Stern v Hampton Club Condominium Bd. of Mgrs.
2017 NY Slip Op 31137(U)
May 24, 2017
Supreme Court, Suffolk County
Docket Number: 12-17887
Judge: Daniel Martin
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SHORT FORM ORDER

COPY

INDEX No. 12-17887

CAL. No. 16-00388EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 8-2-16
ADJ. DATE 1-24-17
Mot. Seq. # 002 - MotD

ELENA STERN,

Plaintiff,

- against -

HAMPTON CLUB CONDOMINIUM BOARD OF MANAGERS,

Defendant.

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Upon the following papers numbered 1 to 87 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33 - 85 ; Replying Affidavits and supporting papers 86 -87 ; Other memorandum of law 32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the plaintiff's first and second causes of action are dismissed, and is otherwise denied.

The plaintiff is the owner of unit #25 in a 28-unit condominium community known as Hampton Club Condominium (HCC) located at 545 Hampton Road, Southampton, New York. The defendant is the manager of HCC and is charged with the oversight of HCC's recreational facilities and common areas. Each condominium owner in the community is referred to as a home owner. The rights and obligations of home owners are set forth in HCC's Declaration Establishing a Plan of Condominium Ownership (the Declaration), By-Laws, and Rules and Regulations.

It is undisputed that the plaintiff and her now deceased husband purchased unit #25 on or about January, 1998, and that between the date of their purchase and 2004 the plaintiff spent summers in the unit while residing full-time in New Jersey. The plaintiff rented out her unit in the summers of 2008 and

2009. Article XVI of the Hampton Club Condominium Offering Plan permits home owners to lease their unit pursuant to the Rules and Regulations Relating to Renting of Units (the rental rules or RRRU) promulgated by the defendant Hampton Club Condominium Board of Managers (the defendant or the Board). In accordance with the RRRU, a homeowner must seek the defendant's approval to rent their unit, and post a $2,500.00 security deposit "to ensure compliance by the lessees with the rules and regulations of the condominium and reimbursement of any damages to the common elements caused by lessee or occupants of the unit during the term of the lease." In the event of a violation of the RRRU or the "other rules and regulations of the Condominium, the Board of Managers shall have the right to assess appropriate penalties and apply all or part of the security deposit for satisfaction of the same."

It is further undisputed that nonparty Morley Property Management Inc. has acted as the property manager and agent for the defendant pursuant to a written contract and extensions running from October 2, 2003 through the present, and that said corporation employed nonparty Juli Oldham-Powers as the property manager for HCC at all relevant times herein. It appears that the plaintiff entered into a written lease with Patricia Karp (Karp), representing the Karp Development Corp., to rent her unit from May 20, 2009 through July 31, 2009, after obtaining the necessary approval and submitting a security deposit of $2,500. By letter dated July 13, 2009, Oldham-Powers advised the plaintiff of certain complaints received about her tenants, including alleged disturbances of the peace, occupancy by unauthorized guests, the use of the parking spaces of other homeowners, verbal abuse to homeowners, and an illegal subleasing during the summer. Said letter notified the plaintiff that the Board "intends to revoke your rental privileges until further notice," and that "[f]uture violations may result in forfeiture of your rental deposit, imposition of fines and the placement of a lien on your unit."

On August 12, 2009, the plaintiff responded by email to Oldham-Powers' letter and indicated that she had spoken to the tenants, who agreed to abide by the condominium rues, that she was not present to oversee the conduct of her tenants and "was unaware of their misbehavior towards the other residents," and that she "[apologizes] once more for what happened and would like to know the current status of my rental privileges." On August 13, 2009, Oldham-Powers responded by email to the plaintiff advising that she would forward the plaintiff's email to the defendant. The plaintiff occupied her unit for the month of August 2009.

By letter dated January 7, 2010, Edward M. Taylor, Esq. (Taylor), attorney for the Board, advised the plaintiff that, based on her tenants' continued violations of the rules and regulations of the condominium after July 13, 2009, the Board had decided to revoke her rental privileges for 2010 and to retain her 2009 security deposit. The plaintiff occupied her unit in the summer of 2010, and rented her unit for portions of the summers of 2011, 2012, and 2013 with the approval of the Board and, because their were no further issues with those tenants, her security deposits for those years were returned.

The By-Laws of the Hampton Club Condominium provide that "the affairs of the Condominium shall be governed by a Board of Managers," that "The Board may exercise all such powers of the Condominium which are lawful and authorized by the Declaration and Bylaws," including making repairs, restoration or alteration of any home or the common elements, abating nuisances, and enjoining or seeking damages from home owners for violations of the rules and regulations of the condominium.

The plaintiff commenced this action by the filing of a summons and complaint on June 12, 2012, setting forth three causes of action. In her first and second causes of action, the plaintiff respectively alleges that the revocation of her rental privileges for 2010, and the retention of her 2009 security deposit, were"without just cause." In her third cause of action, the plaintiff alleges that the roof of her unit is a common element, that her roof is the source of a "moisture buildup in the premises" causing mold in, and a deterioration of, the premises, and that the defendant has refused to repair or replace her roof.

The defendant now moves for summary judgment dismissing the complaint on the grounds that its actions were taken in good faith to further the legitimate interests of the condominium, and that it acted reasonably in investigating the plaintiff's complaints about moisture in her unit and venting the roof in a timely manner. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the defendant submits the pleadings, the transcripts of the deposition testimony of the plaintiff, the affidavit of Oldham-Powers, the relevant organizational documentation, and certain correspondence between and amongst the parties and their contractors. At her deposition, the plaintiff essentially testified in conformance with the undisputed facts. In addition, she stated that she and her daughter occupied her unit in August 2009 and the summer of 2010, that she rented her unit for the summers of 2011, 2012, and 2013, and that she could not find a tenant for the summers of 2014 and 2015. She indicated that her unit shares a building with a unit owned by a Mr. and Mrs. Gordon, that her unit is a two-floor dwelling that includes two parking spots for residents and two for guests, and that her unit does not have a basement or a garage. The plaintiff further testified that the washer and dryer in her unit is housed in a separate room on the second floor, that the dryer was purchased in 1998, and that she was aware before commencing this lawsuit that the dryer was improperly venting into the attic in her unit. She indicated that she believes that the defendant's claims that there were additional violations of the condominium rules by her tenant after July 13, 2009 to be a lie, that she asked the Board to reconsider its decision to revoke her rental privileges for 2010 but was ignored, and that she was expecting to receive $29,000 for the rental of her unit in 2010. She stated that she first observed "leaks" in her unit at the end of 2009 and the beginning of 2010, that at first there was just "bulging spots" in the spare rom on the second floor, and that she did not pay much attention to the issue when she was there in the summer of 2010. She declares that there was "thick mold" in the same location as the bulging spots by the end of 2011, and that she spoke with Oldham-Powers by telephone call regarding the problem and followed up with an email. She acknowledged that she received an email response wherein Oldham-Powers stated that she and an engineer had inspected the unit and that it

appeared that the mold on the ceiling and wall was "not coming from the outside," but was due to the plaintiff turning off the heating and ventilation system and leaving the unit "all closed up."

The plaintiff further testified that she hired a certified mold remediation contractor and inspector who "treated the mold" and provided a written inspection report which indicated that, in his professional opinion, he believed "the attic area is not properly ventilated," and that the roof should be checked for leaks. She stated that, after the defendant did not act, she hired a roofer who inspect her roof and found a leak over her "small bedroom," that she sent the roofer's findings to Oldham-Powers, and that Oldham-Powers said that the Board would repair the "roof to the eaves," but never did so. She indicated that there was no further mold or leaking in her unit between 2012 and 2015 but there was mold on the beams in the attic, that the Board did "something to [the] flashing" of her roof in 2015, and that the dryer and venting "tube" were installed by a professional hired by her husband. The plaintiff further testified that, after Oldham-Powers told her the dryer was venting into her attic, she "covered" an "opening in the ceiling," and that she does not know, nor does she care, where the tubing from the dryer goes.

In her affidavit, Oldham-Powers swears that she had received multiple complaints from other HCC residents about the plaintiff's tenants prior to July 13, 2009, that one resident continued to complain between July 13, 2009 and July 30, 2009, and that the plaintiff did not submit a lease for Board approval for August 2009. She states that she sent the letter dated July 13, 2009 to the plaintiff, that she did not hear back from the plaintiff until August 12, 2009, and that she forwarded the plaintiff's response to the Board. She indicates that she was advised by the Board that they conferred with their attorney regarding the plaintiff's 2009 rental, that the Board discussed the plaintiff's situation again at its meeting of November 19, 2009, and that she received a copy of said attorney's letter dated January 7, 2010 advising the plaintiff that the Board had revoked her rental privileges for 2010 and retained her security deposit. Oldham-Powers further swears that the plaintiff advised her by email in or about November 2011 that she observed mold on the ceiling of her unit, that she retained an engineer to inspect the plaintiff's unit, and that she and the engineer inspected the unit on November 7, 2011. She states that she and the engineer "noted right away that the HVAC system was not turned on and all the widows in the unit were closed," and that the engineer sent her an email reiterating their findings upon inspection of the unit. She indicated that she informed the plaintiff via email of the engineer's findings, that she had turned on the heating and ventilation system on, that the problem was not caused by leaks, and that the plaintiff should have the interior of the unit cleaned of the mold.

Oldham-Powers further swears that she received an email from the plaintiff dated January 11, 2012 indicating that the plaintiff disagreed that the HVAC unit had been turned off, and that the mold was spreading. She states that she retained a roofer to inspect the plaintiff's unit on January 20, 2012, that she and the roofer inspected the unit and found that there was poor ventilation in the attic, that the second-floor utility room containing the plaintiff's dryer vented directly into the plaintiff's attic, that there was insulation "tucked in the eave vents," and that the roof did not appear to be leaking. She indicates that the plaintiff supplied her with the report of a roofer who inspected the unit for the plaintiff, that her roofer disagreed with the plaintiff's roofer, and that her roofer performed a "water test" of the roof which indicated that there were no leaks in the roof. Oldham-Powers further swears that, in the spring of 2013, the Board's roofer installed a "ridge vent" on the plaintiff's roof without the plaintiff's

consent as the roof is a common element. It is noted that Oldham-Powers lays out the foundation for admission of the exhibits referred to in her affidavit as records kept in the ordinary course of business.

In his report dated April 19, 2012, the plaintiff's roofer states "[t]here is no ridge ventilation along ridge, and cap shingles seem to not seal causing leak on ridge," and that valley shingles "stopped short with shingles under cap shingles on hip causing water to get trapped in cap shingles, and rush right over." In his report dated February 27, 2012,[1] the Board's roofer responds to the report of the plaintiff's roofer, and indicates that he agrees with the need for ridge ventilation, stating "I ... also recommended 'ventilation' as well as intake at the soffits," and otherwise disagreeing with the conclusions of the plaintiff's roofer.

A condominium's board of directors or managers is "statutorily empowered to enforce the condominium's by-laws, rules and regulations" (***Board of Mgrs. of Stewart Place Condominium v Bragato***, 15 AD3d 601, 789 NYS2d 907 [2d Dept 2005]; *see also* Real Property Law § 339-j; ***Board of Mgrs. of Ocean Terrace Towne House Condominium v Lent***, 148 AD2d 408, 538 NYS2d 824 [2d Dept]). Where, as here, an owner of a condominium unit challenges an action by a board of directors, the court must apply the business judgment rule (*see* ***Pascual v Rustic Woods Homeowners Assn., Inc.***, 134 AD3d 1003, 24 NYS3d 81 [2d Dept 2015]; ***Molander v Pepperidge Lake Homeowner's Assn.***, 82 AD3d 1180, 920 NYS2d 201 [2d Dept 2011]; *see also* ***Matter of Levandusky v One Fifth Avenue. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807 [1990]). Under the business judgment rule, court review of the actions of a board of directors is limited to whether the board of directors' actions were authorized, and whether they were taken in good faith and in the furtherance of legitimate interests of the condominium (***19 Pond, Inc. v Goldens Bridge Community Assn., Inc.***, 142 AD3d 969, 37 NYS3d 305 [2d Dept 2016]; ***Skouras v Victoria Hall Condominium***, 73 AD3d 902, 902 NYS2d 111 [2d Dept 2010]).

The defendant has established its prima facie entitlement to summary judgment dismissing the plaintiff's first and second causes of action seeking to recover her security deposit and the loss of rental income for 2010. The defendant's submission establishes prima facie that the 2009 tenants violated the rules and regulations of the condominium, that the Board had the authority to enforce those rules by its actions herein, and that the Board acted in good faith and in the furtherance of legitimate interests of the condominium.

However, the defendant has failed to establish its prima facie entitlement to summary judgment dismissing the plaintiff's third cause of action. There are issues of fact which preclude the granting of summary judgment including, but not limited to, whether improper ridge venting of the plaintiff's roof caused or contributed to the moisture and mold conditions that developed within her unit. Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Avenue. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]).

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[1] Oldham-Powers indicates that the plaintiff delivered her roofer's report prior to the response of the Board's roofer despite it being dated afterward.

In opposition to the motion, the plaintiff submits, among other things, her affidavit, copies of much of the correspondence previously referenced herein, certain photographs, and a copy of a letter by Karp purportedly mailed to the attorney for the Board regarding the complaints made during her occupancy of the plaintiff's unit in 2009. Most of the exhibits attached to the plaintiff's affidavit are unauthenticated or consist of inadmissible hearsay. It is a prerequisite to the admission of a private document offered in evidence by a party to an action that the authenticity and genuineness of the document be established (*see* ***Horowitz v Kevah Konner, Inc.***, 67 AD2d 38, 414 NYS2d 540 [1st Dept 1979]; ***Prestige Fabrics v Novik & Co.***, 60 AD2d 517, 399 NYS2d 680 [1st Dept 1977]). In addition, while hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (***Mallen v Farmingdale Lanes, LLC***, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; ***Stock v Otis Election Law. Co.***, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]). To the extent that any of the plaintiff's exhibit's do not conform to these rules, they have not been considered in the determination of the defendant's motion.

In her self-prepared affidavit, the plaintiff swears that Oldham-Powers is involved in a scheme to bankrupt her and appropriate her unit, that Oldham-Powers' letter dated July 13, 2009 was intended to harass her, and that the accusations against her 2009 tenant in the letter dated January 7, 2010 advising her of the actions taken by the Board "were false." She indicates that other home owners in HCC are renting their units in violation of the rental rules or violating parking rules and other rules of the condominium without consequences, that the Board has no authority to revoke her 2010 rental privileges, and that the Oldham-Powers "teamed up with the Board and tried to foreclose on my unit on December 22, 2014." She states that Karp's letter to the Board attorney establishes that her 2009 tenant moved out of her unit on July 25, 2009. The remaining statements and allegations in the plaintiff's affidavit will be addressed below.

In an unsigned letter addressed to counsel for the Board, dated February 28, 2010, Karp claims that her niece had an "unauthorized and unfortunate party one night over the Memorial Day weekend," that she and her husband would never speed through the condominium property, and that nothing in Taylor's letter of January 7, 2010 is true "for the months of June and July." In the plaintiff's submission it is clear that the subject letter was not mailed by Karp to Taylor but delivered to the plaintiff. In addition, said letter has not been authenticated as genuine. Regardless, the undersigned will consider the letter for the purposes of this motion only as the defendant does not dispute that it was received by Taylor. In any event, the subject letter does not raise an issue of fact regarding the actions of others, including Karp's niece, who visited with or otherwise temporarily occupied the plaintiff's unit during the time period in question.

The undersigned now addresses the remaining statements and allegations in the plaintiff's self-prepared affidavit.[2] To the extent that said affidavit includes information regarding the moisture and mold condition in her unit, it is academic based upon the determination that the defendant is not entitled

[2] The plaintiff's affidavit contains numerous statements which raise matters and other factual issues which are not relevant to her causes of action herein and have not been pled in her complaint. Although not necessary, the undersigned addresses a few of these matters, as they are the issues given more emphasis in the plaintiff's affidavit.

to summary judgment on its third cause of action. The affidavit also evidences a misunderstanding of the import and meaning of Oldham-Powers letter dated July 13, 2009 regarding the plaintiff's ability to rent her unit for August 2009, that her request for information regarding her ability to rent for August 2009 was made well after the time to rent for that month had passed, and the affidavit fails to include admissible evidence that such a rental was a realistic possibility. In addition, the plaintiff's remaining allegations that the Board acted inappropriately in matters not related to the causes of action set forth in her complaint, and that the actions of others were in violation of the rules and regulations of the condominium, are based on conjecture, speculation and supposition. To the extent that said allegations are intended to raise an issue of selective enforcement, the plaintiff's affidavit fails to establish that the Board was aware of her allegations against other home owners, that she made any such complaints to the Board prior to the submission of her affidavit, or that the Board failed to act appropriately in determining any individual case of an alleged violation at any time. To the extent that said allegations are intended to raise an issue of the Board's bad faith, the plaintiff's contentions are without merit.

It is well settled that mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*). Accordingly, the defendants motion for summary judgment dismissing the complaint is granted to the extent that the plaintiff's first and second causes of action are dismissed.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining cause of action shall continue (*see* CPLR 3212[e][1]).

Dated: MAY 24, 2017

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION