Herriott v 206 W. 121st St.
2017 NY Slip Op 30218(U)
February 1, 2017
Supreme Court, New York County
Docket Number: 153764/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice **PART** 35

Index Number : 153764/2016
HERRIOTT, MS., SHERRY
vs
206 WEST 121ST STREET
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/15/16
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

In this action to, *inter alia*, declare as invalid and void two amendments to the By-laws of defendant 206 West 121st Street Housing Development Fund Corporation (the "Co-op"), plaintiff Sherry Herriott ("plaintiff") as Administrator of the Estate of Catherine Oglesby ("Oglesby") moves for partial summary judgment on her second cause of action for declaratory relief and for attorneys' fees.

The Co-op opposes dismissal and cross-moves to dismiss the first, third and fourth causes of action as time-barred; to dismiss the second cause of action as an improperly pled breach of contract action lacking in merit in light of the valid actions undertaken by the Co-op; to dismiss the fifth cause of action as same is not viable in the absence of a viable cause of action; and to dismiss the sixth cause of action for attorneys' fees as lacking in merit.

Factual Background

In August 2008, Oglesby became the lessee and owner of 250 shares allocated to the cooperative apartment at the Co-op, located at 206 West 121st Street, #1B, in New York City ("apartment").[1] According to plaintiff, Oglesby later expressed an interest in selling her

[1] The Co-op is organized under Business Corporation Law ("BCL") §402 and Private Housing Finance Law Article XI.

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

Dated: _____ Page 1 of 4 **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**

apartment.

By Notice of Special Meeting dated October 20, 2011, a meeting was scheduled the same date to amend the By-laws. According to the Minutes of October 20, 2011, the By-laws were amended by adding two sections to Article XV as follows:

> The maximum sum for which a proprietary lease and accompanying shares of the Corporation corresponding to an apartment in the building may be sold or transferred shall consist of: A) the initial purchase price paid; B) special assessments for building wide improvements, if any; and C) ten times the monthly maintenance fee assessed by the Corporation with respect to the apartment. . . . (Section 2(c))
>
> Right of first refusal - The Corporation shall have a right of first refusal to elect to purchase the proprietary lease and accompanying shares of the Corporation corresponding to an Apartment owned by a Shareholder on the same terms and conditions as set forth in a contract of sale or other sale or transfer agreement entered into by the Shareholder. The right to purchase may be exercised by the Corporation within 30 days of delivery to it of an executed contract of sale or other sale or transfer agreement. . . .
> (Section 2(d))
> (the "Amendments")

According to plaintiff, Oglesby did not receive notice of the meeting.

Three months later, on January 26, 2014, Oglesby died.

On October 7, 2014, the Board held a meeting at which it set forth the maintenance of the shareholders as $214.29 per room. Thereafter, on December 15, 2014, the Board's corporate lawyer advised plaintiff of, *inter alia*, the maintenance charge amount and requirement that the apartment be transferred to an income qualified purchaser.

Plaintiff attempted to sell the apartment and accepted a cash offer of $200,000. The Co-op then sought to exercise its right of first refusal to purchase the apartment at the price calculated by the amendments, *to wit*: $7,500.00. The proposed buyer was advised of the amendment and then withdrew its $200,000 offer.

Plaintiff's counsel then demanded that the Co-op invalidate the amendments and compensate plaintiff for $180,000 due to the loss of the sale.

This action for damages, injunctive relief, and declaratory judgment ensued.

In support of summary judgment, plaintiff argues that the Amendments are invalid, and null and void because they violate BCL §§501 (c), 605(c) and 608, were adopted in violation of the other corporation documents and without amendment of the proprietary lease, are an unlawful restraint on alienation and were adopted in bad faith and in breach of defendants' fiduciary duty of reasonableness.

Discussion

As a threshold issue, the branch of defendant's cross-motion to dismiss the first, third and fourth causes of action as time-barred is granted.

Plaintiff's first cause of action seeks damages based on the claim that plaintiff was "denied the right to sell the apartment" for market value. The Co-op denied plaintiff's right to sell the apartment in that it, *inter alia*, "prevented Plaintiff from selling the apartment to the prospective purchaser" (Complaint, ¶11). Plaintiff's third cause of action alleges violations of BCL §§501 (c) (which forbids restrictions that are inconsistent with the lease and other governing corporate documents), 605(a) (which requires at least 10 days notice of meetings) and 608 (requiring at least 1/3 of voting shares to constitute a quorum). And, plaintiff's fourth cause of action for damages for "breach of contract" alleges that the Co-op's "adoption of the Sale Restriction Amendments breached §3.03 of the proprietary lease" (which requires votes by 2/3 members for amendments and that approval by Housing Preservation Department approval of amendments affecting the City's share of sale profits).

"Generally, the applicable statute of limitations depends upon the substantive remedy sought" *(Board of Managers of Bayside Plaza Condominium v. Mittman*, 43 Misc.3d 1208(A), 990 N.Y.S.2d 436 [Supreme Court, New York County 2014]). "When the relief sought is equitable in nature, the six-year limitations period found in CPLR 213(1) applies" (*Board of Managers of Bayside Plaza Condominium, supra citing Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 [1st Dept 2003]).

Nevertheless, any allegations that the Co-op was acting "in violation *of its own governing documents*," are subject to "the four-month statute of limitations associated with Article 78 proceeding" (*Konigsberg v. 333 East 46th St. Apartment Corp.*, 2016 WL 3455940 (N.Y.Sup.), 2016 N.Y. Slip Op. 31180(U) (emphasis added) *citing see e.g. Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012] [allegations that defendant cooperative acted beyond the powers granted to them in the cooperative's governing documents are governed by the four month statute of limitations for an Article 78 proceeding]; and *Buttitta v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250 [1st Dept 2004]). And, even actions that are allegedly violative of the BCL are governed by the four-month statute of limitations (*see e.g., Lindkvist v. Honest Ballot Ass'n,* 31 Misc.3d 1234(A), 932 N.Y.S.2d 761 (Table), 2011 (stating, The court's jurisdiction flows from BCL § 619 to which a four-month Statute of Limitations applies")).

Plaintiff asserts that her primary cause of action is one for declaratory judgment and that her "sole remedy is to have the court declare that the Sales Restriction Amendments are invalid . . . ." (Memorandum of Law in Reply and Opposition, pp.1-2).[2] However, the thrust of plaintiff's entire action is premised on claims that the Co-op's actions violated the BCL and its own governing documents. Plaintiff commenced this action on May 4, 2016, well beyond the date on which the amendments to the By-laws were adopted (on or about October 20, 2011) (Complaint, ¶4).

And, although the Co-op rejected plaintiff's demand to void the Amendments on March 14, 2016, within four months prior to the commencement of this action, said rejection was, as plaintiff alleges in her Complaint, based on the Amendments.

Thus, plaintiff's first and third claims are time-barred.

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[2] The fourth cause of action, and a portion of the third cause of action, are deemed withdrawn (see Reply and Opposition, p. 3, fn.1 "Plaintiff withdraws her claims based upon violation of 3.03 of the Proprietary Lease. . . . and BCL 608").

Plaintiff's reliance on *Chappell v Trump Plaza Owners, Inc.*, 2011 Misc LEXIS 4842 (Supreme Court, New York County 2011]) is misplaced. The Court in *Chappell* declined to apply the four-month statute of limitations, noting that the plaintiff's claims therein sought money damages for breach of fiduciary duty and negligence. Plaintiff's Complaint herein does not allege a breach of fiduciary duty and plaintiff admits that her claims are for declaratory relief based on actions undertaken by the Co-op at or about the time of the meeting.

Therefore, the branch of the cross-motion to dismiss the first and third causes of action as time-barred is granted, and the branch of the cross-motion to dismiss the and fourth cause of action is denied as moot, as same is deemed withdrawn.

Because the declaration plaintiff seeks on her motion for partial summary judgment rests entirely on allegations that the Co-op breached either its governing documents, or violated the BCL, such claims are governed by the four-month statute of limitations and untimely. Consequently, her motion is denied. In this regard, and in light of the unchallengeable actions undertaken by the Co-op, the branch of the Co-op's cross-motion to dismiss the second cause of action is granted.

As to the balance of the Co-op's cross-motion, dismissal of the fifth and sixth causes of action is warranted.

In her fifth cause of action, plaintiff seeks an injunction directing the Co-op to process any sale pursuant to the terms and conditions of the Lease. "The relief of an injunction is a drastic remedy 'granted [only] in a clear case, reasonably free from doubt'" (*Standard Realty Associates, Inc. v. Chelsea Gardens Corp.*, 105 A.D.3d 510, 964 N.Y.S.2d 94 [1st Dept 2013] *citing 116 East 57th Street Inc. v. Gould*, 273 A.D. 1000, 79 N.Y.S.2d 243 [1st Dept. 1948], lv. denied 274 A.D. 782, 81 N.Y.S.2d 189 [1948]). There is no viable cause of action independent of injunctive relief, and no viable claim that the Co-op violated the terms of the Lease. As such, injunctive relief is unwarranted.

And, the sixth cause of action for attorneys' fees fails, since plaintiff is not a prevailing party in this action.

Plaintiff's remaining arguments lack merit.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on her second cause of action for declaratory relief and for attorneys' fees is denied; and it is further

ORDERED that the branch of the cross-motion to dismiss the first, third and fourth causes of action as time-barred is granted as to the first and third causes of action, and denied as moot as to the fourth cause of action; and it is further

ORDERED that the branch of the cross-motion to dismiss the second, fifth and sixth causes of action is granted, and said claims are dismissed; and it is further

ORDERED that the Clerk may enter judgment dismissing the complaint accordingly; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 2/1/17 **ENTER:** _____, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**