Cutone v Riverside Towers Corp.
2017 NY Slip Op 30945(U)
May 5, 2017
Supreme Court, New York County
Docket Number: 157774/2013
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 32

Leonardo Cutone,

Plaintiff,

-against-

Riverside Towers Corp.,

Defendant.

Index No.: 157774/2013
Motion Seq. 004

Arlene P. Bluth, JSC

DECISION and ORDER

Defendant's motion for summary judgment dismissing the last remaining cause of action of the complaint, breach of contract, is granted.[1]

Defendant Riverside Towers Corp. is a cooperative housing corporation. Plaintiff purchased Apartment 2C in the building in 2007 and sold it in 2012. Plaintiff alleges that defendant breached its obligations under the proprietary lease, the By-Laws and the House Rules. Plaintiff further alleges that defendant's actions forced him to expend additional money for the renovation of his apartment, for the treatment of his physical stress and emotional distress, and for an alternate residence for his family.

Parties' Contentions

Defendant moves for summary judgment dismissing the sole remaining cause of action, breach of contract, on the grounds, inter alia, that it was plaintiff who did not follow the rules of the Proprietary Lease and/or the House Rules. Additionally, defendant asserts that it did not

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[1]By decision and order dated October 22, 2014, Justice Rakower granted defendants' motion to dismiss pursuant to CPLR §3211 only to the extent that plaintiff's causes of action for breach of fiduciary duty and nuisance were dismissed, and the cause of action for breach of contract was dismissed only as against the individual defendants (Greg Witchell and Morris Gurley). Only defendant Riverside Towers Corp. remains.

"sell" basement storage space, did not misrepresent the financial health of the Coop and/or did not misapply the flip taxes to operating expenses, as plaintiff alleges.

In opposition, plaintiff states that the "essence" of his lawsuit is that during the period May 2007 through April 2012, defendant engaged in a course of malicious and improper conduct that breached the Proprietary Lease, the By Laws, and the House Rules; plaintiff claims that defendant breached its obligation to treat all shareholders fairly and equally, and to allow the quiet enjoyment of their apartment units for all of its shareholders. Plaintiff further alleges that defendant breached its alteration agreement with plaintiff for renovations to the Unit (Savitt affirmation, ¶ 14).

Background

On July 1, 2007 plaintiff submitted an alteration plan for his apartment. Four days later, on July 5, 2007, plaintiff and his father were doing demolition-type work in the apartment when Morris Gurley, the former president of the co-op's board of directors, entered and told them to cease all work. A dispute ensued.

Plaintiff's alteration plans were ultimately approved in October 2007; plaintiff claims that his alterations were delayed by accusations that he was not following the rules. Thereafter, plaintiff claims that he decided to sell the apartment but was unable to do so due to the financial condition of the building, which plaintiff claims was misrepresented to him when he purchased the apartment. Thereafter, plaintiff bought the unit adjacent to the apartment and combined them to make one large apartment. Plaintiff attempted to sublet this combined space but refused to submit a sublet application after discovering that there was a sublet fee (which he refers to as a maintenance payment). Plaintiff eventually found a buyer for the apartment.

Discussion

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id., see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce proof sufficient to require a trial of material questions of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]).

In order to establish a breach of contract under the circumstances alleged here, plaintiff must demonstrate that defendant's rules were unreasonable on their face and/or were unfairly applied to plaintiff (*see Siller v Third Brevoort Corp.*, 145 AD3d 595, 595–96, 44 NYS3d 40, 41 [1st Dept 2016]).

Defendant's Motion for Summary Judgment

In support of the motion, defendant cites to the 8th paragraph of the Proprietary Lease which provides:

> The Lessee shall not, without first obtaining the written consent of the Lessor, make in the Apartment any structural alteration or any alteration of the water, gas or steam pipes, electrical conduits or plumbing, or remove any additions, improvements or fixtures from the Apartment.

Additionally, defendant notes that the requirement that the consent be in writing is repeated in House Rule 19 which provides in pertinent part:

> All requests, including without limitation, permission for sublets, financings or sales must be made in writing to the Managing Agent. Oral consents are not valid under any circumstances.

In further support, defendant attaches photos of the Unit from July 5, 2007 showing that all the bathroom tiles had been removed, the vanity and the sink were removed, the walls were stripped down to uncover plumbing and electrical wires, and approximately 20 bags of trash were in the apartment. Defendant states that its actions on that day were completely proper: after no one answered the door after Gurley and Martin Cahill (the Building's superintendent) knocked, Gurley instructed Cahill to open the door. Upon discovering plaintiff and his father at work, Gurley advised them to cease all work immediately until the alteration plans were reviewed by the co-op's experts and approved.

In opposition, plaintiff claims that defendant's wrongful course of conduct against him began with the ensuing dispute that Gurley had with plaintiff regarding whether the removal of broken and loose bathroom and kitchen linoleum tiles in the Unit, which shared a common wall with Apartment 2B where Greg Witchell (a Board member at the time) resided. Plaintiff maintains that the work he was doing, removing tiles without power tools or excessive noise, was not forbidden by the Proprietary Lease, By Laws or House rules. He states that it was "his understanding" that the floor tile removal and the removal of the bathroom sink to access the tiles underneath, did not violate the Proprietary Lease. By claiming that it was his "understanding" that he did not need permission to remove tiles, plaintiff has not raised an issue of fact; the Proprietary Lease expressly requires permission before removing the sink.

Plaintiff claims that he was treated differently from other shareholders because defendant gave him "an unreasonably short time period of 45 days" to complete his renovations is also without merit. Because renovations often disturb neighbors, it is not uncommon for cooperative

boards to use their business judgment and to require renovations to conclude within a specified time frame. Besides, plaintiff himself caused delays; he filed a request for renovation with defendant's managing agent on July 1, 2007, and changed his plans again in September 2007 to sub-divide the living room. Plaintiff has not raised any issue of fact demonstrating that he was treated differently from any other shareholder, or that he was unfairly targeted. To the contrary, the defendant cut plaintiff some slack despite his breaches; as defendant indicates, even though plaintiff missed the forty-five day deadline, defendant never issued any fines for violating the alteration agreement.

Sublet

In his complaint, plaintiff alleges that he asked the Board's permission to sublet and was advised he could only sublet for 2 years if his maintenance payments were increased 20% for the first year and 30% for the second year. Plaintiff insists this requirement was unreasonable.

In support of its motion, defendant points out that plaintiff misstated the sublet policy. Defendant routinely imposed a sublet fee equal to 20% of the monthly common charges. In opposition, plaintiff did not dispute that defendant has the authority to charge such a sublet fee. Moreover, plaintiff does not dispute that he never submitted an application to sublet his apartment despite reporting over $100,000.00 in income on his tax returns from rent during 2007-2009 (*see* defendant's exh JJ).

Plaintiff claims that despite his "pleas to be reasonable in its sublease conditions, neither the board nor its property manager responded to his requests" (Savitt affirmation in opposition, ¶ 94). From the papers submitted, plaintiff did not show that he suffered any damages with respect to subletting his apartment. In fact, the evidence submitted demonstrates that plaintiff

received a substantial amount of money from renting his apartment even though he failed to follow the rules and never submitted a sublet application. Plaintiff has not raised an issue of fact demonstrating that he was treated differently from any other shareholder, or that he was unfairly targeted.

Other Purported Issues of Fact

Plaintiff failed to raise an issue of fact with regard to his other matters, including accusations of the co-op's wrongful interference with plaintiff's attempt to sell the apartment, the use of transfer fees/flip taxes for uses that were not capital expenditures, improper maintenance increases, and deprivation of storage space.

With respect to the sale of the apartment, plaintiff failed to raise an issue of fact in his claim that defendant prevented plaintiff from reaching a financially reasonable sale. Plaintiff purchased the apartment in May 2007 for $625,000, he put the apartment on the market in 2008 for $859,000 (defendant's exh NN) and, after subletting it, he received an offer in August 2010 for $575,000. Of course, it is well known that the real-estate market crashed in 2008. There could have been many reasons it was hard to sell the apartment. It could have been overpriced. There could have been many better deals out there, especially after the crash. It could have been the odd configuration (plaintiff reconfigured his unit by splitting the living room into two small rooms to create a nursery). It could have shown poorly with a tenant in occupancy. It could have been something else. Quite simply, plaintiff failed to provide anything other than innuendo and speculation as to *how* defendant affected the offers (or lack thereof) plaintiff received. Plaintiff has not shown a single accepted offer where the co-op did not approve a buyer nor has plaintiff submitted any proof that it is defendant's fault that plaintiff could not get his price.

Defendant also submits a chart which it claims demonstrates that it spent more money for capital repair projects than it received in flip taxes. To the extent that plaintiff is correct that the defendant mismanaged the financials of the co-op, plaintiff needed to bring a derivative claim and plaintiff has not met the requirements to bring such a cause of action (*see* Business Corporation Law § 626[c]).

With respect to the storage room, defendant claims that each apartment has space allocated to it in the basement that can be used to construct a storage space if the shareholder pays a fee. Defendant insists that plaintiff decided not to construct a storage room when offered the option. Plaintiff takes issue with the testimony of defendant's representative (Dougherty) but does not raise an issue of fact. Plaintiff admits choosing not to purchase a storage room despite being offered the option to buy one (plaintiff tr at 214). Plaintiff has not raised any issues of fact and his breach of contract claim is dismissed.

Punitive damages

Because the Court has dismissed the breach of contract claim, it is unnecessary to address the claim for punitive damages which is not a separate cause of action. *See Rocanova v Equitable Life Assur. Soc. of the U.S.*, 83 NY2d 603, 612 NYS2d 339 (1994). The Court notes that punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as "gross" and "morally reprehensible," and of "such wanton dishonesty as to imply a criminal indifference to civil obligations," (*id.* at 614). Plaintiff has made no such showing; therefore, defendant's motion for summary judgment dismissing the claim for punitive damages is granted.

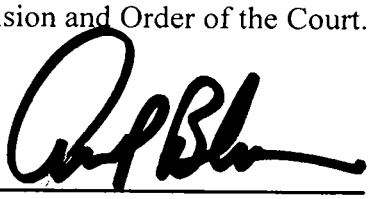
Summary

The key facts in this case do not support plaintiff's theory that defendant unreasonably delayed plaintiff's renovations. Plaintiff submitted a renovation request in July 2007 and defendant documents how its architects and engineers (Lawless & Mangione) engaged with plaintiff regarding his renovations over that summer. Plaintiff then decided to change his alteration plan in September 2007 and defendant approved this altered plan on October 15, 2007. The Court finds that these actions in working together until the plans - and then the changed plans - were approved, as a matter of law, do not constitute a breach of contract.

Despite the fact that plaintiff purports to identify numerous issues of fact (in bold and italicized font), plaintiff fails to identify a material issue of fact. "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment" (*see People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545, 858 NYS2d 23, 32 [1st Dept 2008] [citations omitted]). Thus, to defeat defendant's summary judgment motion, plaintiff must raise an issue of material fact, to wit, whether defendant unfairly targeted him in enforcing the Proprietary Lease and/or the House Rules; plaintiff has not done so.

Accordingly, it is ORDERED that defendant's motion for summary judgment dismissing the remaining causes of action in the complaint, the first cause of action for breach of contract and for punitive damages, is granted; the action is hereby dismissed in its entirety and the clerk is directed to enter judgment accordingly. This is the Decision and Order of the Court.

Dated: May 5, 2017
New York, New York



ARLENE P. BLUTH, JSC