Graham v 420 E. 72nd Tenants Corp.
2016 NY Slip Op 31002(U)
June 1, 2016
Supreme Court, New York County
Docket Number: 154712/2015
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

SHARIE GRAHAM,

Plaintiff,

-against-

420 EAST 72ND TENANTS CORP., STEWARD LEVY, ARNOLD ROSS, ED BISNO, LYNN RUBIN, LARRY CARTER, JOSH FREEDMAN and AUBREY ZICKEL

Defendants.

INDEX NO.	154712/2015
MOTION DATE	05-25-2016
MOTION SEQ. NO.	003
MOTION CAL. NO.	

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 8
Replying Affidavits	9

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion for summary judgment under Mot. Seq. 003, is denied, Plaintiff's motion to compel under Mot. Seq. 002 and motion to lift the stay of disclosure, are granted to the extent stated herein.

Plaintiff is a shareholder of 420 East 72nd Street Tenants Corp. (herein "the Cooperative") and is the owner/lessee of Unit 1D therein. In the summer of 2014, Plaintiff applied to purchase another unit within the Cooperative, and the Defendant Board expressed to Plaintiff an interest in purchasing Unit 1D from her in order to create a gym for the Cooperative. After not hearing from the Cooperative's Managing Agent on whether or not the Board had decided to pursue purchasing Unit 1D, plaintiff retained real estate broker Aimee Denaro and the Unit was listed on November 13, 2014, for the listing price of $499,000.00. On November 28, 2014, Plaintiff alleges to have spoken with Defendant Levy, and on behalf of the Board Defendant Levy offered plaintiff $400,000.00 for Unit 1D. Plaintiff declined this offer because it was below the market value for the Unit.

On December 11, 2014, Plaintiff received an all cash offer of $495,000.00 from Mr. and Mrs. Soffen (herein "the Purchasers). The Purchasers submitted an application to the Board on December 28, 2014, and plaintiff and the Purchasers entered into a contract of sale for the Unit on December 29, 2014. (Aff. In Opp. Exhs. C & D). In late February 2015, Defendant Board's Managing Agent called plaintiff's broker and stated that the sale of Unit 1D to the Purchasers was not approved at a Defendant Board meeting because the Defendants felt the sale price was under market value. (Aff. In Opp. Exh. B). The Managing Agent also stated that the Defendants would consider a sales price of at least $535,000.00 for the Unit. (Id.)

On March 9, 2015, plaintiff and the Purchasers agreed to amend the Contract of Sale for Unit 1D to reflect the defendants' required purchase price of $535,000.00 (herein the "Amended Sale Price") (Mot. Exh. C & Aff. In Opp. Exh. E), and the Purchasers resubmitted their application to Defendants. (Mot. Exh. C & Aff. In Opp. Exh. B). In the interim, Plaintiff

had Unit 1D appraised, and as of March 17, 2015, Unit 1D was appraised with a market value of $525,000.00. (Aff. In Opp. Exh. F).

On April 17, 2015, Erwin F. Lontok, Esq., the attorney representing Plaintiff in the sale of Unit 1D, sent a letter to Defendants' Managing Agent memorializing plaintiff's and the Purchaser's actions in complying with the Board's dissatisfaction of the original contract price, the subsequent Amended Sale Price, and the Board's further request of an increase in the sales price to $610,000.00. (Mot. Exh. C & Aff. In Opp. Exh. G).

Plaintiff commenced the instant action against defendants on May 11, 2015, asserting causes of action for (1) breach of fiduciary duty, (2) tortious interference with a prospective contract, (3) declaratory relief ordering that the sale of plaintiff's apartment be approved, and (4) breach of contract alleging that the defendants acted in bad faith and/or self-dealing in not approving the sale of Unit 1D. Issue was joined, and a limited amount of discovery has since taken place.

This Court directed in its Preliminary Conference Order of October 7, 2015, that defendants provide a written decision either approving or denying the Soffen's application to purchase plaintiff's apartment, thereby resolving plaintiff's Order to Show Cause under Mot. Seq. 001. On October 9, 2015, Defendants' Managing Agent sent a letter to Plaintiff denying the Purchaser's application to purchase Unit 1D. (Mot. Exh. F).

By motion dated January 30, 2016, Plaintiff moved under Mot. Seq. 002 to compel Defendants to comply with This Courts Preliminary Conference Order and Compliance Conference Order of October 7, 2015 and December 16, 2015, respectively, which directed all party depositions to be conducted on or before February 2, 2016. Plaintiff sought an Order directing that (1) depositions of all parties be conducted as soon as possible, (2) compelling the Defendants to appear for and testify at the scheduled oral depositions, (3) conditionally sanctioning the Defendants in the event they do not appear for depositions by striking their Answer and deeming the allegations in the Complaint as admitted, and (4) awarding the Plaintiff damages for costs and attorney's fees in bringing the motion.

Defendant now moves under CPLR 3212 for summary judgment in its favor dismissing Plaintiff's complaint in its entirety. Discovery was stayed pending the determination of the instant motion. Defendant contends that the decision of Defendant to deny the Purchasers' application is fully protected by the business judgment rule, and because Plaintiff has failed to show any discrimination, self-dealing or misconduct on behalf of the defendants, then the acts of defendants are presumed to be in good faith in the exercise of their honest judgment in furthering the corporation's purpose. Defendants further contend that rejection of the sale of Unit 1D was based on the Purchasers' low offer as compared to the Managing Agent providing a sales sheet for other Units in the Cooperative recently being sold for between $560,000,00 and $610,000.00. (Mot. Exh. J). Plaintiff opposes the motion.

Plaintiff brought a subsequent motion under Mot. Seq. 004 for an Order (1) lifting the discovery stay so the Defendants depositions could move forward, and (2) adjourning Mot. Seq. 003 (the instant motion) until Defendants' depositions were taken.

Defendants' Motion for Summary Judgment under Mot. Seq. 003, and Plaintiff's Motion to lift the discovery stay under Mot. Seq. 004:

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

"Under the business judgment rule, which applies to the directors of residential cooperative corporations (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807 [1990]), absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting in 'good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' (Auerbach v. Bennett, 47 N.Y.2d 619, 419 N.Y.S.2d 920 [1979]). Thus, without a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though 'the results show that what [the directors] did was unwise or inexpedient.' (Pollitz v. Wabash R.R. Co., 207 N.Y. 113, 100 N.E. 721 [1912]). Inquiry into claims of fraud and self-dealing is permitted only where a factual basis exists to support such a claim. (Simpson v. Berkley Owner's Corp., 213 A.D.2d 207, 623 N.Y.S.2d 583 [1995])." (Jones v. Surrey Co-op. Apartments, Inc., 263 A.D.2d 33, 700 N.Y.S.2d 118 [1st Dept. 1999]).

Defendants argue that they are entitled to summary judgment dismissing the plaintiff's complaint because the business judgment rule governs their decision not to approve the Purchasers' application. Defendants do not submit much in the way of evidence other than a print-out of what they deem to be sales of "comparable" apartments sold at higher prices than what the Purchasers offered to pay for Unit 1D, and affidavits from Defendant Board Members confirming that it was the Board's decision to deny the Purchasers' application. Plaintiff, on the other hand, has raised an issue of fact, and has provided a basis to permit judicial review into the Board's decision.

Plaintiff provides a showing that the Board may have engaged in self-dealing by denying the application and basing this denial on the sales price being too low, when the Board had previously offered to the Plaintiff to purchase Unit 1D from her at the price of $400,000. The Board's offer was much less than the Purchasers initial offer of $495,000.00. Further, Plaintiff has shown that after the Board initially stated that the

$495,000.00 sales price was too low, and to come back with an offer of at least $535,000, Plaintiff and the Purchasers complied with this request, but the Board still denied the sale.

Issues of fact remain as to whether or not the Board engaged in self-dealing because they had an interest in purchasing Unit 1D. This issue can only be further developed through the discovery process, therefore this motion for summary judgment is premature. The summary judgment motion is denied and the discovery stay is lifted.

Plaintiff's Motion to Compel under Mot. Seq. 002:

CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (see CPLR § 3126; Silberstein v. Maimonides Medical Center, 109 A.D.3d 812, 971 N.Y.S.2d 167 [2nd Dept., 2013]). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (Mateo v. City of New York, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1st. Dept. 2000]).

The plaintiff has not made a clear showing that defendants have willfully, contumaciously, or in bad faith, failed to appear for their depositions. Therefore, sanctioning the Defendants by striking their Answer and awarding the Plaintiff damages for bringing the motion under Mot. Seq. 002 is not warranted. However, the parties shall appear for depositions as stated below.

Accordingly, it is ORDERED, that Defendants' Motion for Summary Judgment under Mot. Seq. 003, is denied, and it is further,

ORDERED, that Plaintiff's Motion to lift the stay of discovery under Mot. Seq. 004, and to Compel the parties to appear for depositions is granted to the extent stated herein, and it is further,

ORDERED, that the discovery stay is lifted, and the parties may proceed with the discovery process, and it is further,

ORDERED, that all party depositions be completed by August 1, 2016, and it is further,

ORDERED, that Plaintiff shall serve a copy of this Order with Notice of Entry upon all Defendants within twenty (20) days from the date of entry of this Order, and it is further,

ORDERED, that the parties appear for a Status Conference, in IAS Part 13, 71 Thomas St., Room 210, New York, New York 10013, on August 17, 2016, at 9:30 a.m.

ENTER:

Dated: June 1, 2016

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE