Wolf v 570 Park Ave. Apts., Inc.
2017 NY Slip Op 31435(U)
June 28, 2017
Supreme Court, New York County
Docket Number: 656153/2016
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

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MATHEW WOLF, ANN WOLF

Plaintiffs,

- v -

570 PARK AVENUE APARTMENTS, INC.,

Defendant.

INDEX NO. 656153/2016

MOTION DATE 2/13/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this application to/for DISMISSAL.

Upon the foregoing documents, it is

Decided that defendant's motion to dismiss is granted in part and denied in part. Plaintiffs are the owners of a 285 shares of capital stock that has been allocated to the apartment known as 10-A at 570 Park Avenue, New York, New York. Plaintiffs hold a proprietary lease leased by defendant. In early 2015, plaintiffs wished to perform renovations in their apartment. The proprietary lease requires that plaintiffs obtain consent in the form of an "alteration agreement." Accordingly, on February 27, 2015, plaintiffs submitted a proposed alteration plan to defendant. Defendant did not approve this draft and informed plaintiffs of its problems with the proposed plan. According to the Complaint, over the next seven months, the parties negotiated the terms of the alteration. Discussions specifically included window replacement and soundproofing. On September 14, 2015, the parties concluded their negotiations and entered into a final alteration agreement (the "Alteration Agreement") which included provisions for window replacement and

soundproofing. During the construction, it became apparent that the window replacement could only be done with additional work performed on the masonry and façade of the building. Plaintiffs' engineers determined that the new windows could not be properly anchored to the masonry due to the alleged deteriorated condition of the masonry piers which could no longer provide the proper structural support. Plaintiffs claim that under the proprietary lease, masonry and similar external façade work is the responsibility of the building and not individual stockholders.

Upon discovering the alleged defective condition, on February 16, 2016, plaintiffs provided notice to defendant of the defect and advised defendant that it was defendant's responsibility to bear the costs. In the notice, plaintiffs allegedly offered to have their contractor perform the work and would seek reimbursement. Defendant did not respond or otherwise object to the February 16, 2016 notice. On February 23, 2016, the parties with their engineers met to discuss the masonry work that would be performed by plaintiffs. At no time did defendant inform plaintiffs that it would not reimburse plaintiffs for the masonry work or otherwise inform plaintiffs of its belief that it was not responsible to perform the work. Plaintiffs submitted several reimbursement requests for the masonry work, but said requests have not be fulfilled.

Plaintiffs commenced the instant suit alleging one cause of action for breach of contract. The alleged breach of contract specifically lists two instances where plaintiffs believe that defendant breached an agreement with plaintiffs. Specifically, the proprietary lease provides with respect to outside masonry work that:

> "The Lessor shall keep in good repair the foundations, sidewalks, walls (except interior walls of apartments), supports, beams, roofs, gutters, fences, cellars, chimneys, entrances and street and court doorways, common halls, common

> stairways, windows, elevators, pumps and tanks, and all main and principal pipes for carrying water, gas or steam through the Building, and the main drain pipes and electrical conduits, together with all plumbing, heating and other apparatus intended for the general service of the Building, except those portions of any of the foregoing which it is the duty of the Lessee to maintain and keep in good repair as in this lease provided, it being agreed that the Lessee shall give the Lessor prompt notice of any accident or defect known to the Lessee and requiring repairs to be made and that the Lessor's obligations are subject to the provisions of Paragraph 34 hereof. All such repairs required to be made by the Lessor shall be at the Lessor's expense, unless the same shall have been rendered necessary by the act, or neglect, or carelessness of the Lessee, or any of the family, guests, employees, or subtenants of the Lessee in which case this expense is to be borne by the Lessee."

Plaintiffs allege that despite the February 16, 2016 notice of the defective condition and reimbursement proposal, and despite defendant's failure to object to said notice and even defendant's participation on February 23, 2016 in the meeting regarding the masonry work, defendant has not paid for the masonry work in violation of the proprietary lease.

Further, with respect to soundproofing the Alteration Agreement states in ¶10H that:

All new materials and construction with respect to wall, floors and ceilings, shall be at least equivalent in sound absorption capabilities to the original building construction.

Plaintiffs allege that even though the soundproofing plan originally proposed in February 2015, maintained or exceeded the current soundproofing capabilities, the Board's refusal to accept that proposal and the Board's "forcing" of the upgraded soundproofing was in breach of the proprietary lease and the alteration agreement.

Defendant moved to dismiss the Complaint based upon CPLR 3211(a)(1) and (7). Specifically, the documentary evidence of the Alteration Agreement show that plaintiffs cannot maintain an action. Defendant also argues that the Complaint should be dismissed based upon violation of CPLR 217 as the causes of action needed to be brought in an Article 78 proceeding and are subject to the shorter four-month statute of limitations.

As a threshold matter, the motion to dismiss this action under CPLR 217 is denied. This action is a breach of contract action and subject to a six-year statute of limitations. The action is not seeking to compel the board to perform any action, nor is it alleging that the Board acted in contravention to its governing documents (*see eg Buttitta v Greenwich House Co-op. Apartments, Inc.*, 11 AD3d 250 [1st Dept 2004][allegation that board of coop acted in contravention to governing documents subject to four-month statute of limitation for an Article 78 proceeding]). Rather, here, plaintiffs alleged that defendant acted in violation of the parties Alteration Agreement and the Proprietary Lease. Clearly, the Alteration Agreement is not a Board's governing document. There is case law that states that a proprietary lease needs to be read together with the bylaws and other corporate governing documents to determine relationship issue between a Board and its cooperative shareholder (*see Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 563 [1985]["The relationship between the shareholder/lessees of a cooperative corporation and the corporation is determined by the certificate of incorporation, the corporation's bylaws and the proprietary lease .... therefore, it is not just the bylaws that are determinative; the relevant provisions of the related documents must be read together."]; *Barbour v Knecht*, 296 AD2d 218 [1st Dept 2002][" The relationship between the shareholders of a cooperative corporation and the corporation, as well as the extent of the authority of the board of directors, is determined by the certificate of incorporation, the bylaws and proprietary lease, which must be read together."]). However, in a recent case, after denying the same argument on waiver grounds, the Appellate Division, First Department definitively stated "[I]n any event, this is an action for breach of a proprietary lease; it was timely commenced within six years of defendant's denial of [plaintiff's] application for transfer of the apartment from their mother's estate" (*Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136

AD3d 486, 488 [1st Dept 2016], *affd*, 28 NY3d 1114 [2016]). Here, plaintiffs allege a breach of contract action, specifically that defendant violated the proprietary lease with its demands for soundproofing and failure to pay, and is subject to a six-year statute of limitations (*see Konigsberg v. 333 East 46th St. Apartment Corp.*, 2016 WL 3455940 [NY Sup 2016]).

Defendant's motion to dismiss with respect to the upgraded soundproofing is granted. Paragraph 10H states that the soundproofing will be "at least equivalent in sound absorption capabilities." It does not say it will be equivalent. Furthermore, in the introduction paragraph of the Alteration Agreement plaintiffs state:

> Based on the terms of Page 16, Paragraph 26 of my proprietary lease entered into with you (the "Proprietary Lease"), I hereby request permission to make the alterations, additions and/or improvements (hereinafter collectively referred to as the "Work") to the subject apartment, as such work is set forth in the detailed architectural plans, specifications, and drawings (collectively the "Specifications"), including a room-by-room list of all alterations to be undertaken prepared by FERGUSON & SHAMAMIAN ARCHITECTS, LLP, that is annexed hereto as "Exhibit A.".

Plaintiff clearly agreed that the specifics of the Alteration Agreement were subject to the plans and specification annexed as Exhibit A. Further, plaintiffs have conceded that the final terms of the Alteration Agreement and the specifications were after months of negotiation and were ultimately agreed upon. As the Complaint does not allege that the final version of the soundproofing was different than such agreed upon terms, the cause of action alleging a breach of contract with respect to soundproofing is dismissed. Similarly, any claim that defendant breached the proprietary lease's reasonableness standard is dismissed. Plaintiffs negotiated the terms of the soundproofing and did not reserve any rights. Plaintiffs then signed an agreement agreeing to the terms of the soundproofing and did not bring a declaratory action (or a breach of contract action). Plaintiffs cannot choose to enter into an agreement under the proprietary lease obtaining permission for the renovations, and then bring an action for unreasonableness.

However, the motion to dismiss the masonry work portion of the complaint is denied. Plaintiffs' claim is that the masonry work was due to a defective condition in the masonry and was not part of the scope of the work mentioned in the agreement. In the Alteration Agreement, plaintiffs did agree to "maintenance and repair of any alterations and installations after completion. [I] assume[d] responsibility for all the Work whether or not structural, including without limitation, weather tightness of windows, exterior walls, roofs, flooring and waterproofing of every part of the Building directly or indirectly affected by the Work. However, reading the Complaint broadly, it is not clear that the outside masonry's defective condition was part of the Work and covered by this provision. Giving plaintiffs all favorable inferences, since the Masonry may not have been covered by the Alteration Agreement, the cause of action based upon breach of the masonry work survives dismissal.

Accordingly, it is therefore

ORDERED, that defendant's motion to dismiss the soundproofing portion of the breach of contract cause of action is granted; and it is further

ORDERED, that the remainder of defendant's motion to dismiss is denied; and it is further

ORDERED, that the parties appear for a preliminary conference on August 9, 2017 at 9:30 am in part 58, Room 1164A, in 111 Centre Street, New York, New York, 10013.

This constitutes the decision and order of the Court.

6/28/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:
APPLICATION:
CHECK IF APPROPRIATE:

- [ ] CASE DISPOSED
- [ ] GRANTED
- [ ] SETTLE ORDER
- [ ] DO NOT POST
- [ ] DENIED
- [X] NON-FINAL DISPOSITION
- [X] GRANTED IN PART
- [ ] SUBMIT ORDER
- [ ] FIDUCIARY APPOINTMENT
- [ ] OTHER
- [ ] REFERENCE