Ciccone v One W. 64th St., Inc.
2017 NY Slip Op 32001(U)
September 14, 2017
Supreme Court, New York County
Docket Number: 651748/16
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MADONNA CICCONE,

Plaintiff,

-against-

ONE WEST 64th STREET, INC.,

Defendant.

Index No.: 651748/16
DECISION/ORDER
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion to dismiss under CPLR 3211 (a) (5) and 3211 (a) (7).

Papers	**Numbered**
Defendant's Notice of Motion	1
Affidavit of Michael Wolfe	2
Affirmation of Patrick J. Sweeney	3
Defendant's Memorandum of Law in Support	4
Plaintiff's Opposition	5
Plaintiff's Memorandum of Law	6
Defendant's Reply Memorandum of Law in Further Support	7
Plaintiff's Counsel's November 8, 2016, letter to the court	8
Defendant's Counsel's December 9, 2016, letter to the court	9

Shaw & Binder, P.C., New York (Daniel LoPresti of counsel), for plaintiff.
Holland & Knight, LLP, New York (Patrick J. Sweeney & Sean P. Barry of counsel), for defendant.

Gerald Lebovits, J.

Defendant, One West 64th Street, Inc. (One West), moves to dismiss plaintiff's complaint under CPLR 3211 (a) (5) on the basis of statute of limitations and under CPLR 3211 (a) (7) for failing to state a cause of action.

According to the complaint, One West is a cooperative corporation that owns a cooperative apartment building located at One West 64th Street in New York County. (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 3.) Plaintiff, Madonna Ciccone, is the proprietary lessee and the shareholder of the shares of stock in One West, Unit 7A. (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 4.) In March 2014, the cooperative board (the board) amended the proprietary lease, paragraph 14, for all shareholders after "an affirmative vote of the holders of over two-thirds of the outstanding shares." (Affidavit of Michael Wolfe, at ¶ 5.) This action stems from that amendment of paragraph 14 — use of premises provision (Paragraph 14). Paragraph 14 provides the following:

> "The Lessee shall not, without the written consent of the Lessor [One West] on such conditions as Lessor may prescribe, occupy or use the apartment or permit the same or any part hereof to be occupied or used for any purpose other than as a private dwelling for the Lessee and Lessee's spouse or domestic partner and, while the Lessee or the Lessee's spouse or domestic partner are *in residence*, the children grandchildren, parents, grandparents, brothers and sisters and domestic employees of the Lessee of Lessee's spouse or domestic partner . . . ." (Affidavit of Michael Wolfe, Exhibit 1, the amended lease, at ¶ 14 [emphasis added].)

Plaintiff brought this action on April 1, 2016, against One West asserting four causes of action: (1) declaratory judgment; (2) breach of the covenant of good faith and fair dealing; (3) production of defendant's corporate documents; and (4) attorney fees under RPL § 234.

On her first cause of action, plaintiff seeks a declaration that Paragraph 14 is void and unenforceable as against public policy and that paragraph 14 may not be enforced against plaintiff. Plaintiff also seeks a declaration that her "daughters . . . sons, any other members of her immediate family and one other occupant (and their children) may occupy Unit 7A, whether or not [p]laintiff is 'in residence.'" (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 4.) Plaintiff also seeks a declaration that because plaintiff demanded that defendant produce documents, she is not liable for defendant's attorney fees.

On her second cause of action, plaintiff alleges that the board amended Paragraph 14 with "the intent to deprive [p]laintiff of her ability to use Unit 7A in a manner consistent with the original proprietary lease . . . . [namely] with the intention of interfering with [p]laintiff's use of Unit 7A." (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶¶ 37-38.) Plaintiff also alleges that the board's actions were "done in bad faith." (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 39.) Plaintiff seeks damages.

Defendant moves to dismiss, pre-answer, plaintiff's first and second causes of action — to the extent that they apply to Paragraph 14 — on the basis that the statute of limitations has expired. Defendant argues that the four-month statute of limitations applies in this case; because plaintiff commenced this case beyond the four months, plaintiff's case is time-barred. Defendant also moves to dismiss plaintiff's second cause of action on the basis that plaintiff fails to state a cause of action for breach of the covenant of good faith and fair dealing. Defendant notes that the aspect of plaintiff's first cause of action for attorney fees — in which she seeks a declaration that she is not liable for defendant's attorney fees incurred because plaintiff demanded that defendant produce documents — is no longer relevant. Defendant states that it elected not to hold plaintiff liable for those fees. (Affirmation of Patrick J. Sweeney, July 21, 2015, at ¶ 10; Exhibit 4.)

Defendant, however, does not move to dismiss plaintiff's third and fourth causes of action.[1]

In opposition, plaintiff argues that this action is governed by the six-year statute of limitations for defendant's alleged breach of plaintiff's lease — six-year statute of limitations for breach of contract. Plaintiff argues that defendant breached the lease because it has frustrated plaintiff's right to use her unit as intended. Plaintiff's counsel argues in his opposition papers and memorandum of law that the amended lease violates RPL § 235-f. Plaintiff argues that the second cause of action is timely and properly pleaded. Plaintiff also argues that the parties have not yet resolved the attorney-fee issue. Plaintiff argues that this court should not rely on defendant's counsel's email withdrawing defendant's claim for attorney fees.

The court notes that plaintiff's opposition papers discuss whether plaintiff has stated a valid cause of action to obtain declaratory relief. But defendant is not moving to dismiss plaintiff's first cause of action for failing to state a cause of action. The court will not consider that aspect of plaintiff's opposition because defendant never addressed that argument in its moving papers.

I. CPLR 3211 (a) (5)

Defendant's motion under CPLR 3211 (a) (5) is granted. Plaintiff's first and second causes of action are time-barred.

A party moving to dismiss a cause of action as time-barred under CPLR 3211 (a) (5) has the burden to establish that the statute has run on plaintiff's cause of action; plaintiff must establish the date on which the cause of action accrued. (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]; *Benn v Bern*, 82 AD3d 548, 548 [1st Dept 2011].)

A proceeding challenging an action a cooperative corporation takes must be commenced within four months after the corporation's "determination to be reviewed becomes final and binding." (CPLR 217 [1]; *accord Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012]; *Buttitta v Greenwich House Coop. Apartments, Inc.*, 11 AD3d 250, 251 [1st Dept 2004].) A determination is final when the party challenging it becomes aware of being aggrieved by it. (*Matter of Martin v Ronan*, 44 NY2d 374, 380-381 [1978]; *Matter of Hia v New York City Dept. of Corn*, 110 AD3d 570, 571 [1st Dept 2013].)

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[1] On her third cause of action, plaintiff alleges that she sent defendant a Notice of Demand for Inspection of Corporate Records dated October 2, 2015, for copies of corporate records under BCL § 624 and New York common law. The documents she seeks pertain to the board's amending of Paragraph 14, including a list of shareholders, annual meeting notices, board minutes, and ballots. She states that defendant partially complied with her request: It turned over some, but not all, documents. On her fourth cause of action, plaintiff seeks attorney fees under RPL § 234 — "implied reciprocal attorney[] fees provision in favor of tenants, including proprietary lessees." (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 52.)

The Court of Appeals has held that when a

> "proceeding is commenced in the form of a declaratory judgment action, for which no Statute of Limitations is prescribed, 'it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' in order to resolve which Statute of Limitations is applicable. . . . In other words, if the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief." (*N.Y. City Health and Hosps. Corp. v McBarnette*, 84 NY2d 194, 200-201 [1994], quoting *Solnick v Whalen*, 49 NY2d 224, 229 [1980].)

The purpose of this rule is to "preclude resort by a dilatory litigant to the declaratory remedy for the purpose of escaping a bar of time which has outlawed the other procedure for redress." (*Solnick*, 49 NY2d at 230.) If a party has "no other form of proceeding" to resolve the party's claims "in the declaratory judgment action[,] the six-year limitation of CPLR 213 (subd. 1) will then be applicable." (*Id.*)

After determining that a party could have brought claims in an Article 78 proceeding, the next inquiry is "whether the Article 78 proceeding that was available to plaintiff[] . . . would have been time-barred when the present declaratory judgment action was commenced." (*Solnick*, 49 NY2d at 233.)

Parties seeking a determination about their lease agreement must commence an Article 78 proceeding, not a declaratory-judgment action. (*City of Utica v N.Y. Susquehanna and West. Ry. Corp.*, 46 AD3d 1355, 1356 [4th Dept 2007] ["We note at the outset that a declaratory judgment action is not an appropriate procedural vehicle for the ultimate relief sought, i.e., a determination concerning the validity of the lease agreement, and thus this is properly only a proceeding pursuant to CPLR article 78."].)

A party may commence an Article 78 proceeding asserting that a cooperative corporation's acts violate the business-judgment rule. (*Matter of Cohan v Bd. of Dir. of 700 Shore Rd. Waters Edge, Inc.*, 108 AD3d 697, 699 [2d Dept 2013] ["[P]etitioner subsequently commenced this proceeding pursuant to CPLR article 78, inter alia, to annul the board's determination and to rescind the sublet fee and for a reasonable attorney's fee, alleging that the board had violated the by-laws, the proprietary lease, and applicable law in assessing the sublet fee."].)

Parties challenging the propriety of a cooperative corporation's acts — amendments to bylaws — must do so within four months in an Article 78 proceeding:

> "Now, however, in an attempt to make their claim appear viable, plaintiffs avoid characterizing their claim as seeking to prohibit defendants' ultra vires acts, and instead, they repeatedly characterize their claim as one 'for money damages' or an 'extraction of money' that was 'wrongful,' seeking a money judgment in the amount of the flip tax.
>
> Supreme Court properly granted defendant's motion because plaintiffs' claim, despite their current characterization, is barred by the statute of limitations. Defendant's allegedly ultra vires acts occurred in 1997 and in 2008 when the by-laws and proprietary leases were amended to, respectively, allow a majority of the directors to alter the by-laws, and to allow two-thirds of shareholders to approve amendments to the proprietary leases, and to institute a 2% flip tax on the gross sale price of any apartment. Plaintiffs are now prohibited from challenging the propriety of those amendments because they are required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof. Plaintiffs are now prohibited from challenging the proprietary of those [bylaw] amendments because they are required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof." (*Katz*, 101 AD3d at 653.)

Similarly, in *Villanova Estates, Inc. v Fieldston Property Owners Ass'n Inc.* (23 AD3d 160, 161 [1st Dept 2005]), the First Department held that the "cause of action, which alleges breach of contract, was properly dismissed . . . . The cause is predicated upon the failure of defendants to abide by their bylaws, and thus, is properly a claim for mandamus that should have been brought as an article 78 proceeding and not in this plenary action."

Parties challenging a cooperative corporation's acts — that the corporation acted in bad faith — must do so within four months in an Article 78 proceeding. (*Buttitta*, 11 AD3d at 251.) In *Buttitta*, the lower court noted that plaintiffs, all shareholders, brought an action asserting seven causes of action seeking declaratory and injunctive relief against their residential cooperative corporation. (2003 WL 25780826, at * 1 [Sup Ct, NY County 2003].) In their first three causes of action, plaintiffs sought a declaration that Article III, Section 4, of Greenwich House's By-Laws was illegal because it violated the Business Corporation Law and constituted an improper restraint on alienation. (*Id.*) The First Department held that the first three causes of action — which sought to "nullify the bylaw" — were time barred: "Plaintiffs . . . cause of action, alleging that the board acted in bad faith by treating them differently from other . . . shareholders . . . [was] barred by the four-month limitations period of CPLR 217 which plainly applies to defendant corporation." (*Buttitta*, 11 AD3d at 250-251.) The *Buttitta* court found that "plaintiffs were informed of the co-op's decision no later than July 2002, but did not commence this action until January 2003, more than four months later." (*Id.* at 251.)

Plaintiff's first cause of action should have been commenced as an Article 78 proceeding. The issues about which plaintiff complains and the relief she seeks could have been brought as

an Article 78 proceeding. Even though plaintiff does not characterize her first cause of action as defendant's acting ultra vires or violating the business-judgment rule, plaintiff's complaint is about the propriety of the board's amending Paragraph 14 of her lease. Plaintiff's counsel states that "[p]laintiff is not challenging the Board's procedural actions or the Shareholders' authority to amend the proprietary lease (at this time), but rather is challenging the content and substance of the proprietary lease itself, as amended, and its application to her." (Plaintiff's Memorandum of Law, at 3.) Regardless of plaintiff's characterization, plaintiff seeks to "nullify the bylaw[s]," Paragraph 14; thus, plaintiff should have commenced an Article 78 proceeding. (*See Buttitta*, 11 AD3d at 250-251.) Her claim that Paragraph 14 violates applicable law and public policy likewise should have been brought as an Article 78 proceeding. (*Id.*)

Plaintiff's second cause of action, in which she alleges that defendant acted in bad faith, should have been commenced as an Article 78 proceeding. (*See id.* ["Plaintiffs . . . cause of action, alleging that the board acted in bad faith by treating them differently from other . . . shareholders . . . is barred by the four-month limitations period of CPLR 217 which plainly applies to defendant corporation."].)

Because plaintiff commenced this action more than four months after she became aware of being aggrieved by it, her first and second causes of action are time-barred. Defendant established that the cause of action accrued on April 2, 2014. Defendant shows that on April 2, 2014, it sent notice to all shareholders that it amended the lease. (Affidavit of Michael Wolfe, July 21, 2016, at ¶ 7; Exhibit 2.) Defendant sent shareholders a Notice of the Amended and Restated Proprietary Lease and a copy of the lease. (Affidavit of Michael Wolfe, July 21, 2016, at ¶ 7; Exhibit 2.) Plaintiff had four months from April 2, 2014, to commence an Article 78 proceeding. But plaintiff commenced this action on April 1, 2016, more than two years later.

Plaintiff asserts that she learned about the board's amendment of the bylaws "verbally [from defendant] and by letter dated June 5, 2015." (Plaintiff's Affirmation in Opposition, Affidavit of Madonna Ciccone, Sept. 30, 2016, at ¶ 3.) Even if the court applies the June 5, 2015, date in calculating the statute of limitations, plaintiff's claims would still be time-barred. Four months from June 5, 2015, is October 5, 2015. Plaintiff commenced this action on April 1, 2016.

Plaintiff's first and second causes of action, relating to Paragraph 14 of her amended lease, are dismissed as time-barred.

II. CPLR 3211 (a) (7)

The court dismisses that aspect of plaintiff's complaint in which plaintiff seeks a declaration on her first cause of action that she is not liable for defendant's attorney fees when defendant responded to her demand for documents. Defendant states that it is not seeking attorney fees from plaintiff. (Affirmation of Patrick J. Sweeney, July 21, 2015, at ¶ 10; Exhibit 4.) Defendant states that those fees will be removed from plaintiff's statement. (Affirmation of Patrick J. Sweeney, July 21, 2015, at ¶ 10; Exhibit 4.) Plaintiff's request for a declaration about owing attorney fees, her first cause of action, fails to state a cause of action.

To the extent that plaintiff is seeking damages on her second cause of action for defendants' alleged breach of the covenant of good faith and fair dealing — and she could not have asserted those damages in an Article 78 proceeding — plaintiff fails to state a cause of action. A covenant of good faith and fair dealing is implicit in all contracts. (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995].) The covenant of good faith and fair dealing "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (*Jaffe v Paramount Communications*, 222 AD2d 17, 22–23 [1st Dept 1996].) Plaintiff must "allege actual ascertainable damages arising in connection with such claim[]." (*Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010].)

Plaintiff does not allege actual ascertainable damages with respect to her claim for defendant's breach of the covenant of good faith and fair dealing. Plaintiff states in her complaint that "[a]s a result of One West's breach, Plaintiff has been and continues to be damaged in an amount to be determined by the Court." (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 42.) Nor does plaintiff assert in her affidavit what damages, if any, defendant caused. Plaintiff's second cause of action is dismissed.

Because defendant is not moving to dismiss plaintiff's third and fourth causes of action, those causes of action shall continue.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted and plaintiff's first and second causes of action are dismissed; and it is further

ORDERED that defendant serve a copy of this decision and order with notice of entry on plaintiff and on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that defendant must file its answer within 20 days from service of this decision and order; and it is further

ORDERED that the parties appear for a preliminary conference on November 29, 2017, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: September 14, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.