooperative for inspection, and that after such inspection plaintiff serve supplemental papers in connection with the summary judgment motion. Plaintiff was given access to the records but failed to serve supplemental papers.

Discussion

As a general rule, when service of a notice to cure is a prerequisite to the commencement of a summary dispossess proceeding, the dismissal of such a proceeding nullifies the notice to cure upon which it was based, and a new notice to cure must be

served before another proceeding may be brought. See *Matter of Nicolaidis v State of New York Div. of Hous. and Community Renewal*, 231 AD2d 723 (2d Dept 1996); *Kaycee W. 113th St. Corp. v Diakoff*, 160 AD2d 573 (1st Dept 1990). On the other hand, when a commercial lease provides for a conditional limitation, that is, a provision that, upon the expiration of the period provided in a notice to cure, the lease will "automatically expire on the happening of a specified contingency, the arrival of the termination date fixed in the termination notice." *TSS-Seedman's, Inc. v Elota Realty Co.*, 72 NY2d 1024, 1026 (1988), citing *Perotta v Western Regional Off-Track Betting Corp.*, 98 AD2d 1, 5 (4th Dept 1983).

While a conditional limitation in a commercial lease for a default in payment of rent is generally enforced, the same is not the case for a residential lease. Specifically, the courts have found that in the case of a residential tenancy a conditional limitation is unenforceable as against public policy. *61 East 72nd Street Corp. v. Zimberg*, 161 AD2d 542 (1st Dept 1990); *520 East 86th Street, Inc. v. Leventritt*, 127 Misc2d 566 (Civ Ct Civil of NY 1985); but see, *Goldcrest Realty Co. v. 61st Bronx River Road Owners, Inc.*, 83 AD3d 129 (2d Dept 2011). Accordingly, the court finds that the leases have not been terminated based on the expiration of the date in the termination notice. To find otherwise and to permit enforcement of the conditional limitation would be particularly inequitable under the circumstances here in which plaintiff was denied a Yellowstone injunction on the ground that tenancies at issue were residential. As plaintiff's tenancies have

not been terminated, defendants are not entitled to summary judgment on their third counterclaim

The court reaches a different conclusion, however, with respect to the first counterclaim which seeks to recover moneys for unpaid maintenance assessments and related fees, and further finds that defendants are entitled to summary judgment dismissing the first cause of action in the complaint seeking inspection of the corporate books and records.

On a motion for summary judgment, the proponent "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. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, the court finds that the evidence submitted by defendants is sufficient to make a prima facie showing demonstrating that plaintiff owes unpaid maintenance charges, assessments and late fees. Specifically, defendants have submitted an affidavit from a manager at ABC who attaches a maintenance arrears report indicating showing that as of February 1, 2012, plaintiff owes \$102,940.55 in maintenance payments, late charges, and assessments. In addition, defendants submit an affidavit from the President of Development Corp's Board of Directors setting

forth the efforts of the corporation to provide plaintiff with access to the corporation's books and records and to resolve with plaintiff any issues regarding the unpaid charges.

Defendants also rely on an October 26, 2009 letter from Mindy Eisenberg Stark, a certified public accountant, who was asked by the Board to "ascertain [whether] the maintenance receipts from [the] tenant shareholders [of the Building,] for the months February 2006 to September 2009, were deposited into the bank account of [ABC]." Fleishell Aff., at 1. Ms. Stark, concluded that, based upon the sample of transactions that she had selected, the "deposits of [Development Corp., that is, the maintenance payments that were received in the ABC lockbox] were deposited into the ABC bank account." *Id.* at 2.

Next, although plaintiff was given an opportunity to inspect to corporate books and records, plaintiff submits no evidence suggesting that it does not owe the amounts for maintenance, assessments and late fees. Moreover, while ABC does not maintain a separate bank account for the corporation², there is no evidence that this fact or any inaccurate record keeping by ABC provides a legal or factual basis for plaintiff to withhold payment of maintenance. In addition, plaintiff does not provide any specific objection to the calculation of the amounts due and owing as shown on the maintenance arrears report. Accordingly, defendants are

²Ms. Stark stated that ABC does not maintain a bank account solely for corporation, and that the Board has been repeatedly advised by her accounting firm that it does not believe "from an internal control stand point that this is an advisable method of maintaining the Corporation's accounts."

entitled to summary judgment on their third counterclaim in the amount of \$102,940.55.³

Furthermore, summary judgment is warranted dismissing the complaint. With respect to the first cause of action, as plaintiff was permitted to inspect the corporate books and records, this action must be dismissed as moot. Next, while in its second cause of action plaintiff seeks a seat on the Board, defendants submit uncontroverted evidence in the form of statements^{and} an affidavit from the managing agent that plaintiff was offered a seat on the Board, but did not appear at board meetings or participate in the governance of the building. Accordingly, the second cause of action must be dismissed.

With respect to the third and fourth causes of action, relating to issue regarding plaintiff's right to obtain a seat on the Board and the replacement of the Building's managing agent, absent a showing of bad faith, which the complaint does not allege, courts will defer to a Board of Directors' business judgment in choosing a managing agent. See generally *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990); *Bregman v 111 Tenants Corp.*, 97 AD3d 75 (1st Dept 2012). The fourth cause of action seeks to hold the Board and its directors and officers personally liable for their failure to replace ABC as the managing agent for the Building. Moreover, individual members of a board of directors may not be held liable in tort, absent allegations, of

³To the extent defendants seeks attorneys' fees, this request is premature, particularly as they did not move for summary judgment on their fourth counterclaim seeking such relief.

which there are none here, of independent tortious activity on their part. *Id.*

Accordingly, it is hereby

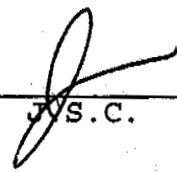
ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the complaint and the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendants' are hereby granted judgment on their first counterclaim in the amount of \$102,940.55, plus interest from June 16, 2011 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action shall continue, and the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY, on December 6, 2012 at 9:30 am.

Dated: October 23 2012

FILED
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