

Board of Director of Windsor Owners Corp. v Platt

2014 NY Slip Op 32281(U)

August 22, 2014

Supreme Court, New York County

Docket Number: 155985/14

Judge: Peter H. Moulton

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Supreme Court of the State of New York
New York County: Part 57

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BOARD OF DIRECTORS OF WINDSOR
OWNERS CORP.

Plaintiff,

-against-

Index No. 155985/14

ELAINE PLATT,

Defendant.

-----X
Peter H. Moulton, J.S.C.

In this action plaintiff cooperative corporation sues Elaine Platt, who is a board member of the cooperative.

Plaintiff moves by order to show cause for a preliminary injunction barring Platt from "disclosing, disseminating, or in any manner distributing communications by attorneys for Windsor Owners Corp." to anyone not a member of the cooperative's board of directors.

BACKGROUND

It appears from the parties' papers in this case, and in a related case brought by Platt entitled Platt v Tudor Realty, et al. (100612/14), that disagreements between Platt and the other cooperative board members were triggered by the board's disputes with shareholder Frank Mazzocchi. The disputes with Mazzocchi arose from the alleged behavior of Mazzocchi's live-in companion, referred

to in prior litigation and herein as "Jane Doe." Jane Doe allegedly has a mental illness which caused her to behave strangely in the building's public spaces, commercial areas, and areas adjacent to the building. The board voted to bring a Pullman proceeding¹ against Mazzocchi and Jane Doe. Accordingly, counsel for the building filed an ejectment proceeding in September 2011.

While the ejectment proceeding was pending, Mazzocchi brought a federal action pro se in November 2011 asserting an array of claims. The initial federal action was dismissed. Mazzocchi, represented by counsel, filed a second complaint in federal court. Two causes of action, against some but not all of the defendants, survived a motion to dismiss. The case is pending.

In March 2014, the board voluntarily withdrew its ejectment action.

In Spring 2014, Platt was up for re-election to the board, and asserts that she engaged in a "heated campaign" against fellow board member Vivienne Gilbert. The two engaged in email exchanges concerning the building's governance. Among other things, Platt criticized Gilbert for leading the board to bring the ejectment proceeding against Mazzocchi. In one of the emails, Platt stated: "we withdrew this lawsuit because we were advised by two different law firms, that it was fatally flawed."

Plaintiff avers that this communication violated the

¹40 West 67th Street Corp. v Pullman, 100 NY2d 147.

cooperative corporation's attorney-client privilege. It points to this statement, and to other statements made by Platt in her papers in the related case, in support of its instant application for a preliminary injunction barring Platt from revealing any other privileged attorney client information.

Mazzocchi brought a state court action against the cooperative in May 2014, alleging, inter alia, violations of the New York City Human Rights Law. The status of this action is unclear from the parties' papers. The summons and complaint, and no other filings, appear on ECourts.

Paragraph 135 of the complaint in Mazzocchi's state court action paraphrases Platt's email, quoted above, regarding the advice of counsel. Platt reads this portion of the complaint to be directed solely at Thomas Curtis, Esq., the cooperative's lawyer in the ejection action and a named defendant in Mazzocchi's state lawsuit. However, the repetition by Mazzocchi of Platt's email could be directed plausibly at the individual board members named therein, and the cooperative, as an assertion of bad faith.

Platt's disclosure of attorney-client communication was discussed at the cooperative's board meeting on May 15, 2014. An "Executive Committee for Legal Matters" was created by vote of the board. The mandate of this Executive Committee is to determine strategy for dealing with Mazzocchi's various lawsuits. Platt was excluded from the Executive Committee because of her disclosure of

attorney-client communication.

Platt then sued the other board members, the building's managing agent, and the cooperative's attorneys, in a proceeding that was also assigned to me, entitled Platt v Tudor Realty, et al. (100612/14) ("the initial action"). The initial action arises from the same nucleus of operative facts as the instant action. In her complaint in the initial action, Platt seeks an array of equitable relief, including a declaration that she did nothing wrong by describing counsel's advice in her email. She also seeks an injunction disbanding the Executive Committee, and a declaration that board members who are named defendants in the Mazzocchi actions should have counsel separate from counsel for the cooperative corporation as their interests may diverge from the cooperative's. Platt also contends that these board members should also be enjoined from voting on any matters "which impact the corporation's positions in pending litigations." As noted above she named the cooperative's new counsel, Morrell Berkowitz, Esq. and his firm Gallet Dreyer & Berkey, LLP, as parties defendant. Platt's lawsuit added another item to the portfolio of the Executive Committee for Legal Affairs.

The defendants in the initial action moved to dismiss the complaint on various grounds. This court dismissed the initial action without prejudice because Platt's claims therein were derivative claims, and she did not name the corporation in that proceeding. Platt has been given leave to file her various claims

as counterclaims or third-party claims in the instant action, where the cooperative is already a named party, if she can do so in good faith.

DISCUSSION

Plaintiff seeks a preliminary injunction barring Platt from disclosing, disseminating, or in any way distributing communications by attorneys for the cooperative to anyone not a member of the Board of Directors of the cooperative.

In order to obtain a preliminary injunction, a movant must demonstrate a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balance of equities in movant's favor. (Levkoff v Soho Grand-West Broadway, Inc., 115 AD3d 536.)

Plaintiff satisfies these elements. First, plaintiff has demonstrated a likelihood of success on the merits. Platt breached the corporation's attorney-client privilege by reciting legal advice given by counsel to board members at a meeting at which no one else was present. It is well-established that the privilege applies to corporations. (Niesig v Team I, 76 NY2d 363; 371.) The attorney-client privilege protects confidential communications between an attorney and a client made "in the course of professional employment for the purpose of obtaining legal advice." (Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld, LLP, 52 AD3d 370, 372.)

[F]or the privilege to apply, the communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. The communication itself must be primarily or predominantly of a legal character.

(Spectrum Systems Intl Corp. v Chemical Bank, 78 NY2d 371, 377-8 [cites omitted].) Platt's email, and statements made in her papers in the initial action, clearly reveal the communications from counsel that fall within the privilege.

Plaintiff has demonstrated irreparable harm. The privilege belongs to the cooperative, not to Platt individually. Once a privileged communication is revealed, it can not be withdrawn in any meaningful way. Breach of the privilege can provide a windfall to an opponent in litigation. While it is unclear if Mazzocchi will be able to use Platt's statements to harm the cooperative or the board members in litigation, he is certainly trying to do so.

Finally, the balance of equities clearly favors the plaintiff. As noted the privilege belongs to the corporation, not to Platt. Additionally Platt is not foreclosed from providing her own opinion concerning the wisdom of the cooperative pursuing an ejectment action against Mazzocchi and Doe. The privilege applies only to confidential communications, it does not prevent Platt from discussing her own opinion with shareholders.

The order to show cause by which plaintiff sought the

instant preliminary injunction also directs Platt to "show cause" why the remaining relief sought by plaintiff should not be granted. However, the order to show cause is not brought under CPLR 3212, nor could it have been be as Platt had yet to answer the complaint. The various prayers for relief are not the proper subjects for a preliminary injunction. Absent extraordinary circumstances not present here a movant cannot obtain the ultimate relief sought in the lawsuit via a preliminary injunction. (Board of Managers of Wharfside Condominium v Nehrich, 73 AD3d 822.)

CONCLUSION

Plaintiff's motion is granted to the following extent. It is ORDERED, that pending the determination of this lawsuit, defendant shall not in any manner disclose or disseminate confidential privileged communications provided by counsel to Windsor Owners Corporation to anyone except another member of the board of directors of the Windsor Owners Corporation.

This constitutes the decision and order of the court.

Dated: August 22, 2014



J.S.C.

PETER H. MOULTON
J.S.C.