Dempsey v 73 Tenants Corp.
2016 NY Slip Op 30029(U)
January 6, 2016
Supreme Court, New York County
Docket Number: 151838/2015
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KATHERINE DEMPSEY;

Plaintiff,

Index No. 151838/2015

-against-

DECISION/ORDER

73 TENANTS CORP.,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Katherine Dempsey commenced the instant action seeking an injunction compelling defendant 73 Tenants Corp. to repair a chimney flue at its own cost. She now moves for an order pursuant to CPLR § 3212 granting her summary judgment on her complaint. Defendant cross-moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint. For the reasons set forth below, plaintiff's motion and defendant's cross-motion are both denied.

The relevant facts are as follows. Defendant is the owner of the residential cooperative building located at 42 East 73rd Street, New York, New York (the "building"). Plaintiff resides in and owns shares in the cooperative allocated to Apartment 2A (the "unit"). She purchased her shares on or about March 5, 2013. At the closing of her purchase, plaintiff and defendant

entered into a proprietary lease agreement (the "Lease").

Paragraph 2 of the Lease provides that:

> The Lessor shall at its expense keep in good repair all of the building including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to paragraph 18 hereof.

In paragraph 18 of the Lease, the responsibilities of the lessee are detailed as follows:

> The Lessee shall keep the interior of the apartment...in good repair...and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment and such refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam, water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment.

Plaintiff claims that there was a fireplace in the unit when she purchased the unit but it had been purposely closed off, was covered by a wall and was not in working order. She then submitted an alteration request to defendant to reopen the existing fireplace. Plaintiff's original contractor, Chimney Doctors, submitted a proposal to reopen the existing fireplace, repair it with new red brick, alter the size of the opening and remove a blockage from the flue located just above the unit's ceiling (the "Work"). Defendant approved this proposal and entered into an alteration agreement with plaintiff on or about March 18, 2013. Pursuant to paragraph 9 of the alteration agreement, the shareholder is responsible for all costs incurred by the shareholder or defendant in connection with the Work. Further, pursuant to paragraph 12 of the alteration

agreement,

> [n]otwithstanding anything to the contrary contained in the Lease, the Shareholder shall be responsible for the maintenance, repair and replacement of the Work and any portions of the Apartment affected by the Work, and for all costs incurred by the Corporation of the Shareholder in connection therewith.

Pursuant to paragraph 7 of the alteration agreement, the shareholder is responsible for any damage to or adverse effect on the building or unit resulting from the Work.

Thereafter, plaintiff's second contractor, United Chimney Corporation ("United Chimney"), reopened the fireplace and repaired the firebox. In or around January 2014, United Chimney discovered that the blockage in the flue was not located just above plaintiff's unit's ceiling. The blockage could only be removed from the unit above plaintiff's unit, which was occupied by Steven Lapidus ("Mr. Lapidus"). Mr. Lapidus agreed to allow United Chimney access to his unit, which was vacant at the time, on February 21, 2014, for one day only. United Chimney was unable to remove the blockage on that day. Mr. Lapidus refused to allow United Chimney further access to his unit.

Due to Mr. Lapidus's refusal to allow United Chimney access to his unit, plaintiff requested that defendant remove the blockage as defendant had access to Mr. Lapidus's unit for the purpose of performing maintenance and making repairs. Plaintiff sent defendant e-mails and letters requesting that defendant remove the blockage at plaintiff's expense and informing defendant that she would take legal action if defendant refused. Defendant refused to remove the blockage as defendant did not agree that it had an obligation pursuant to the Lease to remove the blockage. Thereafter, plaintiff commenced the instant action.

Plaintiff moves for summary judgment on the ground that paragraph 2 of the Lease, the

"Lessor's Repairs" provision, requires defendant to remove the blockage from the flue. Defendant cross-moves for summary judgment dismissing plaintiff's complaint on the grounds that the alteration agreement places any obligation to remove the blockage from the flue solely on plaintiff, that plaintiff has no standing to bring the instant action and that defendant's decision not to remove the blockage from the flue is protected from judicial inquiry by the business judgment rule.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

It is well settled that construction of a written contract is a question of law, appropriately decided by the court on a motion for summary judgment, as long as the contract is unambiguous and the intent of the parties can be determined from the face of the agreement. *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 291 (1973). However, "[r]esolution by a fact finder is required where...interpretation of a contract term is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words." *Time Warner Entertainment Co. v. Brustowsky*, 221 A.D.2d 268 (1st Dept 1995).

In the present case, plaintiff is not entitled to summary judgment on the ground that the provision of the Lease she relies on to establish that the defendant is required to remove the blockage from the flue is ambiguous. Paragraph 2 of the Lease provides that:

> The Lessor shall at its expense keep in good repair all of the building including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to paragraph 18 hereof.

The foregoing provision of the Lease does not unambiguously require that defendant remove the blockage from the flue and reopen the existing fireplace as it is unclear from the face of the Lease whether the removal of the blockage is a repair or maintenance, based on the undisputed fact that the flue and fireplace were purposefully closed off when plaintiff purchased the unit. Because the provision is ambiguous, the determination as to whether the removal of the blockage is a repair or maintenance pursuant to the Lease must be made by the fact finder. Therefore, plaintiff is not entitled to summary judgment on the ground that the Lease requires defendant to make the repair or maintenance as a matter of law.

Additionally, defendant is not entitled to summary judgment dismissing plaintiff's complaint based on its argument that the alteration agreement supersedes the Lease and places any obligation to remove the blockage from the flue solely on plaintiff. Initially, none of the provisions of the alteration agreement upon which defendant rely unambiguously provide that it is the obligation of the plaintiff pursuant to the alteration agreement to remove a blockage from the flue which is not located in her unit and cannot be accessed from her unit. Moreover, although defendant relies on paragraph 12 of the alteration agreement, which places the responsibility for the maintenance, repair and replacement of the Work and portions of the unit

affected by the Work on the shareholder "[n]otwithstanding anything to the contrary contained in the Lease," this provision does not apply to the removal of the blockage from the flue as it applies to the maintenance, repair or replacement of the Work but not to the performance of the Work itself. Further, although defendant relies on paragraph 7 of the alteration agreement, which places responsibility for damage to or adverse effect on the building or unit resulting from the Work on the shareholder, this provision does not apply to the removal of the blockage from the flue as the blockage was not damage caused by plaintiff's Work. Therefore, defendant is not entitled to summary judgment dismissing plaintiff's complaint on the ground that the alteration agreement places any obligation to remove the blockage from the flue solely on plaintiff as a matter of law.

Defendant's argument that it is entitled to summary judgment dismissing plaintiff's complaint on the ground that plaintiff lacks standing because plaintiff cannot demonstrate that there was an existing fireplace when she purchased the unit is without merit as there is a disputed issue of fact as to whether there was an existing but nonworking fireplace when she purchased the unit.

Finally, defendant's argument that it is entitled to summary judgment dismissing plaintiff's complaint on the ground that defendant's decisions not to force Mr. Lapidus to provide access to his unit and not to remove the blockage from the flue are precluded from judicial review by the business judgment rule is without merit. The business judgment rule "prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 537-38 (1990) (internal

citations omitted). However, the business judgment rule does not insulate the cooperative itself from liability where the plaintiff claims that the cooperative breached the proprietary lease. *See Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 222-23 (1st Dept 1999). In the present case, the business judgment rule does not insulate defendant's decisions from judicial inquiry as plaintiff claims that defendant breached the proprietary Lease by not making a repair or maintenance required under the Lease. Therefore, defendant is not entitled to summary judgment dismissing plaintiff's complaint on the ground that the business judgment rule precludes the court from reviewing defendant's decisions.

Accordingly, plaintiff's motion and defendant's cross-motion for summary judgment are denied. This constitutes the decision and order of the court.

Date: 1/6/16

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.