Wahrsager v Paterline
2016 NY Slip Op 31215(U)
June 27, 2016
Supreme Court, New York County
Docket Number: 653022/2015
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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KAREL WAHRSAGER,

Plaintiff,

Index No.: 653022/2015
Subm. Date: 2/24/2016
Mot. Seq. 001.

-against-

DECISION AND ORDER

RALPH B. PATERLINE, individually and as trustee of the RALPH B. PATERLINE REVOCABLE TRUST, EL MUSTAPHA JABIR, individually and as trustee of the RALPH B. PATERLINE REVOCABLE TRUST, the RALPH B. PATERLINE REVOCABLE TRUST, and 20 EAST 11 OWNERS CORP., named herein as a nominal defendant,

Defendants.

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ELLEN M. COIN, J.:

In this action, plaintiff Karel Wahrsager, holder of a proprietary lease in a cooperative apartment, seeks a declaratory judgment that the changes made by defendants Ralph B. Paterline (Paterline), individually and as trustee of the Ralph B. Paterline Revocable Trust, El Mustapha Jabri (Jabri), individually and as trustee of the Ralph B. Paterline Revocable Trust, and Ralph B. Paterline Revocable Trust, and 20 East 11 Owners Corp. (Co-op), named herein as a nominal defendant (collectively, defendants), to the proprietary leases, were not

properly adopted by the shareholders, and seeks a declaration that the changes are null and void. Plaintiff is also seeking damages for an alleged diminution in the value of her ownership interest in the Co-op as a result of the amendments to the proprietary leases. Defendants move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

In 1987, plaintiff purchased one of the six apartments owned by the Co-op, and located at 20 East 11st Street, New York, New York. The Co-op has 1000 shares, with defendants Jabri and Paterline collectively owning 811 of the issued shares and the other five units in the building. Plaintiff owns the other 189 shares and has never lived in the building. Defendants Jabri and Paterline live in the building. Plaintiff was provided with a proprietary lease that had, up until May 2015, remained unchanged since 1998 (proprietary lease).

In May 2015, plaintiff received a document entitled "Written Consent By > 2/3 shareholders to 20 East 11 Owners Corp. To Change Proprietary Leases" (Defendants' exhibit E at 1). The document notified plaintiff that defendants Paterline and Jabri, who are the majority shareholders, had made changes to all of the proprietary leases, "without a meeting, by written

consent of the shareholder-lessees owning at least two-thirds of the corporation's issues shares, as authorized by Article 6.1 of the proprietary lease" (*id.*). Plaintiff had not been notified that any changes would be made, nor was she asked for her consent to make the changes.

The amended proprietary lease (amended lease) adopted the following changes, in pertinent part:

- The Co-op was provided with a 15-day right of first refusal in the event that a lessee desires to transfer the lease and shares.
- A provision was added giving the right to a minority shareholder to sell the lease and shares to the Co-op for the fair market value of the shares and lease.
- Upon death of a lessee, the consent provision was changed to include an automatic consent for the transfer of shares to certain relatives who had resided in the building with the lessee for the majority of the lessee's ownership and who has met certain income requirements. All other transfers upon death must receive consent by the Co-op Board. This replaced a provision that provided, upon the death of a lessee, "consent shall not be unreasonably withheld to an assignment of the Lease and Shares to a financially responsible member of Lessee's family (other than Lessee's spouse as to whom no consent is required)." Defendants' exhibit C, 1998 proprietary lease at 11.
- A transfer fee, or flip tax, of 2% was added for the sale price.
- Washer and dryer machines were to be used only in the basement of the building and not to be installed in any unit.
- Unless given written consent by the Board or by the lessees owning at least 2/3 of the shares, the lessee shall not grant workmen or others access or a key to the building, "who Lessee knows (or has reason to know) to have performed services for the Corporation that have terminated."
- A provision was added "inviting" lessees to submit their disputes to non-binding arbitration.

[* 4]

(Defendants' exhibit E).

After receiving notice of the changes, plaintiff commenced this action. Plaintiff claims that the majority shareholders have abused their position and made changes that only benefit themselves. Plaintiff alleges that defendants would like to occupy or sell the entire building as a whole, and that the changes have been made to the proprietary lease as a way to force her to sell the apartment to defendants.

In the first cause of action, plaintiff seeks a declaration that the amendment was not properly adopted. Plaintiff alleges that she was not told about any meeting to address the proposed changes and that she did not get a chance to vote. According to plaintiff, the Co-op's By-laws provide that each shareholder at a meeting is entitled to vote. Because she was not given the opportunity to vote, she claims that the amendment is a nullity.

In the second cause of action, plaintiff seeks a declaration that the amendment is void. She argues that defendants have used their position as majority shareholders to make changes that are beneficial to themselves, but not to plaintiff. For example, plaintiff alleges that defendants are "coercing" her into transferring her shares to trigger the right of first refusal. According to plaintiff, she is now prevented

from transferring the apartment to her daughter, even upon plaintiff's death.

The complaint sets forth that "[s]ince Paterline and/or Jabri constitute the entire board of directors of the Co-op, any transfer of shares and proprietary lease proposed by Paterline and/or Jabri will be approved by the Co-op's board of directors" (Complaint, ¶ 42). She believes that the flip tax was added as a way to solely affect her economic interests, as the other defendants "do not intend to sell their shares and proprietary lease" (*id.*, ¶ 45).

Among other problems plaintiff has with the amended lease, plaintiff alleges that she is deprived of the right to have her "chosen caretaker" enter her unit, as unit owners now cannot allow access to people who "performed services for the Co-op but were terminated" (*id.*). She further claims that although the amended lease added a right for her to sell her shares at market value to the Co-op, this "provision is illusory because it is contingent upon the Co-op obtaining financing, which contingency may never occur" (*id.*).

In the third cause of action, plaintiff is seeking $150,000 in damages. She argues that this is due to attorney's fees and the "diminution of value in her ownership interest in the Co-

op."

In support of their motion, defendants provide the 1998 proprietary lease, the Co-op's By-Laws (By-Laws), and the amended lease. They argue that the documentary evidence establishes that an amendment to the lease does not a require the unanimous consent of all shareholders, a vote at a meeting, or notice of such meeting. According to defendants, article 6 of the proprietary lease sets forth that an amendment can occur with written consent of lessees owning 2/3 or more of the shares. Moreover, the By-laws are in accord with the proprietary lease provisions. Defendants argue that plaintiff confuses the procedures required to amend the By-Laws, with the process for amending the lease.[1]

In pertinent part, Article 6 of the proprietary lease, Changes in Proprietary Lease, states as follows:

> "6.1 Consent of Shareholders Required. Each proprietary lease shall be in the form of this Lease, unless a variation of the Lease is authorized by Lessees owning at least two-thirds of the Lessor's shares then issued and executed by the Lessor and Lessee affected. The form and provisions of all proprietary leases then in effect and thereafter to be executed may be changed by the approval of Lessees owning at least sixty-six and two-thirds (66 2/3%) percent of Lessor's Shares then issued. Such changes shall be binding on all Lessees even if they did not vote for such changes . . . . Approval by Lessees as

[1] *See* Article 15 of the By-Laws, Amendments (of the By-Laws).

provided herein shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose."

Proprietary lease at 6.

Section 2.5(b) of the By-Laws states the following:

"Consent of Shareholders. Whenever the shareholders are required or permitted to take any action by vote, such action may be taken without a meeting on written consent, setting forth the action so taken and signed by the holders of all outstanding shares entitled to vote thereon, except as expressly provided to the contrary elsewhere in these By-Laws or in the Certificate of Incorporation of the Corporation."

Defendants' exhibit B, By-Laws of 20 East 11 Owners Corp. at 3.

In addition, section 5.1 of the By-Laws, entitled proprietary leases, states the following, in pertinent part:

After a Proprietary Lease in the form so adopted by the Board shall have been executed . . . all Proprietary Leases . . . subsequently executed and delivered shall be in the same form . . . unless any change or alteration is approved by lessees owning at least two-thirds in amount of the shares of the Corporation then issued and outstanding . . . ."

Id. at 9.

Defendants state that plaintiff misstates the amendments regarding a proposed transfer of her shares to her daughter by gift or after plaintiff's death. According to defendants, the right of first refusal does not apply to a gift or to a bequest. The amended lease provides a right of first refusal only if the lessee enters into an agreement to sell the shares and lease.

Furthermore, according to defendants, the right of first refusal is within the authority of the Co-op.

Defendants continue that plaintiff's right to sell her lease and shares to the Co-op at fair market value actually benefits plaintiff, and that the financing terms incorporated into the amended lease is standard.

Defendants argue that their actions are not in bad faith and that plaintiff has not been singled out. For instance, they state that co-ops are allowed to impose flip taxes. These taxes would apply to all shares, not just plaintiff's. However, defendants note that a flip tax would not apply to a gift or a bequest, and, in the event that the Co-op exercises its right of first refusal, or the lessee exercises her right to sell, the fee would be paid by the co-op, not by the lessee.

Defendants reiterate that the right of first refusal does not apply to a gift or bequest and that no consent is necessary for certain relatives who have, for example, been residing with the lessee for a majority of the lessee's ownership and are financially responsible. Defendants state that, among other other things, the new provision includes residential occupancy requirements, "which is the primary purpose of the Co-op in its governing documents." Defendants' memo of law at 8. Defendants

mention that board approval of lease transfers has been a long-standing requirement, not one just created by this amendment.

Among other things, defendants maintain that plaintiff's allegations regarding defendants' motives are irrelevant with respect to allowing majority shareholders to make legitimate changes. They also contend that plaintiff's damages are speculative.

On reply, plaintiff argues that the documents submitted by defendants should not be relied on because they were attached to their lawyer's affidavit, and allegedly were not submitted by someone with personal knowledge.[2]

Plaintiff claims that defendants cannot rely on the proprietary lease as a way to make amendments without written consent of all shareholders. Plaintiff cites to Business Corporations Law (BCL) § 615 (a), and claims that, according to this statute, shareholders may execute written consent in lieu of a shareholders' meeting if the written consent is unanimous. Plaintiff further adds that, pursuant to the By-laws, she is required or permitted to vote on the proposed amendments.

In the alternative, plaintiff alleges that the amended

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[2] On reply, "for the avoidance of doubt," Jabri, a director and officer of 20 East 11 Owners' Corp. re-authenticated the documents (Reply Memo. of Law at 4).

lease should be void because it was adopted in bad faith. Plaintiff asserts that defendants' true intention for changing the lease is to force her to sell her shares. She states, "[a]t a minimum, the plaintiff is entitled to explore, during discovery, why the defendants decided, after so many years, that the particular changes they made to the Proprietary Lease were suddenly necessary; and were so needed that they had to be made without notice or a shareholder meeting" (Plaintiff's memo of law at 11).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory" (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; *see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]). Dismissal is warranted under CPLR 3211 (a) (1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Adoption of the Lease Amendments

Defendants misread Article 6.1 of the proprietary lease as altering the procedure for shareholder action by written consent as applied to lease amendments, thereby permitting deviation from Section 2.5(b) of the By-Laws.

The leasehold and corporate attributes of the relationship between the shareholders of a cooperative corporation and the cooperative corporation are determined by the certificate of incorporation, the by-laws and the proprietary lease, subject to applicable statutory and decisional law (*Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 563 [1985] [by-laws amendment providing for "flip tax" violated provisions of proprietary lease and BCL § 501(c)]; *see also Quirin v 123 Apartments Corp.*, 128 AD2d 360, 363 [1st Dept 1987]["flip tax" upheld]). The relevant provisions of all three documents must be read together(*id.*, *Quirin*, 128 AD2d at 363).

In interpreting the terms of the controlling documents, the Court applies the usual principles of contract interpretation (*see Kralik v 239 East 79th Street Owners Corp.*, 5 NY3d 54, 59 [2005][determination of status of holder of unsold shares is arrived at by reading cooperative's governing documents]; *see also Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 78 [1st

Dept 2008][offering plan is read together with other cooperative documents in determining holder of unsold shares status] [citations omitted]).

There is no inherent vagueness or disagreement in the relevant provisions of the governing corporate documents here. Section 2.5(b) of the By-Laws is effectively fashioned after BCL §615(a). It provides that whenever any action may or must be taken by vote at a shareholder meeting, this formality may be disposed of upon written consent of all shareholders, unless expressly permitted by any other provision of the By-Laws or of the Certificate of Incorporation. By its very wording, it is not limited to amendments to the By-Laws, but applies broadly as an alternative to action by vote at a shareholder meeting, conditioned on complete consent. No exception to this condition is found elsewhere in the By-Laws or in the Certificate of Incorporation.

Section 5.1 of the By-Laws and Article 6.1 of the proprietary lease address a different goal. They furnish the minimum vote count of two-thirds of all outstanding shares (66 2/3 %) required for alteration of the provisions of proprietary leases. The final sentence in Article 6.1 ("[a]pproval by Lessees as provided herein shall be evidenced by written consent

or by affirmative vote taken at a meeting for such purpose") does not expressly provide for such written consent to be evidenced by approval of less than all outstanding shares. It merely implies that as an alternative to a two-thirds vote, the shareholders could forego the vote entirely on complete written consent, a reading that would not only satisfy the minimum two-thirds majority requirement of Article 6.1 and Section 5.1 but also be consistent with Section 2.5(b).

In addition, while Article 6.1 specifically addresses changes to proprietary leases, Section 2.5(b) addresses corporate action by written consent. Neither provision is entitled to precedence over the other. This interpretation avoids a conflict among the relevant provisions.

Were the Court to adopt defendants' reading and find a conflict among these provisions, the lease amendments would nonetheless be null and void. Where there is a conflict in the procedure for adopting amendments to proprietary leases between that contained in the by-laws and that provided for in the lease itself, with the by-laws containing the stricter of the two, "there must be compliance with both the procedure contained in the by-laws and those [sic] contained in the lease" (*Brennan v Breezy Point Coop., Inc.*, 63 NY2d 1022, 1025 [1984]).

So much of defendants' CPLR 3211(a)(1) motion as seeks to dismiss the first cause of action with prejudice triggers the requirement of issuance of a declaratory judgment, because the documentary evidence here completely resolves the dispute (*see Jadam Assocs., Inc. v Felomer*, Inc., 37 AD2d 550, 550 [1st Dept 1971], citing *Medical World Publishing Co. Inc. v Kaufman*, 29 AD2d 859, 859 [1st Dept 1968]). As the Court reaches a conclusion opposite to what defendants sought, the declaratory judgment on the first cause of action is issued in favor of plaintiff. So much of the motion as addresses the second cause of action is thus rendered moot.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211 is denied; and it is further

ADJUDGED and DECLARED that certain written document entitled "Written Consent By >2/3 Shareholders of 20 East 11 Owners Corp. To Change Proprietary Leases," dated and notarized on May 5, 2015, is null and void; and it is further

ORDERED that the second cause of action is dismissed without prejudice as moot, and no declaration thereon shall issue; and it is further

ORDERED that the third cause of action is severed and shall continue.

This constitutes the Decision, Order and Judgment of the Court.

Dated: June 27, 2016

ENTER:

Ellen M. Coin, A.J.S.C.