

**7 W. 92nd St. Hous. Dev. Fund Corp. v Vidal**

2017 NY Slip Op 30044(U)

January 10, 2017

Supreme Court, New York County

Docket Number: 155298/2015

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

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7 WEST 92ND STREET HOUSING DEVELOPMENT FUND  
CORPORATION

Plaintiff,

**DECISION/ORDER**  
**Index No. 155298/2015**

-against-

CARMEN VIDAL,

Defendant.

-----X  
HON. CYNTHIA KERN, J.:

Defendant Carmen Vidal has brought the present motion to stay execution of the order and judgment which was entered against her, to vacate the order and judgment which was entered against her on default and permitting her to file an answer. As will be explained more fully below, the motion is denied on the ground that defendant has failed to establish a meritorious defense to this action

The relevant facts are as follows. The plaintiff is a residential housing cooperative (the "HDFC") and is the owner of the building located at 7 West 92<sup>nd</sup> Street. The defendant is the shareholder of Apartment 53, pursuant to a proprietary lease. In late 2014, it came to the attention of the HDFC that there was an infestation of bed bugs in the building. As a result of the infestation, plaintiff retained M&M Environmental to inspect apartments in the buildings and to design and oversee a bug eradication protocol. M&M Environmental is a professional extermination company with expertise in bed bug infestations. M&M Environmental inspected defendant's apartment and identified an infestation of bed bugs in her apartment in a written report. M&M Environmental also identified physical conditions in the apartment, including wood particle boards on the walls and suspended ceiling tiles, that caused or exacerbated the bed bug infestation and indicated that such conditions had to be eradicated to permanently cure the infestation

and prevent a recurrence. It also found similar conditions in other apartments in the building and repairs have now been effectuated in all of the units requiring repairs other than in defendant's apartment.

M&M Environmental recommended to the HDFC that the wooden particle boards on the walls and the suspended ceiling tiles be removed and replaced with sheetrock and that the linoleum tile flooring had to be taken up and replaced with new flooring after the extermination. It further informed HDFC that the apartment had to be vacant when the work was performed. M&M Environmental also stated that the clothing and possessions in the apartment had to be treated. The Board of the HDFC accepted all of M&M Environmental's recommendations. After defendant declined to voluntarily move out of the apartment to effectuate the work, HDFC delivered the report by M&M Environmental to defendant attached to a notice to cure. In the notice to cure, plaintiff informed defendant that it could perform the work on the defendant's behalf and recover the costs as additional maintenance or defendant could perform the work herself. After defendant failed to perform the work herself or permit the HDFC to have access to the apartment to perform the work, HDFC commenced the present action for an order allowing it to remove the defendant from the apartment to perform the required work, to perform the work and then to charge defendant as additional maintenance the cost of the work. Defendant defaulted in opposing the order to show cause brought by plaintiff when it commenced the action and plaintiff obtained a judgment and order granting it the requested relief. It is that judgment and order which defendant now seeks to vacate.

It is well settled that a party seeking to vacate a default judgment under CPLR § 5015(a)(1) must establish a reasonable excuse for the default and a meritorious defense to the underlying action. *Mercado v. Allstate Life Ins. Co.*, 193 A.D.2d 476 (1<sup>st</sup> Dept 1993); *Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 A.D.2d 624 (1<sup>st</sup> Dept 1985).

In the present case, defendant has failed to establish a meritorious defense to the present action. Pursuant to the proprietary lease, the obligation to repair the conditions in the apartment required to eradicate the bed bug infestation is imposed on the defendant rather than the HDFC. Paragraph 5.02 of the proprietary lease provides that the shareholder shall take possession of the apartment in its "as is" condition as of the commencement date of the lease and that the shareholder shall be solely responsible for the

maintenance and repair of the interior of the apartment. By agreeing to take the apartment in an as is condition, defendant agreed that she would accept any of the conditions in the apartment as they existed when she purchased the apartment. Paragraph 6.01 of the proprietary lease provides that the HDFC may direct the shareholder to repair any part of the apartment, its fixtures or equipment or to remedy an objectionable condition if the item in need of repair or objectionable condition causes or may cause damage to the apartments of other shareholders. It further provides that if the shareholder fails to perform the repair or remedy the objectionable condition, the HDFC may perform the repairs or remedy and recover the costs of such repairs or remedy. Pursuant to the foregoing provisions of the proprietary lease, the responsibility of remedying the objectionable condition of the bed bug infestation in the apartment is the responsibility of the apartment owner and if the apartment owner declines to perform this work when requested to do so by the HDFC, the HDFC has the right to perform the work and recover the expenses of the work from the tenant.

Moreover, the determination by the HDFC that there is in fact a bed bug infestation in the defendant's apartment and that the work recommended by M&M Environmental to eradicate the condition must be performed by defendant is protected by the business judgment rule. The business judgment 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." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979). *See also Levine v. Levine*, 184 A.D.2d 53, 50 (1<sup>st</sup> Dept 1992) (applying the business judgment rule to partners acting as fiduciaries for the partnership and other partners). Thus, such actions taken in good faith and in the exercise of honest judgment cannot constitute a breach of fiduciary duty. *See Auerbach*, 47 N.Y.2d at 629. However, corporate directors or partners are not protected by the business judgment rule if they "acted (1) outside the scope of [their] authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." *See Aguilera del Puerto v. Port Royal Owner's Corp.*, 54 A.D.3d 977, 978 (2<sup>nd</sup> Dept 2008) (internal citations omitted).

In the present case, the determination by the Board to require defendant to implement the recommendations made by M&M Environmental to eradicate the bed bug infestation in her apartment is protected by the business judgment rule, as a result of which the court need not determine whether there is

in fact a bed bug infestation or whether these repairs are required to eradicate the infestation. The actions were taken by the directors in good faith and in the exercise of honest judgment that this work was required to eradicate the bed bug infestation in the building. Moreover, there is no evidence that they acted outside the scope of their authority or in a way that did not legitimately further the corporate purpose or in bad faith. Under these circumstances, there is no basis for this court to inquire further into their determination.

Based on the foregoing, the motion by defendant to vacate her default is denied and the stay issued by this court of the enforcement of the judgment and order is hereby vacated. The foregoing constitutes the decision and order of the court.

DATE: 1/10/17

CJK  
KERN, CYNTHIA S., JSC

**HON. CYNTHIA S. KERN**  
S.C.