Milford Mgt. Corp. v Dellapportas
2017 NY Slip Op 30901(U)
May 3, 2017
Supreme Court, New York County
Docket Number: 158649/2014
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59
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MILFORD MANAGEMENT CORP. and MARINER'S COVE SITE J ASSOCIATES, in its own right and derivatively on behalf of unit owners of the Liberty House Condominium,

Plaintiffs,

Index No. 158649/2014

-against-

JOHN DELLAPORTAS,

Defendant.

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DEBRA JAMES, J.:

This action arises out of a rancorous dispute among the members of the Board of Directors of the Liberty House Condominium (the Condominium) and the Condominium's sponsor and managing agent, purportedly brought derivatively on behalf of the unit owners, against defendant, John Dellaportas, the president of the Condominium's Board of Directors, for alleged breaches of fiduciary duty.

Plaintiff Milford Management Corp. (Milford) also joins the action with direct claims against defendant for alleged tortious interference with contract and prima facie tort.

In this motion, defendant moves, pursuant to CPLR 3211 (a) (1), (7) and 3211 (g), to dismiss the complaint, and for attorney's fees and costs, on the basis that this is a "SLAPP" suit under the New York Civil Rights Law §§ 70-a, 76-a.

Background

The Condominium's Offering Plan was approved by the Attorney General's office nearly 30 years ago. The Condominium consists of 240 units, located at 377 Rector Street in Manhattan. Approximately one-third of the units have never been sold, but are, instead, being rented out by the sponsor of the Condominium, plaintiff Mariner's Cove Site J Associates (Sponsor). The Condominium was previously managed by Milford pursuant to a Management Agreement of long standing, which was terminated, the facts around which are challenged in this lawsuit.

The By-Laws of the Condominium (By-Laws) require a seven-person Board. According to the By-Laws, the Sponsor has the right to have three members on the Board, as long as there are still unsold units (Sponsor Board Members). The remaining four Board members are elected by the unit owners (Resident Board Members). The three Sponsor Board Members have all been appointed by the Sponsor's affiliate, Milstein (Milstein). One of the Sponsor Board Members is Milstein's General Counsel, and Milford officer, Andrew Berkman (Berkman). None of the Sponsor Board Members reside in the Condominium. Defendant has been president (President) of the Board since 2013.

Friction developed between defendant and Milford following a bed bug infestation which involved defendant's unit, along with other units. The matter of the eradication of the problem was

not handled by Milford to defendant's satisfaction, in that, according to defendant, despite the intervention of an extermination company, the infestation continued and spread. Defendant asserted that Milford was employing an incompetent extermination company, and eventually hired another company to handle the infestation, which was finally resolved. Defendant also faulted Milford with other acts of mismanagement and self dealing.

Defendant sought to deal directly with Milford to be recompensed for his own losses stemming from the 2013 bed bug infestation, such as the costs of damaged goods, cleaning costs and the cost of finding accommodations while the infestation was being handled. He sent Milford a lengthy letter labeled "CONFIDENTIAL SETTLEMENT COMMUNICATIONS PURSUANT TO FEDERAL RULE OF EVIDENCE" (Settlement Letter), in which he made what he contends was a good faith effort to settle with Milford for Milford's gross negligence in the handling of the bed bug infestation, in the sum of $100,000. The Settlement Letter states that this settlement was personal to defendant, and would not "apply to any of Liberty House's claims against Milford, which are not ours to settle." It also states that defendant would not speak to the media about the problem, but that "[o]f course, as Board President, I will need to address these matters to the Unit Owners".

In October 2013, defendant emailed a letter to the other unit owners disclosing the bed bug problem, and explaining his own losses, while putting the blame for those losses on Milford. Defendant apparently did not, however, disclose to the Board his own attempts to settle via the Settlement Letter. The relationship between Milford and the Resident Board Members deteriorated further, until defendant and three other unit owners launched a campaign to be elected as Board Members on a "Remove-Milford Slate," in order to free up the Condominium to hire another management company. While no vote was apparently made at that time, plaintiffs provide a letter, signed by defendant, and dated April 8, 2014, which states "[p]ursuant to Section 11 (a) thereof, the Management Agreement dated April 29, 1992 between Liberty House and Milford Management [the] Agreement is hereby terminated, to take effect as of June 30, 2014. Thank you." As a result, plaintiffs claim that defendant unilaterally removed Milford as managing agent prior to any vote.

The Sponsor Board Members, in response, put up a "Keep-Milford Slate." The 2014 Annual Owners Meeting, at which the issue would be resolved, was noticed for September 16, 2014.

Defendant and the Remove-Milford Slate created a "Mission Statement", outlining their criticism of Milford, including the retention of the unsold units, and the alleged undervaluation of Liberty House units as a direct result of the unsold units, as

outlined in a market report allegedly produced by Halstead Property Development Marketing (Halstead). Plaintiffs reacted strongly to the Mission Statement, claiming that it contained misstatements of fact, and omitted the important point that defendant had attempted to settle the matter of the costs of the bed bug problem privately. Berkman provided the Settlement Letter to all of the unit owners. He also disclosed that the report by Halstead was not, allegedly, actually endorsed or authorized by Halstead, but was instead written on Halstead stationary by a Board member who happened to be an employee of Halstead. Berkman claimed that the Board member had been instructed by Halstead not to use its stationary in that manner, but that, when Berkman complained to Halstead about the Board member's actions, he was censured by the Board for putting the Board member's job in jeopardy.

Prior to the 2014 Owners Meeting, plaintiffs commenced an action against defendant seeking a temporary restraining order (TRO) stopping the meeting because, they alleged, defendant had refused to convene a special meeting for the purpose of voting to remove defendant as Board President. This court denied the request for a TRO because plaintiffs failed to show immediate irreparable harm as the By-laws allowed the removal of any officer solely upon an affirmative vote of four Board members, without requiring the convening on notice of a special or other

meeting of the Board. As stated in Section 3.7 of the Condominium By-Laws, "Any officer of the Condominium may be removed from office, with cause, by an affirmative vote of a majority of the members of the Board of Managers." Moreover, at no time prior to the TRO application did the plaintiffs ever make a written request to the defendant to call a special meeting for the purpose of removing defendant as Board president, as set forth in Bylaws Section 2.13.

The 2014 Owners Meeting reconvened on October 7, 2014. The four unit owners on the Remove-Milford Slate were voted in as Board members, and defendant retained his role as Board President. By a 4-0 vote, with all three Sponsor members abstaining, the Management Agreement with Milford was cancelled, on 60 days' notice. The Board then voted to retain a new managing agent, RY Management.

On December 5, 2014, plaintiffs filed an amended complaint. In that amended complaint, plaintiffs claim that Milford was wrongfully terminated by defendant, that defendant was running a "Smear Campaign" against Milford, and that the Settlement Letter was an "Extortion Demand." In the amended complaint, they seek to hold defendant liable to the unit owners in the Condominium for alleged malfeasance and self-dealing.

In the first cause of action, plaintiffs seek money damages on behalf of the Condominium for defendant's various acts of

alleged malfeasance. In the second and third causes of action in the amended complaint, plaintiffs seek judicial declarations that defendant breached the By-Laws and his fiduciary duties in numerous ways, including, among other things, creating "secret" executive committees and failing to comply with his "non-discretionary duty" to call a special meeting requested by the three Sponsor Board members, under section 2.13 of the By-Laws. Defendant is also accused of failing to provide documents to plaintiffs, specifically proxies and ballots from the 2014 Owners Meeting.

In the second cause of action, plaintiffs want a declaration that defendant breached his fiduciary duties by failing to call the special meeting. They seek injunctive relief requiring that defendant do so. In the third cause of action, plaintiffs seek a declaration that defendant "may not continue to conceal the proxies and election ballots", and that the Condominium has a right to inspect those and other documents, such as the retainer agreement and "work product" from the attorneys defendant hired on behalf of the Condominium. Plaintiffs seek to compel defendant to allow inspection by the Sponsor "and all other unit owners."

In the fourth cause of action, plaintiffs allege that Milford has sustained "an economic, pecuniary and financial loss in its valuable, long-term tenure as managing agent" of the

Condominium, due to the "intentional and malicious acts" of defendant. Plaintiffs allege that defendant "intentionally and maliciously sought to harm [Milford] without justification," with "malevolence as [his][1] sole motivating factor." Plaintiffs identify this cause of action as one for prima facie tort, as well as for tortious interference with contract and tortious interference with prospective business relations.

Discussion

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 (2001); see also Leon v Martinez, 84 NY2d 83 (1994). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" Ginsburg Dev. Cos., LLC v Carbone, 85 AD3d 1110, 1111 (2d Dept 2011), quoting EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005). Further, the court may consider affidavits submitted by the plaintiffs "to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not

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[1]Although they are not suing Lisa Margolin, defendant's wife, for some reason plaintiffs bring Margolin into this cause of action, as another malefactor.

whether they have properly labeled or artfully stated one." Chanko v American Broadcasting Companies, Inc., 27 NY3d 46, 52 (2016). The court notes that plaintiffs rely on Berkman's affidavit to expand on the facts and circumstances alleged in the amended complaint.

The first question is whether plaintiffs can establish the right to bring a derivative action against defendant on behalf of the unit owners of the Condominium. Courts have found that, as in the case with corporations, "[u]nit owners in a condominium must abide by the criteria in Section 626 (c) of the [Business Corporation Law], requiring those seeking to bring a derivative claim[] to first attempt to have the Board initiate the action." Tsui v Chou, 2014 WL 3373446, *2, 2014 NY Misc LEXIS 3094, *5 (Sup Ct, NY County 2014), affd as mod on other grounds 135 AD3d 597 (1st Dept 2016). Despite the fact, as plaintiffs point out, that the New York Condominium Law does not specify this rule, this court believes that a demand on the Board is required in the case of condominiums as well as of ordinary corporations.

The New York Court of Appeals has recognized that a plaintiff seeking to initiate a derivative action must "set forth in the complaint - with particularity - an attempt to secure the initiation of such action by the board or the reasons for not making such effort [internal quotation marks and citation omitted]." Bansbach v Zinn, 1 NY3d 1, 8 (2003). If the demand

would be futile, it will be excused. Id. at 9. As relevant here, the complaint must allege, with particularity, "that a majority of the board of directors is interested in the challenged transaction," either by "self-interest" or where "a director with no direct interest in a transaction is controlled by a self-interested director [internal quotation marks and citation omitted]," or is otherwise interested, as explained further in Bansbach. *Id.*

In the present action, plaintiffs made no pre-action demand upon the Board to remove defendant as President, claiming demand futility. This court finds that a demand would obviously have been futile, as the "Retain-Milford" plaintiffs could not expect a Board comprised of a majority of "Remove-Milford" Board members, to agree to act to remove defendant from his office, when it was the "Remove-Milford" Board members who voted to make defendant President of the Board after plaintiffs had objected to his presidency.[2] Plaintiffs may maintain a shareholders' derivative action without making a demand on the Board.

To allege a claim for breach of fiduciary duty, "plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." Burry v Madison Park Owner LLC, 84

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[2]There is no substantial allegation, however, that defendant "controls" the other Board members.

AD3d 699, 699-700 (1st Dept 2011). In the present case, there is no question that defendant, as a Board member, owed a fiduciary duty to the shareholders, including the Sponsor. However, plaintiffs, while offering a slew of allegations of misconduct, fail to show how these various acts harmed anyone except Milford, to whom no duty was owed. They certainly do not show how the Condominium was harmed merely because Milford was replaced by another management company.

Assuming that offering the Settlement Letter to Milford was wrongful (while this court does not see how this letter is extortionate), the Board voted by a majority to terminate Milford with full knowledge of the existence of the Settlement Letter. In fact, the Board heard every argument which plaintiffs insist on calling the "Smear Campaign," and plaintiffs' rebuttal, and made their own determination in the face of these facts. That the Board sided with defendant rather than with plaintiffs does not establish a breach of fiduciary duty, much less damages. If defendant's act in terminating Milford was in some way a breach of fiduciary duty, his act was vindicated by a majority vote of the Board to terminate Milford. Milford's termination is traceable to the Board, not defendant. In fact, the Board had a fiduciary duty to remove Milford as a result of the vote of the unit owners. See 40 W. 67th St. v Pullman, 100 NY2d 147, 156 (2003) ("[t]he Board was under a fiduciary duty to further the

collective interests of the cooperative").

The remainder of plaintiffs' individual allegations of wrongdoing does not establish a breach of fiduciary duty claim against defendant, and requires no declarations. Plaintiffs insist on faulting defendant for not calling a special meeting, while this court has already found that plaintiffs did not call for a special meeting to remove defendant from office. Plaintiffs assertion that they want a special meeting without stating the purpose of the meeting is insufficient to state a cause of action for breach of duty since Section 2.13 requires that they state a "purpose of the meeting".

Plaintiffs' claim that defendant has had a number of "secret meetings" in breach of his duties as President of the Board is conclusory without specifying any facts. Apparently, defendant, on one occasion, asked to speak with the other Resident Board Members, and called it an "Executive Committee" in an email. However, there is no allegation that any Board business or vote ensued, and there is no rule that like-minded Board members cannot meet to discuss issues amongst themselves which might come up later in an official meeting.

As for the issue of defendant's offer to the Board of the so-called "Halstead study," the court does find it problematic that it has not been shown that this document was actually authorized by Halstead. However, as defendant points out, the

study related to the issue of the Sponsor's ownership of units, but has no bearing on the termination of Milford, which is the action which plaintiffs claim was unlawful. As plaintiffs suffered no damages from defendant's act of disseminating the "Halstead Study", there is no basis for a claim of breach of fiduciary duty based on that document.

Plaintiffs seek a declaration that they are entitled to certain documents, including documents created by the Condominium's attorney, and the ballots and proxies from the September 2014 meeting. However, this is not a claim they can make against defendant, as he is not the party who allegedly breached a fiduciary duty to provide these documents to plaintiffs (or, at least, to the Sponsor). It is the Board to whom this request must be made, and the Board is not a party to this lawsuit. As has been stated, defendant does not control the Board; it is made up of individuals perfectly able to decide such demands for records, of course, with a vote from defendant. Any claims that plaintiffs have made, or could make, for declarative of injunctive relief that do not directly involve defendant's obligations towards the Sponsor, but which should have been directed to the Board, are without merit.

Plaintiffs' fourth and final cause of action says that, due to defendant's "intentional and malicious acts," as set forth in the complaint, Milford suffered "an economic, pecuniary and

financial loss in that its valuable, long-term tenure as managing agent of Liberty House was terminated in bad faith," and thus, that Milford was damaged, which plaintiffs characterize as three separate tort claims: prima facie tort, tortious interference with contract and tortious interference with prospective business relations.

To alleged prima facie tort, the plaintiff must plead the "intentional infliction of harm without justification or excuse, which results in special damages, by one or more acts which would otherwise be lawful [internal quotation marks and citation omitted]." Wiggins & Kopko, LLP v Masson, 116 AD3d 1130, 1131 (3d Dept 2014). The plaintiff must act with "disinterested malevolence [internal quotation marks and citation omitted]." Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 333 (1983). Since plaintiffs insist that defendant acted to "extort" money from them, his intent was not "disinterested malevolence," but the advancement of his own financial interest.

Further, special damages must be "specific and measurable." Bohn v 176 W. 87th St. Owners Corp., 106 AD3d 598, 599 [1st Dept 2013). Plaintiffs, who, in the amended complaint, are seeking unspecified millions of dollars in damages, have not pled special damages.

Plaintiffs have not pled tortious interference with contract, based on defendant's alleged success in convincing the

Board to terminate Milford's contract. A claim for tortious interference with contract must allege the existence of a valid contract between plaintiff and a third party, defendant's knowledge of that contract, that defendant intentionally and improperly procured the breach of that contract, and that plaintiff was damaged. See White Plains Coat & Apron Co. Inc. v Cintas Corp., 8 NY3d 422, 426 (2007).

Defendant did not procure a breach of Milford's contract; the contract was not breached. Rather, the Board voted to terminate the contract under the express language of the contract's at-will termination clause. A termination of an at-will contract under the terms of that contract is not a breach of contract such as would support a claim for intentional interference with contract. See Miller v Mount Sinai Med. Ctr., 288 AD2d 72, 72 (1st Dept 2001). Plaintiffs have no recourse to a theory that defendant breached an implied covenant of good will in allegedly obtaining the termination of the contract, because such a clause will not be read into the termination of an at-will contract. See Ingle v Glamore Motor Sales, 73 NY2d 183, 188 (1989).

There is a much harder standard to be met in the tort of tortious interference with prospective business relations. First, this case does not involve a prospective business relationship; it involves a contract already in existence when

the alleged tort occurred, as discussed above. This, alone, is enough basis to dismiss the claim. Further, tortious interference with a prospective business relationship requires, comparable with prima facie tort, a showing "that defendant's conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic considerations." Shared Communications Servs of ESR, Inc. v Goldman Sachs & Co., 23 AD3d 162, 163 (1st Dept 2005). Plaintiffs have mot made such a showing.

Plaintiffs do not show malice where, by their own allegations, they recognize that defendant was discontented with Milford's management of the Condominium, and that he shared that discontent with the other Board members, who agreed with defendant even after learning about the Settlement Letter. There is no showing here of malice, and this cause of action must be dismissed. The Sponsor and Milford have no direct claims against defendant.

Nonetheless, this court finds that this action is not a "SLAPP" suit, as defendant claims; that is, a "strategic lawsuit against public participation" under New York Civil Rights Law §§ 70-a and 76-a. See T.S. Haulers, Inc. v Kaplan, 295 AD2d 595, 596 (2d Dept 2002). Under Civil Rights Law § 76-a (1) (a), a SLAPP suit is "an action . . . for damages that is brought by a public applicant or permitee, and is materially related to any

efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." T.S. Haulers, Inc. v Kaplan, 295 AD2d at 596. Even assuming that the Sponsor was a "public applicant" because 30 years ago it applied to the Attorney General's office to approve the Offering Plan, and received permission, the action is not materially related to "any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." Thus, there is no basis for any award of the attorneys fees that defendant incurred in this lawsuit.

Therefore, it is hereby

ORDERED that the motion brought by defendant John Dellaportas to dismiss the complaint is granted, but the application for attorneys fees is denied; and it is further

ORDERED that the complaint is dismissed with costs and fees to John Dellaportas as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 3, 2017

ENTER:

DEBRA A. JAMES J.S.C.