

Cicccone v One W. 64th St., Inc.
2018 NY Slip Op 31372(U)
June 25, 2018
Supreme Court, New York County
Docket Number: 651748/2016
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.: 651748/2016
DECISION/ORDER
Motion Seq. No. 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion to sever and convert the surviving claims and plaintiff's cross-motion for summary judgment.

Papers	Numbered
Affidavit of Michael Wolfe	45 (exhibit 1-3)
Affirmation of Patrick J. Sweeney	48 (exhibits 1-3)
Defendant's Memorandum of Law in Support of Motion	52
Plaintiff's Notice of Cross-Motion	54
Plaintiff's Affirmation in Support of Cross-Motion – LoPresti Affirmation	55 (exhibits A-G)
Plaintiff's Memorandum of Law in Support of Cross-Motion and in Opposition to Motion	55
Plaintiff's Affidavit in Support of Cross-Motion	63 (exhibit 1-4)
Plaintiff's Memorandum of Law in Support of Cross-Motion and in Opposition to Motion	68
Defendant's Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion	70
Plaintiff's Affirmation in Reply – LoPresti Affirmation	71 (exhibits A-C)
Plaintiff's Memorandum of Law in Reply	75 (exhibit B)

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 recover attorney fees and to sever and convert plaintiff's third and fourth causes of action into a special proceeding for

summary adjudication. Plaintiff cross-moves for summary judgment on her third cause of action to access defendant's corporate books and documents.

Defendant, One West, owns a cooperative housing accommodation at One West 64th Street in New York County. (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 3.) Plaintiff, Madonna Ciccone, is a proprietary lessee and shareholder in One West 64th Street. (Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 4.) In March 2014, the cooperative board amended Paragraph 14 of the proprietary lease.¹ Lessees were allegedly notified of the change by letter dated April 2, 2014. (Defendant's Affidavit of Michael Wolfe, Exhibit 2.)

Plaintiff brought this action on April 1, 2016, against defendant stating four causes of action: (1) a declaratory judgment declaring Paragraph 14 of the amended lease unenforceable; (2) breach of the covenant of good faith and fair dealing with intent to deprive plaintiff of her rights under the lease; (3) production of defendant's corporate documents; and (4) attorney fees under RPL § 234.

This court dismissed plaintiff's first and second causes of action in its decision of September 14, 2017. (Decision and Order on Motion, Sept 14, 2017, NYSCEF doc. No. 34.) This court found that plaintiff should have commenced an Article 78 proceeding for both actions and, under CPLR 217, that the proceedings should have been brought before the four-month statute of limitations expired. (Order, at 5-6.) Defendant did not move to dismiss plaintiff's third and fourth causes of action.

On her third cause of action, plaintiff seeks defendant's corporate books and records pertaining to the board's amending of Paragraph 14. Plaintiff alleges that she sent defendant a notice of demand to inspect corporate records on October 2, 2015, under BCL § 624 and New York common law. Defendant partly complied by providing the documents required by BCL § 624 but not the other material to which plaintiff may be entitled under New York common law. (Affirmation of Patrick Sweeney, Exhibit 2.)

On her fourth cause of action, plaintiff seeks attorney fees under RPL § 234 based on an "implied reciprocal attorneys' fees provision in favor of tenants, including proprietary lessees." (Defendant's Affirmation of Patrick Sweeney, Exhibit 1, Complaint, at ¶ 52.)

Defendant moves to sever the third and fourth causes of action and convert them to a special proceeding for summary adjudication. Defendant argues that the surviving claims are separate from plaintiff's dismissed claims. Defendant also moves to recover attorney fees under ¶

¹ Paragraph 14 of the Amended Lease 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 are *in residence*, the children, grandchildren, parents, grandparents, brothers and sisters and domestic employees of the Lessee or Lessee's spouse or domestic partner . . ." (Affidavit of Michael Wolfe, Exhibit 1, the amended lease, at ¶ 14 [emphasis added].)

28 of the amended lease² for its “successful defense of the causes of action the Court dismissed . . .” (Memorandum of Law in Support of Defendant’s Motion to Sever, at ¶ 1.)

Plaintiff argues that no harm or prejudice will occur if severance is denied. Plaintiff states that this court may convert this action to an Article 78 proceeding and that defendant’s sole motivation for severance is to be named the prevailing party.³

Plaintiff cross-moves for summary judgment on the third cause of action. Plaintiff argues that shareholders have an established statutory and common-law right to inspect a corporation’s books and records if done in good faith and for a valid purpose. (Plaintiff’s Memorandum of Law in Support of Cross-Motion and in Opposition to Motion, at 13.) Plaintiff argues that there is “no question” that her BCL § 624 and common-law request was made in good faith and for a valid purpose: to investigate how and why her lease was amended, whether the Board complied with the by-laws, and how her family may use Unit 7A without breaching the lease. (Plaintiff’s Memorandum of Law in Support of Cross-Motion and in Opposition to Motion, at 12-13.) Plaintiff argues that defendant relies on speculation that plaintiff commenced her document request in bad faith. Plaintiff argues that defendant provides no substantive evidence of bad faith and that defendant’s forbidding her subplot as grounds for the request is insufficient to overcame summary judgment. (Plaintiff’s Memorandum of Law in Reply, at 3-4.)

Plaintiff asserts in her cross-motion that she “intends to withdraw the claim for attorneys’ fees in light of this Court’s dismissal of her first cause of action and paragraph 53 of the Lease.” (LoPresti Affirmation, at n. 4.) This court interprets this as a definitive withdrawal of plaintiff’s fourth cause of action.

In opposition to plaintiff’s summary-judgment motion, defendant argues that plaintiff must show the following: (1) that her request was brought in good faith; (2) that her request was brought for a proper purpose; and (3) that disclosing of the requested records is “relevant and necessary” for the stated purpose. (Defendant’s Memorandum of Law in Further Support of Defendant’s Motion to Sever and for Attorney’s Fees and in Opposition to Plaintiff’s Cross-Motion for Summary Judgment, at 8.) Defendant argues that it already provided plaintiff with the required documents under BCL § 624.⁴ Defendant further contends that plaintiff fails to show a

² The Amended Proprietary Lease provides: “If the Lessor shall incur any expenses . . . in instituting any action or proceedings based on such default, or defending, or asserting a counterclaim in any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorney’s fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent.”

³ Plaintiff argues that if defendant does not prevail on the third cause of action, defendant is not the prevailing party and is unable to collect attorney fees.

⁴ An email dated November 20, 2015, between the parties state that defendant provided plaintiff with the “Minutes of the 2013 Annual Meeting of Shareholders, the Minutes of the 2014 Annual Meeting of Shareholders and the List of Shareholders, which is all that the Corporation’s Board

good faith, valid purpose for the other materials. Defendant also requests, at a minimum, a hearing and limited discovery regarding plaintiff's motivations behind her document request. Plaintiff, in opposition to the discovery request, argues that defendant fails to show that discovery is necessary and that defendant's request is "untimely and meritless." (Defendant's Memorandum of Law in Further Support of Defendant's Motion to Sever and for Attorney's Fees and In Opposition to Plaintiff's Cross-Motion for Summary Judgment, at 8-12.).

I. Defendant's Motion for Attorney Fees

Defendant's motion for a grant of attorney fees is denied.

Determining the prevailing party for purposes of attorney fees is premature while litigation is ongoing. (*Gedula 26, LLC v Lightstone Acquisitions III LLC*, 150 AD3d 583, 584 [1st Dept 2017].) Plaintiff's third cause of action for defendant's corporate books and records remains. This court dismissing the other causes of action does not warrant granting attorney fees under the relevant lease provision.⁵

II. Defendant's Motion to Sever and Convert the Surviving Claims

Defendant's motion to sever and convert the surviving claims is denied.

Under CPLR 603, "in furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." It is within the trial court's discretion to grant severance. This should be exercised sparingly. (*Shanley v Callanan Industries, Inc.*, 54 NY2d 52, 57 [1981].) CPLR 103 (c) authorizes converting an action to a special proceeding and vice versa. Conversion to a special proceeding is within the trial court's discretion. This court declines to grant defendant's motion. Plaintiff must move to sever and convert the remaining claim.⁶ This court declines on its own to sever or convert the surviving claim. This court also notes that the defendant has never moved to dismiss these causes of action.

III. Plaintiff's Cross-Motion for Summary Judgment on the Third Cause of Action

Plaintiff's cross-motion for summary judgment is denied.

Under CPLR 3212, summary judgment shall be granted if the cause of action or defense is sufficiently established to warrant the court, as a matter of law, to direct judgment in any

of Directors is required to give . . . pursuant to the Business Corporation Law." (Affirmation of Patrick J. Sweeney, Exhibit 2.)

⁵ The parties dispute which lease provision controls: plaintiff argues that ¶ 53 applies; defendant argues for ¶ 28.

⁶ As noted above, this court interprets plaintiff's intention to withdraw the fourth cause of action as definitive. Plaintiff's third cause of action survives.

party's favor; the motion shall be denied if a party shows facts sufficient to require a trial on any issue of fact. BCL § 624 (b) provides that "any person who shall have been a shareholder of record of a corporation . . . shall have the right to examine . . . its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder." BCL § 624 (e) provides that "upon the written request of any shareholder, the corporation shall give or mail to such shareholder an annual balance sheet and profit and loss statement for the preceding fiscal year." Defendant partly complied by providing the documents required by BCL § 624. Plaintiff also requests:

1. "A complete record or list of the common shareholders, and a complete record or list of the preferred shareholders . . . showing the names and addresses of each shareholder who is entitled to vote for the election . . . as of the most recent record date . . . and daily transfer sheets from that date to the date of alleged shareholder meeting to amend the proprietary lease. . . .
2. "All daily transfer sheets showing changes in the names, addresses, and number of shares of the common shareholders. . . .
3. "All notices of annual meeting and/or special meeting in which the issue of amending the proprietary lease was noticed or discussed, together with proof of service of any such notice on each shareholder.
4. [omitted]
5. "All waivers of notice regarding annual meeting and/or special meeting in which the issue of amending the proprietary lease was noticed or discussed.
6. "All lists of shareholders and/or their proxies attending the annual meeting and/or special meeting in which the issue of amending the proprietary lease was noticed or discussed.
7. "All ballots (if voting was by ballot) regarding the vote, if any, on the issue of amending the proprietary lease. . . .
8. "All other documents relating to or referring to the amendment of the proprietary lease." (Complaint, at ¶ 45.)

The common-law right of inspection of corporate records is broader than the statutory right and can go beyond the specific materials delineated in BCL § 624 (b) and (e). (*Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Companies, Inc.*, 120 AD3d 1052, 1056 [1st Dept, 2014].) This common-law right is subject to the motion judge's discretion. (*Crane Co. v Anaconda Co.*, 39 NY2d 14, 18 [1976].) When asserting a common-law right of access, petitioner must plead and prove that inspection is desired for a "proper purpose." (*Id.*)

Plaintiff argues that her desire "to understand how and why her Lease was amended so she can protect her children so that they can live in Unit 7A as a family" is a valid purpose to obtain the requested records and that she made it in good faith. (Plaintiff's Memorandum of Law in Support of Cross-Motion and in Opposition to Motion, at 12-13.) This court disagrees. In an interim order of September 14, 2017, this court dismissed plaintiff's first and second causes of action as time-barred. Plaintiff does not need those materials anymore to prove a case that, by law, she is no longer allowed to prove. To seek the records at this phase is merely harassing. Plaintiff is unable to demonstrate that she is entitled to the additional records.

The court continues to note that defendant has not moved to dismiss plaintiff's third cause of action, and thus it survives.

Accordingly, it is

ORDERED that defendant's motion for attorney fees and to sever and convert plaintiff's third cause of action is denied; that aspect of defendant's motion on the fourth cause of action is denied as academic because plaintiff withdraws the fourth cause of action; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the third cause of action is denied; and it is further

ORDERED that the parties appear for a conference on October 10, 2018, at 10:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: June 25, 2018


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