82 Retail LLC v Eighty Two Condominium
2012 NY Slip Op 33541(U)
December 17, 2012
Supreme Court, New York County
Docket Number: 152956/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 152956/2012
82 RETAIL LLC
vs.
EIGHTY TWO CONDOMINIUM
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE ______
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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 12/17/12

______, J.S.C.
HON. EILEEN A. RAKOWER

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

---X

82 RETAIL LLC,

Plaintiffs,

-against-

THE EIGHTY TWO CONDOMINIUM, THE BOARD OF MANAGERS OF THE EIGHTY TWO CONDOMINIUM, ANNA ARONZON, ALANNE BAERSON, COLLIN PHILLIPS, AND ROSINA SAMADINI,

Defendants.

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Index No. 152956/2012

DECISION AND ORDER

Mot. Seq.01

HON. EILEEN A. RAKOWER:

Presently before the Court is Defendants' motion to dismiss the Verified Complaint, with prejudice, pursuant to CPLR 3211(a)(1) and (7). Plaintiff, 82 Retail, LLC, opposes.

Plaintiff is the owner of the Commercial Unit No. 1 ("Commercial Unit") located at 82 University Place, New York, New York (the "Building"), pursuant to a Unit Deed from 82 University Place Corp. ("Sponsor") to Plaintiff dated February 8, 2011 and recorded on February 22, 2011. The Commercial Unit is a part of the condominium association known as Eighty Two Condominium ("the Condominium"). Defendant Board of Managers of the Eighty Two Condominium (the "Board") is an unincorporated association consisting of certain unit owners of the Condominium elected to, among other things, manage the property and business of the Condominium in accordance with the Condominium's By-laws and Declaration. Defendants Anna Aronzon, Alanne Baerson, Collin Phillips, and Rosina Samadini ("the Individual Defendants") are members of the Board and owners of residential condominium units in the Building. Amarjit Bhalla ("Bhalla") is the sole member and manager of Plaintiff and a member of the Board.

The Verified Complaint states that on or about February 8, 2011, Plaintiff acquired title to the Commercial Unit together with a 14.60 undivided interest in the Common Elements of the Condominium. The Commercial Unit was, at all relevant time, located in a zoning district in which commercial use was permitted "as-of-right." The Certificate of Occupancy for the Building classifies the Commercial Unit under Building Code Occupancy Group C, Zone Use Group, Group 6, which permits, : "eating or drinking establishments . . .," "food stores," "and "candy ice stores." On or about February 8, 2011, Sponsor executed and filed an Amendment of Declaration dated February 8, 2011 and recorded on February 22, 2011, which states that "except the commercial unit which shall be used for commercial purposes, each Unit may be used only as a residence . . ." Article 18 of the Declaration, Section D, provides that. "Notwithstanding anything contained in the Condominium Documents to the contrary, but subject to any limitation interposed by the Condominium Act, no Amendment to the Condominium Documents shall be adopted which would: v. change the permitted used [sic] of any Unit or such Unit's Common Interest, unless the owner of such affected Unit shall consent thereto to joining in the execution of such Amendment." The Bylaws (Article IX) provides that, "In any case any of these By-Laws conflict with the provisions of said statute [Article 9-B of the Real Property Law of the State of New York] or of the Declaration, the provisions of the status [sic] or of the Declaration, whichever the case may be, shall control." Sponsor turned over control the Condominium to the Board Managers as of April 29, 2011.

The Verified Complaint alleges that Defendants unlawfully changed the permitted use of Plaintiff's Commercial Unit without Plaintiff's consent after Plaintiff advised Defendants of its intent to lease the Commercial Unit. Plaintiff states that Defendants acted in violation of the express terms of the Declaration of the Condominium and By-Laws by approving and adopting an Amendment to the By-Laws and the Second Amendment to the Declaration without Plaintiff's consent. The Amendment to the By-Laws provided that: "the Commercial Unit shall not be used for: (I) any restaurant, bar, and/or any other establishment in which food and/or beverages . . . are prepared and/or served . . .; or (ii) any noise causing use . ..". The Second Amendment to the Declaration, dated September 23, 2011, also prohibits the use of the Commercial Unit for (I) any restaurant, bar, and/or any other establishment in which food and/or beverages . . . are prepared and/or served . . .; or (ii) any noise causing use . ..".

The first two causes of action of the Verified Complaint seek declaratory relief. The first cause of action seeks a declaratory judgment that the Amendment to the By-Laws and the Second Amendment are null and void. The second cause of action seeks a declaratory judgment that Plaintiff is entitled to entry of a judgment declaring that the Commercial Unit may be used for "Food Stores, including supermarkets, grocery stores, meat stores, or delicatessen stores;" "Candy or ice cream stores;" "Eating or drinking establishments with entertainment, but not dancing . . ." (second cause of action).

The Verified Complaint, alternatively, asserts the following claims: breach of contract based on Defendants' breach of the terms of the Declaration and Bylaws when approving and adopting the Proposed Amendment to the By-Laws and the Second Amendment without Plaintiff's consent (third cause of action); breach of fiduciary duty owed to Plaintiff by Defendants in accordance with the Declaration and By-Laws (fourth); breach of contact based on Defendants' breach of the terms of the Declaration and Bylaws when approving and adopting the Proposed Amendment to the By-Laws and the Second Amendment without Plaintiff's consent (fifth); breach of fiduciary owed to Plaintiff by Defendants in accordance with the Declaration and By-Laws (sixth); tortious interference with a contract of Plaintiff and GSR Yogurt (seventh); and a derivative action against the Board (eighth cause).

Defendants seek to dismiss Plaintiff's Verified Complaint pursuant to CPLR 3211(a)(1) and (7). Defendants submit the affidavit of defendant Anna Aronzon, a member of the Board. Annexed to Aronzon's affidavit as exhibits are the following: copies of the First through Fifth amendments to the Offering Plan for Eighty Two Condominium; a copy of the by-laws for the Eighty Two Condominium, a copy of the Condominium's Declaration; First Amendment to the Declaration; proposed Bylaw Amendment; the Second Amendment to the Declaration; and a redacted copy of the lease between Plaintiff and GSR Yogurt Union Square, LLC.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;

[and]

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendants claim that dismissal of Plaintiff's Complaint is warranted, pursuant to CPLR 3211(a)(1), based upon the governing documents and amendments. Defendants contend "at the time Plaintiff purchased the commercial unit, the Condominium's governing documents were express that the commercial unit could not be used as a restaurant of any kind." Defendants cite to the Fifth Amendment to the Offering Plan, which provided, "The commercial space will not be used as a restaurant, bar or similar noise causing use." Defendants contend that "in spite of the clear language in governing documents and the amendments thereto that the CU [Commercial Unit] could not be used as a restaurant, two months later, Plaintiff entered into a lease with GSR Yogurt Union Square." Defendants contend that the Second Amendment to the Declaration merely "clarified" the permitted uses of the Commercial Unit, and did not change it, as Plaintiff contends. Accordingly, Defendants state that Plaintiff's consent to changes to Declaration or Bylaws was not required because no "change" to Plaintiff's permitted use was in fact made - just a "clarification." As such, Defendants argue that Plaintiff's claims, including her claims for declaratory relief and breach of contract, lack merit. However, as Defendants themselves acknowledge in their papers, the provision they rely upon in the Fifth Amendment to the Offering Plan as to the permitted use of Plaintiff's

Commercial Unit is open to interpretation. As such, Defendants have failed to provide documentary evidence that conclusively establishes, as a matter of law, the permitted use of Plaintiff's Commercial Unit, and that the subject amendments were mere "clarifications" rather than a change of that use that would dispense with need for Plaintiff's consent for the subject amendments.

Defendants also move pursuant to CPLR §3211(a)(7). Defendants seek dismissal of the first and second causes of actions seeking declaratory relief on the basis that Plaintiff has an adequate remedy at law as demonstrated by Plaintiff's legal claims. However, a party may seek legal and equitable relief in the same action.

Defendants seek dismissal of Plaintiff's fiduciary claims (fourth and sixth claims) on the basis that they are impermissibly duplicative of plaintiff's breach of contract claims. "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Org., Ltd., v. Graham & James LLP*, 269 A.D. 2d 171 (1st Dept 2000) (citations omitted). However, "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." *Id.* (citations omitted). Here, the Verified Complaint sets forth breach of fiduciary claims that are based on the duty owed by the Board to Plaintiff, which is independent of the contract itself. As such, the fiduciary claims are not impermissibly duplicative to warrant dismissal.

Defendants further contend that even if Plaintiff's fiduciary claims are not impermissibly duplicative, they should be dismissed based on the business judgment rule."Where a unit owner challenges an action by a condominium Board of Managers, courts apply the business judgment rule." *Grandees v. Kent N. Assoc. LLC*, 2012 N.Y. Misc. LEXIS 4645, *16-17 (N.Y. Sup. Ct. Sept. 25, 2012) (citations omitted). Furthermore:

> "Under the business judgment rule, the court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws . . . and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision."

(Id).

Here, as the Verified Complaint alleges that Defendants failed to act within the scope of its authority under the governing documents and in good faith, whether the business judgment rule applies is an issue of fact. Dismissal on this grounds is therefore not appropriate at this juncture.

Defendants seek dismissal of the Plaintiff's seventh cause of action which asserts tortious interference with a contract. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Havana Cent. NY2 LLC v. Lunney's Pub, Inc.*, 2007 NY Slip Op 10509, *5 [1st Dept. 2007], *citing Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 424 [1996]). Plaintiff alleges in its Verified Complaint that Plaintiff had a lease with GSR Yogurt, Defendants had notice of the lease, Defendants willfully and maliciously interfered with the lease by refusing to rescind the Proposed Amendment and the Second Amendment despite Plaintiff's demands, that GSR Yogurt terminated the lease as a result of Defendants' acts, and that Plaintiff has suffered damages as a result. However, Defendants provide a copy of that Lease, and point out the Lease provided a provision that allowed GSR Yogurt to rescind if the Board did not rescind the amendments with a 90-day period. Accordingly, as GSR Yogurt's right to terminate was part of the express terms of the contract, there was no breach of any contract by GSR Yogurt. Plaintiff's tortious interference with a contract claim (seventh cause of action) is therefore dismissed.

Defendants seek dismissal of Plaintiff's eighth cause of action, which asserts a derivative cause of action against the Board, based on failure to state a claim. "Whether a unit owner may assert a claim derivatively on behalf of the condominium presents a question of capacity. A derivative action proceeds not on the basis of any individual right, but as an assertion of the interest of the entity by one or more of its owners or members when the management of the entity fails to act to protect that interest." *Caprer v. Nussbaum*, 36 A.D. 3d 176, 184 (2d Dept 2006). The Verified Complaint alleges that prior to bringing the instant action and after Plaintiff secured the lease with GSR Yogurt, Plaintiff had offered the Condominium the cash sum of

$50,000, along with a release of Plaintiff's rights to seek damages incurred, in exchange for the Condominium taking action of rescinding the May 19, 2011 amendment to the Bylaws and Second Amendment. It alleges that as a result of Defendants' actions in refusing to accept the offer, the Condominium was harmed. These factual allegations do not support a derivative action against the Board. They relate to nothing more than an offer to negotiate a settlement of Plaintiff's claims against Defendants in the instant matter. Accordingly, Plaintiff has failed to state a claim for a derivative cause of action against the Board and the claim is dismissed.

Defendants seek dismissal on the basis that the Individual Defendants are improper parties in the event that the Court does not dismiss the Complaint in whole or it part. As set forth by the First Department in *Fletcher*:

> In *Matter of Levandusky v. One Fifth Ave. Apt. Corp.* (75 N.Y.2d 530, 553, [1990]), the Court of Appeals held that the "business judgment" rule was the correct standard of judicial review of the actions of the directors of a cooperative corporation. That rule prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. The Court, however, cautioned that "the broad powers of a cooperative board hold potential for abuse through arbitrary and malicious decision making, favoritism, discrimination and the like." In *40 W. 67th St. v Pullman* (100 NY2d 147, 157 [2003]), the Court of Appeals "reaffirm[ed] [Levandusky's] admonition and stress[ed] that those types of abuses are incompatible with good faith and the exercise of honest judgment. While deferential, the Levandusky standard should not serve as a rubber stamp for cooperative board actions." Thus, arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected by the business judgment rule.

Fletcher v Dakota, Inc., 99 A.D.3d 43, 50-51 (1st Dep't 2012).

Furthermore, Section 12 of the Condominium's Bylaws provides:

Section 12. Liability of the Board of Managers and Unit Owners. Any

> contract, agreement or commitment made by the Board of Managers, shall state that it made by the Board of Managers, as agent for the Unit Owners as a group only and that no member of the Board of Managers, nor individual Unit Owners, shall be liable under such contract, agreement or commitment . .. The Board of Managers shall have no liability to the Unit Owners in the management of the Condominium except for willful misconduct or bad faith, and the Unit Owner's [sic] shall severally indemnify all members of the Board of Managers against any liabilities or claims arising from acts taken by a member of the Board of Managers in accordance with his or her duties hereunder except acts of willful misconduct or acts of bad faith.

In the Verified Complaint, Plaintiff asserts that the Individual Defendants, as Board officers and/or members, acted for their own personal benefit (as residential unit owners) and against the interests of Plaintiff. The Verified Complaint alleges that the Individual Defendants, as Board Officers and Members, excluded Plaintiff from meetings between the Board and Board's counsel. The Verified Complaint alleges that Aronzon (the President of the Board) specifically adjourned a Special Unit Owners' Meeting over Plaintiff's objection and called a special meeting of the Board in violation of the form and timing of notice required under the Declaration for her personal benefit and the benefit of the other Individual Defendants. None of these allegations, even if true, amount to "willful misconduct" or "acts of bad faith" to subject the Individual Defendants to personal liability. Accordingly, the Individual Defendants are improper parties and the Complaint is dismissed as asserted against them.

Defendants move to strike Plaintiff's request for punitive damages. Plaintiff seeks an award of punitive damages in connection with its fourth (breach of fiduciary duty), sixth (breach of fiduciary duty), seventh (tortious interference with a contract), and eighth cause of action (derivative action against the Board). "Punitive damages are not available in the ordinary fraud and deceit case [internal quotation marks and citation omitted]), but are permitted only when a defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations. Mere commission of a tort, even an intentional tort requiring proof of common-law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant." *Hoeffner v. Orrick, Herrington &*

Stucliffe, LLP, 85 A.D. 3d 457, 458 (1st Dept 2011). Here, the claims and factual allegations set forth in the fourth and sixth cause of actions of the Verified Complaint do warrant the imposition of such damages.

Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss is granted only to the extent that the Verified Complaint is dismissed in its entirety as against defendants Anna Aronzon, Alanne Baerson, Collin Phillips, and Rosina Samadini; with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that Plaintiff's plea for punitive damages in the Verified Complaint is stricken; and it is further

ORDERED that the seventh cause of action for tortious interference with a contract and eighth cause of action for derivative action of the Verified Complaint is dismissed.

This constitutes the decision and order of the court. All other relief is denied.

DATED: 12/17/12

EILEEN A. RAKOWER, J.S.C.