Brody v Acheson
2018 NY Slip Op 32515(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 157279/18
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ERICA BRODY and KONSTANTIN ZAKASHANSKY

INDEX NO. 157279/18

MOT. DATE

- v -

MOT. SEQ. NO. 001

ANN ACHESON et al.

The following papers were read on this motion to/for order directing resp to comply with bylaws, vacate amendment to bylaw

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

In their amended complaint, plaintiffs Erica Brody and Konstantin Zakashansky allege that defendants Ann Acheson and Amanda Bielskas (collectively the "director defendants") improperly prevented plaintiffs from purchasing an additional apartment to combine with their existing apartment at the building owned by 11 West 95th Street Apartment Corp. (the "corporation"). Plaintiffs allege that the defendants committed "unreasonable and tortious interference" with the purchase which was approved by a majority of the shareholders and engaged in an "eleventh hour bad faith power grab... to inoculate themselves from shareholder oversight by amending the corporate by-laws to require a supermajority of shareholders to remove directors." The remaining defendant is Jeffrey Levin, the corporation's transfer agent.

Plaintiffs now seek an order pursuant to CPLR § 6301[1] directing the corporation to comply with its by-laws by transferring the shares of Apartment 2F/2R and appurtenant proprietary lease to plaintiffs; and [2] vacating the amendments to the corporation's by-laws passed by the corporation's Board of Directors (the "Board") at its special meeting on August 5, 2018.

Defendant Jeffrey Levin cross-moves, pre-answer, to dismiss the amended complaint against him pursuant to CPLR § 3211[a][7]. The director defendants and the corporation (collectively the "co-op defendants") also cross-move, pre-answer, to dismiss on both grounds of failure to state a cause of action and based upon documentary evidence (CPLR § 3211[a][7] and [1]). Plaintiffs oppose the cross-motions. The court's decision follows.

The building which the corporation owns at the heart of this dispute is a four-story brownstone with six apartments located at 11 West 95th Street in Manhattan (the "building"). Plaintiffs are presently the owners of apartment 1 at the building and they own a 41.5% of the corporation's shares. In or about December 2017, plaintiffs claim that they approached the owners of apartments 2F/2R (sometimes "apartment 2") in the building, Bing Song and Daniel Bell (the "sellers"). The sellers own 22.3% percent of the corporation's shares.

Dated: 10/3/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

The Board is comprised of three directors/officers: plaintiff Erica Brody, President; defendant Bielskas, Vice President and Co-Treasurer; and defendant Acheson, Co-Treasurer. Bielskas owns the shares and proprietary lease appurtenant to apartment 3R, which accounts for 9.81% of the corporation's shares. Acheson owns the shares and proprietary lease appurtenant to Apartment 4F, which accounts for 8.95% of the corporation's shares. The remaining owners are James Catalano and Jake Klisivitch. Catalano owns the shares and proprietary lease appurtenant to Apartment 3F, which accounts for 9.25% of the corporation's shares. Klisivitch owns the shares and proprietary lease appurtenant to Apartment 4R, which account for 8.51% of the Co-op shares. Klisivitch's sister, Alex Klisivitch, serves as Secretary of the corporation and resides in apartment 4R.

On or about April 23, 2018, plaintiffs and the sellers entered into a contract for the purchase of apartments 2F/2R. On May 29, 2018, plaintiffs submitted an application for the purchase to the corporation's Board of Directors (the "Board"). As of June 29, 2018, plaintiffs claim that the Board has neither approved nor rejected the application. Section 16(a)(vi) of the Corporation's Proprietary Lease provides that a shareholder may appeal the Board's denial of or inaction on an application to transfer a unit in the corporation.

Meanwhile, the co-op defendants explain that given that the proposed transfer would result in a single owner with a 63% share of the corporation, the Board, in "exercising its business judgment, on numerous occasions over the last eight (8) months, advised plaintiffs that their attempted purchase of apartment would not be permitted." The co-op defendants further maintain that "after being presented with a formal purchase application, [the Board] made the objectively reasonable decision to reject and withhold consent to the proposed transfer..." The co-op defendants have provided copies of emails between them and plaintiffs. In an email dated December 15, 2017, plaintiff Zakashansky informed defendant Bielskas that he "received a very exciting promotion at work" and was therefore "able to offer" Bing "a better price than her last two offers." Zakashansky then stated: "Would like to hear your thoughts on this before moving forward."

An email from Bielskas to Zakashansky dated December 17, 2017 provides in pertinent part as follows:

> First of all, congratulations on your promotion, and we appreciate the desire to have your family closer to you (and Bing's desire to sell once and for all). Since the purchase of Bing's apartment would make you majority shareholders in the co-op, we felt it our responsibility to contact the remaining shareholders for their feedback, to add to our own opinions. All remaining shareholders are unanimously opposed to this sale for many reasons, but primarily:
>
> It puts the building in a tenuous financial situation - should something happen where you were not able to continue maintenance payments, your portion of capital improvements, or other increased financial responsibilities.
>
> Unfavorable resale value and appeal of units in the future and/or ability for potential buyers to obtain financing.
>
> Renders the rest of our shares obsolete in a voting capacity.
>
> Based on the unanimous opposition to this sale by the remaining shareholders, we would not approve this sale should it go to contract and enter the board approval process. We would not want you to waste your time and money unnecessarily.

In a subsequent email from Acheson to Zakashansky dated January 8, 2018, Acheson wrote that "[w]hile we appreciate your willingness to compromise, we remain opposed to this sale... we the remaining shareholders will not approve this sale."

In a letter dated March 15, 2018, plaintiffs' counsel advised Levin that plaintiffs and sellers "have a sufficient number of shares to approve the sale at a shareholders' meeting" and "they will be able to override the Board's decision and obtain Co-op approval for the proposed purchase."

Plaintiffs claim that because they did not receive a response from the Board regarding their application to purchase apartment 2, they were entitled to serve a notice of special meeting to consider same. Plaintiffs maintain that they were authorized to serve such notice because Brody is an officer of the corporation and plaintiffs own more than 25% of the shares of the corporation. Plaintiffs noticed the special meeting to consider the proposed purchase for July 10, 2018. The notice was dated June 29, 2018 and was sent by regular mail to all shareholders. The notice provided that the purpose of the meeting was to consider plaintiffs' application for:

1. The sale by Song/Bell to Zakashansky/Brody of the 1,810 shares of stock owned by Song/Bell and the assignment by Song/Bell to Zakashansky/Brody of the proprietary lease to Apt. 2F/2R allocated to such shares of stock; and

2. The physical merger and combination of Apt. 2F/2R with Apt. 1 (the apartment currently occupied by Zakashansky/Brody and allocated to shares of stock currently owned by Zakashansky/Brody); and

3. The construction plans for the said merger and combination of Apt. 2F/2R and Apt. 1; and

4. Acceptance and execution by the Company of the Recognition Agreement with the mortgage lender for Zakashansky/Brody in connection with the said sale, assignment, merger and combination.

That special meeting was held on 7/10/18. Plaintiffs represent that they attended the meeting in person and the sellers attended by proxy, thereby constituting a quorum. At the special meeting, plaintiffs assert that the proposed purchase was approved by a majority vote of the shareholders.

Plaintiffs claim that following the 7/10/18 special meeting, defendants refused to schedule the closing. The parties have provided to the court a copy of a letter dated July 24, 2018 from defendant Levin to the sellers which states in pertinent part that "[t]he Admission Committee and Board... have declined to consent to the sale" of apartment 2 to plaintiffs.

Plaintiffs then served a notice of a special shareholders' meeting for August 7, 2018 to vote on removing the director defendants. In response, the director defendants called a special meeting of the Board for August 5, 2018 to vote on amendment to the bylaws that would change the number of shareholders needed to remove directors and appoint replacements from one-half to two-thirds. Plaintiffs allege that this act constituted a breach of the director defendants' duty to the corporation and its shareholders and was an *ultra vires* act. This order to show cause ensued.

Discussion

At the outset, defendants argue that since plaintiffs filed their amended complaint after the order to show cause was brought, such act "supersedes and eliminates the OSC." The court rejects this procedural argument. Defendants have not demonstrated any prejudice which would result by the court considering the OSC in light of the amended complaint, since defendants' opposition to the instant motion was served after they received a copy of the amended complaint.

The court will first consider plaintiffs' motion for a preliminary injunction. Pursuant to CPLR § 6301, a preliminary injunction may be granted in two instances: [1] where the defendant is about to do or is doing, procuring or suffering to be done an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual; [2] where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an

act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

A preliminary injunction is a drastic remedy and should not be granted unless the movant can demonstrate "a clear right" to such relief. (*City of New York v. 330 Continental, LLC*, 60 AD3d 226 [1st Dept 2009]). On a motion for preliminary injunctive relief, plaintiffs must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in their favor (see *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; see also *1234 Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011]).

The co-op defendants argue that plaintiffs cannot obtain relief pursuant to CPLR § 6301 because plaintiffs essentially seek to fully adjudicate their claims by way of this motion. The co-op defendants further contend that the granting of such relief is improper as issue has not even been joined. The court declines to address these arguments. Even if the relief plaintiffs seek was available pursuant to CPLR § 6301, plaintiffs have not shown a likelihood of success on the merits for the reasons that follow.

Transfer of Apartment 2

Plaintiffs' first request for relief concerns their proposed purchase of apartment 2, wherein plaintiffs challenge two specific events: [1] defendants' failure to approve the proposed purchase of apartment 2; and [2] the 8/7/18 special meeting. The court will first consider the former. This claim is based upon the allegation that the Board failed to timely respond to their application to purchase apartment 2.

Section 16 of the proprietary lease provides in pertinent part as follows:

> (a) The Lessee shall not assign this lease or transfer the shares to which it is appurtenant or any interest therein, and no such assignment or transfer shall take effect as against the Lessor for any purpose, until
> ...
>
> (vi) Except in the case of an assignment, transfer or bequest of the shares and this lease to the Lessee's spouse or adult siblings or parents, and except as otherwise provided in Paragraphs 17(b) and 38 of this lease, consent to such assignment shall have been authorized by resolution of the Directors, or given in writing by a majority of the Directors; or, **if the Directors shall have failed or refused to give such consent within 30 days after submission of references to them or Lessor's agent, then by lessees owning of record a majority of the then issued shares of the Lessor.** Consent by lessees as provided for herein shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose in the manner as provided in the by-laws.
>
> (Emphasis added.)

Defendants have come forward with proof that the Board gave plaintiffs notice of their refusal to consent to the proposed purchase long before plaintiffs' application was formally submitted. In any event, it is of no moment whether the Board properly refused consent or failed to in connection with the proposed purchase. In either event, the proprietary lease gives shareholders the ability to override the Boards' refusal without distinction.

Plaintiffs maintain that as of June 29, 2018, more than thirty days after they submitted their application for the proposed purchase, they were entitled to call a special meeting to consider said purchase. Section 16(a)(vi) provides that a majority of the shareholders may call a special meeting for the purpose of approving the proposed purchase. The court must look to the by-laws and proprietary lease to determine whether the corporation's procedures were properly followed in noticing and holding the 7/10/18 special meeting.

Pursuant to Article 1, Section 2, of the by-laws, a special meeting of the shareholders may be called by an officer of the corporation, a majority of the Board or by the secretary when requested in writing by shareholders of record of at least twenty-five percent of the shares. Such notice of the special meeting must include "the time, place and purpose thereof and the officer or other person or persons by whom the meeting is called, shall be served, either personally or by mail. on each shareholder of record, not less than ten nor more than fifty days before the date of the meeting." The by-laws provide that shareholders may attend either in person or by proxy and further require that a quorum be present at the meeting. Quorum is defined under the by-laws as holders of at least fifty percent of the corporation's shares.

There is no dispute that the 7/10/18 special meeting was properly noticed. At the meeting, plaintiffs claim that a majority of shareholders attended either in person or by proxy. To wit, plaintiffs attended in person, and they claim that the sellers appeared by proxy. No other persons attended the meeting. At the meeting, the shareholders voted to approve a corporate resolution which, *inter alia*, approved Plaintiffs' purchase of apartment 2.

Defendant Levin contends there is an issue whether quorum was met at the 7/10/18 special meeting, because "no written proxy has been produced, nor referenced in the Minutes (of said meeting), as required by by-laws, section 5, which provides: 'All proxies shall be in writing but need not be acknowledged or witnessed and shall be filed with the secretary at or previous to the time of the meeting.'"

The minutes of the 7/10/18 special meeting do indeed reflect that the sellers were present "by proxy." No written proxy, however, has been provided to the court. Further, plaintiffs are silent as to whether the written proxy was filed with the secretory at or previous to the meeting. Therefore, plaintiff has failed to demonstrate, *prima facie*, that a quorum was present at the 7/10/18 special meeting.

Assuming *arguendo* that quorum was met, both Levin and the co-op defendants maintain the corporate resolution should nonetheless be set aside. First, the co-op defendants argue that "where, as here, the non-interested Board has decided to withhold consent", a majority of interested shareholders cannot "*carte blanche* [] overrule that decision." The co-op defendants further argue that plaintiffs' interpretation of Section 16(a)(vi) "would render meaningless the other provisions of the co-op governing documents that (a) generally give the Board the authority to manage the affairs of the co-op [], and (b) specifically give the Board authority, in the first instance, to decide transfers." The co-op defendants urge the court to read into Section 16(a)(vi) the term "non-interested" in defining which shareholders may override the Board's refusal or failure to consent to a proposed transfer. These arguments fail.

The corporation's governing documents are contracts which must be interpreted according to general contractual principles (*Olszewski v. Cannon Point Ass'n, Inc.*, 148 AD3d 1306 [3d Dept 2017]). Unambiguous provisions in a contract must be given their plain and ordinary meaning (*Burlington Ins. Co. v. NYC Transit Authority*, 29 NY3d 313 [2017]). Where the parties' intent can be gleamed from the four corners of a contract, the court should interpret the contract in order to effectuate that intent (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Associates*, 257 AD2d 1 [1st Dept 1999]). "The court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert" (*Maser Consulting, P.A. v. Viola Park Realty, LLC*, 91 AD3d 836 [2d Dept 2012] quoting *131 Heartland Blvd. Corp. v. C.J. Jon Corp.*, 82 AD3d 1188 [2d Dept 2011]; see also *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 AD3d 61 [1st Dept 2008]).

To agree with the co-op defendants that the term "non-interested" should be inserted in Section 16(a)(vi) to disqualify plaintiffs and sellers from exercising their rights under said provision would be in derogation of the law. Indeed, such a word would fundamentally alter the provision, and absent any expressed intent by the drafters of the proprietary lease and/or by-laws, the court cannot adopt the co-op defendants' interpretation of Section 16(a)(vi). The court is unpersuaded by their related argument that Section 16(a)(vi) conflicts with the other provisions of the corporation's governing documents. It is true that the Board is explicitly authorized to manage the affairs of the corporation. That authority, however,

was checked by the Section 16(a)(vi), which expressly permits a majority of shareholders to override the Board's refusal or failure to consent to a transfer. The co-op defendants reading of Section 16(a)(vi), that shareholders may only decide whether to consent to a proposed transfer "in the event that the Board does not make a decision within thirty (30) days of receiving an application for consent to a proposed transfer", is wholly unsupported by the plain language of this provision. Therefore, it is rejected.

Plaintiffs are correct that, again, assuming *arguendo* that quorum was met, once the shareholders approved plaintiffs' purchase at the Special Meeting, the corporation had approved the proposed purchase and the Board no longer had authority to approve or reject Plaintiffs' application. The inquiry does not end here, however.

The defendants argue that the corporate resolution should be set aside because Brody acted in bad faith in noticing the special meeting and in voting to approve the sale. Levin specifically argues that "Brody, an officer and director of the corporation, acted in bad faith or was motivated by factors other than interest of the cooperative corporation" and "was required to recuse herself from all corporate actions related to her personal interest in acquiring the subject unit."

In essence, defendants are challenging Brody's role in noticing the 7/10/18 special meeting, and in voting to approve the corporate resolution. They claim that Brody breached her fiduciary duties to the corporation. Directors and corporate officers owe a fiduciary duty to their corporation in the performance of their duties (*Morales v. Galeazzi*, 72 AD3d 765 [2d Dept 2000]). In explaining this fiduciary duty, the Court of Appeals wrote:

> Because the power to manage the affairs of a corporation is vested in the directors and majority shareholders, they are cast in the fiduciary role of "guardians of the corporate welfare." In this position of trust, they have an obligation to all shareholders to adhere to fiduciary standards of conduct and to exercise their responsibilities in good faith when undertaking any corporation action... Actions that may accord with statutory requirements are still subject to the limitation that such conduct may not be for the aggrandizement or undue advantage of the fiduciary to the exclusion or detriment of the stockholders.
>
> The fiduciary must treat all shareholders, majority and minority, fairly. Moreover, all corporate responsibilities must be discharged in good faith and with "conscientious fairness, morality and honesty in purpose."
>
> *Alpert v. 28 Williams Street Corp.*, 63 NY2d 557 [1984] [internal citations omitted].

The elements of a cause of action for breach of fiduciary duty are: [1] the existence of a fiduciary relationship; [2] misconduct by the defendant; and [3] damages directly caused by the defendant's misconduct (*Litvinoff v. Wright*, 150 AD3d 714 [2d Dept 2017]). The business judgment rule, however, "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" (*Fletcher* at 48 quoting *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]). A cooperative board of directors' decision, made in good faith and for the purposes of the cooperative, is protected by the business judgment rule (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]).

The business judgment rule has been applied to cooperative sales (*Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]). Further, evidence of a director's self interest in an application to purchase an apartment unit is sufficient to sustain a claim of bad faith and breach of fiduciary duty (*Bernheim v. 136 East 64th Street Corp.*, 128 AD2d 434 [1st Dept 1987]; *Barbour v. Knecht*, 296 AD2d 218 [1st Dept 2002]).

On this application, Brody, as director, has wholly failed to demonstrate that the purpose of the 7/8/10 special meeting was in the best interest of the corporation. Indeed, defendants have offered numerous reasons for why they objected to the proposed purchase which goes to the issue of whether

Brody acted in bad faith and breached her fiduciary duty to the corporation. Defendants argue that if the purchase was approved and plaintiffs fail to meet their own financial obligations, as >60% interest owners of the corporation, the corporation would be exposed to potentially catastrophic financial risk. Further, it is reasonably likely that the attendant financial risk of plaintiffs' proposed purchase and combination of apartments 1 and 2 would devalue the remaining shares of the corporation. Finally, the co-op defendants further point out that plaintiffs proposed purchase would result in their having a majority ownership interest in the corporation which would obviate the need for a Board.

Based upon the foregoing, plaintiffs have neither established that the 7/10/18 meeting was held in conformance with the corporation's by-laws in that quorum was met, nor have they demonstrated that Brody's acts were in good faith and in furtherance of the corporation's purposes. Therefore, plaintiffs have not demonstrated a likelihood of success on the merits on their application for an order directing the corporation to transfer the shares of Apartment 2F/2R and appurtenant proprietary lease to plaintiffs.

The 8/5/18 Special Meeting

Next, the court must consider plaintiffs' request for an order vacating the amendments to the corporation's by-laws passed by the corporation's Board of Directors (the "Board") at its special meeting on August 5, 2018. The co-op defendants admit that through the Secretary of the corporation, the 8/5/18 special meeting was noticed upon their receipt of notice of plaintiffs' second special meeting for 8/7/18. Notice of the 8/7/18 special meeting was dated July 26, 2018, which is twelve days before the meeting was to be held.

Plaintiffs claim that the co-op defendants only served written notice of the 8/5/18 special meeting on August 3, 2018. While the 8/5/18 special meeting notice is undated, if it was also served on 7/26/18, it would have set the special meeting to be held ten days thereafter, which would be in conformance with the by-laws. Aside from Brody's self-serving and conclusory claim that she only received notice of the 8/5/18 special meeting two days prior, there is no proof that proper notice of same was not given. Brody has not provided any specific details regarding her receipt of the notice.

Assuming *arguendo* however that plaintiffs could demonstrate a likelihood of success that the 8/5/18 special meeting was not properly noticed, plaintiffs have not demonstrated irreparable harm. The purpose of the 8/5/18 special meeting was to consider a resolution by the defendant directors that would raise the threshold of shareholder votes required to remove a director or appoint a new director, from a majority to a two-thirds vote. At that meeting, the resolution was approved. Plaintiffs alone do not constitute a majority of shareholders. In order to demonstrate irreparable harm, plaintiffs would need to come forward with proof in the form of a sworn affidavit by another shareholder which would have established that a majority would have voted to remove any of the directors but for the subject corporate resolution. Plaintiffs have not provided such proof to the court.

Further, for reasons already stated herein, the court does not find that the equities weigh in plaintiffs' favor on this claim. On this record, there is at least as much evidence that Brody is engaged in a "bad faith power grab" as there is that the director defendants did so. Otherwise, the corporate resolution requiring a supermajority vote to remove a director serves a legitimate cooperative purpose to the extent that it prevents plaintiffs from essentially mounting a take-over of the corporation.

Accordingly, the motion for a preliminary injunction is denied in its entirety.

The Cross-Motions

The court now turns to the cross-motions to dismiss. Plaintiffs' second cause of action is against Levin and is for breach of fiduciary duty. Levin argues that this claim should be dismissed for failure to state a cause of action. Levin represents that as a Transfer Agent for the corporation, he "is responsible for the preparation, processing and distributing of the necessary paperwork required in connection with the transfer of ownership of a cooperative, including the proprietary lease and shares of stock in the

corporation." According to the amended complaint, plaintiffs allege that the director defendants gave Levin "standing orders to disregard the shareholders' approval and not proceed with the closing" and that "Levin's wrongful refusal to complete the closing, in turn, is in blatant violation of his professional and fiduciary obligations to the Corporation."

Levin argues that plaintiffs' claims against him are insufficient because plaintiffs have not alleged that his withholding of consent to their purchase of apartment 2 was in bad faith or in furtherance of purposes other than the corporation's own legitimate interests. In opposition, plaintiffs maintain in conclusory fashion that Levin breached his fiduciary duty to them by failing to transfer the sellers shares and appurtenant lease to them after the 7/10/18 special meeting.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

While there is no dispute that a transfer agent owes a fiduciary duty to the corporation, there are no facts here which support plaintiffs' claim that Levin breached that duty. Plaintiffs' amended complaint is devoid of any allegations of misconduct by Levin. Indeed, plaintiffs' claims arise from a dispute regarding corporate governance and is between plaintiffs and the director defendants. If that dispute was resolved in plaintiffs' favor, there is no indication that Levin would not comply with a court order directing Levin to transfer the subject shares and appurtenant lease to plaintiffs.

Accordingly, Levin's cross-motion is granted and plaintiffs' complaint as against Levin is severed and dismissed.

Plaintiffs' claims against the co-op defendants are also for breach of fiduciary duty, and plaintiffs seek related injunctive and declaratory relief. The co-op defendants argue that the allegations concerning the director defendants only arise from their acts undertaken in their capacity as directors, and not as individuals. Therefore, the co-op defendants argue that the breach of fiduciary duty claim fails as a matter of law. While the co-op defendants rely upon *Pelton v. 77 Park Ave. Condo.* (38 AD3d 1 [1st Dept 2006]), the plaintiffs maintain that "*Pelton* is no longer good law" and cite *Fletcher v. Dakota, Inc.* (99 AD3d 43 [1st Dept 2012]).

The co-op defendants also cite, however, *Avramides v. Moussa*, 158 AD3d 499 [1st Dept 2018], wherein the First Department explained that *Pelton* is not "abrogated law", but rather stood for the proposition that a motion to dismiss claims against individual directors should be granted where the allegations "fall squarely within the protections of the business judgment rule" (*Avramides* at 500).

Plaintiffs contend that the director defendants breached their fiduciary duties by "wrongfully instruct[ing] Levin not to proceed with the closing" and "vot[ing] to make it more difficult for the shareholders to remove and appoint directors immediately before the shareholders were going to vote on whether to remove them as directors." The court is unpersuaded by these arguments. Contrary to plaintiffs' contention, the allegations against the director defendants fall within the ambit of the business judgment rule. Indeed, there are no claims that either director objected to plaintiffs' purchase in bad faith or that the objection was not in the interest of the corporation (*cf. Pelton*, *supra*, which contained allegations of wrongful discrimination). Mere disagreement with the director defendants' decision to object to plaintiffs' purchase does not evidence bad faith. Nor does the director defendants prevention of their removal from the board while following the corporation's governing documents and procedures establish bad-faith *prima facie*.

The balance of the co-op defendants' cross-motion must be denied, however, as plaintiffs have alleged sufficient facts to support their claims for injunctive and declaratory relief sought in this action for the reasons already stated herein. Accordingly, the co-op defendants' cross-motion is granted only to

the extent that plaintiffs' complaint against the director defendants, individually, is severed and dismissed.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that defendant Levin's cross-motion to dismiss is granted and plaintiff's complaint as against him is severed and dismissed; and it is further

ORDERED that the co-op defendants' cross-motion is granted only to the extent that plaintiffs' complaint against the director defendants, individually, is severed and dismissed.

ORDERED that the corporation shall serve and file an answer within 20 days after service of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on November 27, 2018 at 9:30am in Part 8, 80 Centre Street; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10-3-18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.