Board of Mgrs. of Lenox Grand Condominium v DSW Lenox LLC
2012 NY Slip Op 33549(U)
October 9, 2012
Supreme Court, New York County
Docket Number: 112834/2009
Judge: Barbara R. Kapnick

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA R. KAPNICK Justice PART 39

Index Number : 112834/2009
LENOX GRAND CONDOMINIUM
vs.
DSW LENOX LLC
SEQUENCE NUMBER : 005
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Settle Order

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

Dated: 10/9/12

_____, J.S.C.
BARBARA R. KAPNICK
J.S.C.

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: IA PART 39

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BOARD OF MANAGERS OF THE LENOX GRAND CONDOMINIUM,

Plaintiff,

-against-

DSW LENOX LLC, et. al.,

Defendants.

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DECISION
Index No. 112834/09
Motion Seq. No. 005

BARBARA R. KAPNICK, J.:

In the instant motion, plaintiff Board of Managers of the Lenox Grand Condominium ("Lenox Grand" or the "Condominium") moves by Order to Show Cause for an order:

(1) directing DSW Lenox, LLC ("DSW"), the owner of two commercial units and three parking spaces at the Condominium, to make immediate payment to the Condominium in the amount of $45,281.27 for all unpaid common charges, assessments, interest, late fees and a violation charge through April 30, 2012; and

(2) directing that DSW pay promptly all common charges and assessments against its Units each and every month commencing with May 2012 at the rates then in effect as adopted from time to time by the Lenox Grand Board of Managers (Unit: Comm-1 $2,766.59, Comm-2 $4,679.72 and $157.56/parking space for each of the three parking spaces).

After hearing oral argument on the record on May 3, 2012, DSW was directed, by Interim Order dated May 4, 2012, to make payment in the amount of $5,000.00 to Lenox Grand within ten (10) business days of the date of the Order to reimburse Lenox Grand for a violation charge paid to the Department of Buildings on behalf of DSW. DSW was also directed to pay monthly common charges for its two commercial units and three parking spaces, at the rates adopted by the Condominium in September 2011, beginning with the May 2012 payments and going forward pending further Order of this Court.

Background

Lenox Grand is a condominium association whose members own the residential, commercial and parking units in the building known as and located at 381 Lenox Avenue, New York, New York (the "Building"). The Condominium was established in 2007 by the filing of a Declaration of Condominium and By-laws. (Berthelot Aff. ¶ 3.)

DSW is and has been the owner of the two commercial units Comm-1 and Comm-2 and Parking Spaces 3, 4 and 5 (collectively, the "Commercial Units") in the Building since 2007. Plaintiff states that upon information and belief, DSW has leased Unit Comm-2 to the Harlem Children's Zone School (the "School"). Also upon information and belief, DSW's mortgagee Country Bank receives all of the rent from the School at the rate of $19,000 per month plus

the pro rata common charges allocated to Unit Comm-2. (Berthelot Aff. ¶ 4.)

According to plaintiff, as the owner of the Commercial Units, DSW is obligated to pay all common charges, assessments and others fees imposed thereon as long as it owns them. Beginning in September 2011, DSW failed to pay the monthly common charges and other payments due to the Condominium. After the Condominium requested payment, DSW paid only the undisputed amounts it believes to be due, which are the common charges at the old rate and no assessments on Unit Comm-1 or on the parking spaces. Additionally, Country Bank has paid the common charges (but not the special assessments) due from DSW to the Condominium solely on Unit Comm-2. (Berthelot Aff. ¶ 5.)

Article VI, Sections 4 and 6 of the Condominium By-laws address the issue of payment of common charges and provide in relevant part:

> Section 4. Payment of Common Charges. Each Unit Owner shall be obligated to pay the common charges assessed by the Board of Managers pursuant to the provisions of Section 1 of this Article VI at such time or times as the Board of Managers shall determine. The Board of Managers may also impose a reasonable late charge for late payment of common charges, which shall be added to the Unit Owner's common charges due on the first day of the following month, and which shall be a lien upon the Unit Owner's Unit if not paid.

Assessments for common charges are the personal obligation of the person owning the Unit at the time the assessment becomes due.

* * *

Section 6. Default in Payment of Common Charges. In the event any Unit Owner shall fail to make prompt payment of its common charges or any assessment as determined by the Board of Managers, such Unit Owner shall be obligated to pay interest at the highest legal rate on such unpaid common charges computed from the due date thereof, in addition to any late charge which may have been imposed pursuant to Section 4 of Article VI, together with all expenses, including attorneys' fees, paid or incurred by the Board of Managers or the Managing Agent in any proceeding brought to collect such unpaid common charges or assessments or in an action to foreclose the lien on such Unit arising from said unpaid common charges or assessments. The Board of Managers shall have the right and obligation to attempt to recover such common charges or assessments, together with interest thereon, and the expenses of the proceeding, including attorneys' fees, in an action to recover the same brought against such Unit Owner, or by foreclosure of the lien on such Unit granted by Section 339-z of the Real Property Law of the State of New York, in the manner provided in Section 339-aa of the Real Property Law against Units with respect to which the Sponsor or such designee is in arrears of common charges by more than thirty (30) days.

A lien for non-payment of common charges granted pursuant to Section 339-z has priority over all other liens except (i) liens for taxes on the Unit in favor of any assessing unit, school district, special district, county or other taxing unit, and (ii) all sums unpaid on a first mortgage of record.

Plaintiff contends that DSW has only made partial payments

towards its common charges, but nothing towards special assessments, interest, late charges and a violation charge,[1] in an aggregate sum of $45,281.27, exclusive of legal fees, which are not being sought in this motion. (Berthelot Aff. ¶ 8.)

Further, plaintiff asserts that the increase in common charges has resulted from an increase in the Condominium's litigation expenses, which have dramatically risen due to the filing of the instant action and the defense costs associated with a derivative action that is also pending before this Court, under Index No. 652786/11.[2] Although the Condominium has replaced the Building's doormen with a security system to lower costs, plaintiff contends that this savings is not enough to cover the increase in legal expenses. Thus, effective May 1, 2012, the common charges on all of the units was increased. (Berthelot Aff. ¶¶ 9-11.)

Discussion

Plaintiff argues that the Condominium By-laws, *supra* at 3-4,

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[1] The violation charge and other payments were ostensibly made pursuant to this Court's Interim Order of May 4, 2012, but other payments remain outstanding.

[2] The derivative action names individual members of the Board of Managers as defendants, whose defense costs are paid by the Condominium pursuant to the Condominium's indemnification obligations. (Berthelot Aff. ¶ 9.)

and New York Real Property Law ("RPL") §§ 339-j[3] and 339-x[4] make clear that all unit owners are obligated to pay common charges as assessed by the Board of Managers.

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[3] RPL § 339-j provides the following:

> § 339-j. Compliance with by-laws and rules and regulations
>
> Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner. In any case of flagrant or repeated violation by a unit owner, he may be required by the board of managers to give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions. Notwithstanding the foregoing provisions of this section, no action or proceeding for any relief may be maintained due to the display of a flag of the United States measuring not more than four feet by six feet.

[4] RPL § 339-x provides the following:

> § 339-x. Waiver of use of common elements; abandonment of unit; conveyance to board of managers
>
> No unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit. Subject to such terms and conditions as may be specified in the by-laws, any unit owner may, by conveying his unit and his common interest to the board of managers on behalf of all other unit owners, exempt himself from common charges thereafter accruing.

Defendant DSW argues that its principal, Stanley Wolfson ("Wolfson"), entered into an Amended Purchase Agreement with the Condominium's Sponsor in lieu of rescinding the original Purchase Agreement, in exchange for certain provisions to protect his interests in the Commercial Units from interference from the Sponsor or its successors-in-interest. The relevant provision of the Amended Purchase Agreement provides: ". . . the Seller also grants to Purchaser the right to at least one seat on the Board of Managers and *an absolute right of veto on any issue concerning the Commercial Units.*"[5] (Amended Purchase Agreement, ¶ 3) (emphasis added). Based on this purported veto power, DSW contends that it has the right to refuse to pay the increased common charges and assessments.

DSW argues that the Condominium is bound by the Amended Purchase Agreement under the theory that the Condominium is a successor-in-interest to the Sponsor and has, therefore, stepped into the shoes of the Sponsor, with respect to contractual rights and obligations. In the alternative, DSW argues that it is at least entitled to take discovery to determine the extent to which the Condominium is bound by the provisions of the Amended Purchase Agreement.

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[5] The Amended Purchase Agreement is signed for "Seller" by Rosetree on Lenox LLC, and by DSW Lenox, LLC and Stanley Wolfson, Managing Member, for "Purchaser."

In reply, plaintiff argues that the Amended Purchase Agreement was never disclosed to the Condominium and, in any event, as a matter of law, plaintiff is not bound to agreements not incorporated into the operative documents of the Condominium. Plaintiff reasons that once a condominium is created, the administration of the condominium's affairs are governed principally by its bylaws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which sets forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements. *See* RPL § 339-u.

Here, since neither the Amended Purchase Agreement itself, nor the provision concerning DSW's purported veto power is even mentioned in the Condominium's By-laws, the Condominium cannot be bound. Moreover, plaintiff contends that if the Sponsor intended for the veto power provision to be binding upon the Condominium, it could have easily added such a provision to the By-laws when it drafted the same. The Sponsor failed to do so, although it did include a provision in the By-laws to provide for DSW's right to a permanent seat on the Board of Managers.[6]

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[6] Plaintiff also notes that DSW's right to a permanent seat on the Board was also included in the Sponsor's Offering Plan, which details the rights and obligations of the unit owners and the board of managers and must be reviewed and approved by the New York State Attorney General's Office. The veto power provision, however, was not included in the Offering Plan.

Based on the foregoing, plaintiff maintains that the Amended Purchase Agreement does not provide a way for DSW to circumvent its statutory and contractual obligations to pay common charges assessed by the Condominium.

As to the successor-in-interest issue, this Court granted defendant permission to submit sur-reply papers and plaintiff permission to submit sur-sur-reply papers to address the issue of whether a condominium or cooperative entity can be bound by agreements entered into by its sponsor, as plaintiff asserts is the case here.

Defendant DSW first argues that the law is clear that when a *cooperative* entity is first created and the sponsor controls the board, the cooperative entity and the Sponsor are essentially one entity and are treated as alter egos. While this may be the case, it has no bearing on the instant dispute which involves a condominium, not a cooperative entity. Furthermore, the case cited by DSW, *Richards v. Estate of Kaskel*, 169 AD2d 111, 115 (1st Dep't 1991), does not address the issue at hand; rather, it deals with the issue of whether a cooperative entity is a proper party to a nonpurchasing tenants' renewal lease. As such, the Court finds this argument to be without merit.

Next, DSW argues that other courts have held that a condo association is a sponsor's successor-in-interest and is bound by the sponsor's prior actions and agreements. To support this contention, DSW cites one New York State case entitled, *Board of Managers of the Glen at Great Kills Homeowners Ass'n v. NBM Realty Holdings,* 2010 WL 2984343 (Sup. Ct., Richmond Co. [July 12, 2010]), which held that the homeowners association's possession of the subject property was not hostile for purposes of making out an adverse possession claim because the true owners of the parcel, the sponsor and later a LLC entity, was aware of and never objected to the association's use or improvement of the property. However, this Court finds that this case does not support defendant's position here.

On the other hand, plaintiff argues that a condominium is not bound by private agreements of its sponsor, which were not incorporated into the offering plan or disclosed to the other unit owners. To support its argument, plaintiff cites to the case of *Leonard v. Gateway II, LLC,* 68 AD3d 408 (1st Dep't 2009), which affirmed the Supreme Court's dismissal of a breach of contract claim by a unit owner against the condominium because the condominium was not a party to the purchase agreement, only the sponsor and the unit owner were parties.

While this Court recognizes that *Leonard* does not directly address the successor-in-interest argument either, DSW has not come forward with any cases to support its position that as a matter of law, the plaintiff here is bound by the Amended Purchase Agreement that was executed between DSW and the Sponsor based on the theory that plaintiff is a successor-in-interest to the Sponsor. Therefore, based on the language of Sections 4 and 6 of the Condominium By-laws, plaintiff's Order to Show Cause is granted insofar as it seeks relief that has not already been granted by this Court's Interim Order dated May 4, 2012.

SETTLE ORDER.

Date: 10/9, 2012

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.