SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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ANNA WACHTEL & EDWARD WACHTEL

Plaintiffs,

- v -

PARK AVE & 84TH ST., INC., & HOLLY FLAGG,

Defendants.

INDEX NO. 657144/2017

MOTION DATE 11/28/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Gallet Dreyer & Berkey, LLP (David L. Berkey of counsel), for plaintiffs
Boyd, Richards, Parker & Colonnelli, P.L. (Bryan J. Mazzola of counsel), for defendants

Gerald Lebovits, J.

Defendants, Park Ave & 84th St., Inc. (the Co-op) and Holly Flagg (collectively the Co-op defendants), move under CPLR 3211 (a) (1) and (a) (7) to dismiss the complaint. Plaintiffs, Anna Wachtel and Edward Wachtel, cross-move under CPLR 3211 (d) for disclosure and leave to replead.

I. Background

In 1974, the Co-op took approximately 25% of the floor area originally allocated to Apartment 1A (the apartment) — premises located at 103 East 84th Street in New York County — and combined that floor area into the superintendent's apartment (alteration). But the Co-op did not proportionally reduce the number of shares, which was 200, allocated to the apartment. On December 8, 2014, plaintiffs became the shareholder of 200 shares of the Co-op's stock and the proprietary lessees of the apartment. On December 16, 2015, the New York City Department of Buildings (DOB) issued violations against the Co-op because of the alteration without filing plans with and obtaining approvals from the DOB. Defendant Flagg is a member of the Co-op board of directors.

Plaintiffs base their five causes of action on three alleged wrongs. First, plaintiffs allege that the alteration performed by the Co-op without filing plans and obtaining approval from the DOB was unlawful and the Co-op is obligated to cure the violations imposed on the Co-op by the DOB. Second, plaintiffs allege that the Co-op removed the apartment's entrance that was

compliant with the Americans with Disabilities Act (ADA) through the alteration, and the Co-op is obligated to provide plaintiffs with the ADA-accessible entry to the apartment. Finally, plaintiffs claim that the Co-op took approximately 25% of the floor area of the apartment but did not proportionally reduce the number of shares allocated to the apartment and plaintiffs have been compelled to pay maintenance charges 25% more than they should have been paying.

Plaintiffs' complaint seeks (1) a declaratory judgment against the Co-op; (2) injunctive relief against the Co-op; (3) breach of contract against the Co-op; (4) in the alternative, unjust enrichment against the Co-op; and (5) breach of fiduciary duty against Flagg.

II. Motion to Dismiss

Under CPLR 3211 (a) (1), a party may move for judgment dismissing a cause of action on the basis that a defense is founded upon documentary evidence. A court must accept the complaint's factual allegations as true and determine whether the facts as alleged fit within any cognizable legal theory. Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence "utterly refutes [plaintiffs'] factual allegations" and "conclusively establishes a defense to the asserted claims as a matter of law." (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].)

Under CPLR 3211 (a) (7), a party may move for judgment dismissing a cause of action on the basis that the pleading fails to state a cause of action.

A. First cause of action

In the first cause of action, plaintiffs allege that they are entitled to a judgment declaring that: (a) the alterations performed by the Co-op without filing plans and obtaining approval from the DOB was unlawful; (b) the Co-op is obligated to cure the violations imposed by the DOB against the Co-op; (c) the Co-op is obligated to restore the ADA-compliant entrance; (d) the Co-op is obligated to repair and maintain the entrance to the apartment; and (e) the Co-op must reduce the number of shares allocated to the apartment.

1. Claims for the DOB violations

The Co-op's motion to dismiss plaintiffs' first cause of action for its DOB-violations claim is granted under CPLR 3211 (a) (7).

Under CPLR 3001, "supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy." To constitute a "justiciable controversy," there must be "an actual controversy between genuine disputants with a stake in the outcome," involving substantial legal interests for which a declaration of rights will have some practical effect. (*Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006].) Declaratory relief is a discretionary remedy that should be granted only where necessary to serve some useful purpose to the parties. (*Jenkins v State Div. of Hous. & Cmty. Renewal*, 264 AD2d 681, 682 [1st Dept 1999].)

Plaintiffs acknowledge that the DOB already issued violations against the Co-op, due to the alteration without filing plans and obtaining approvals from the DOB and the Co-op is not denying that. No declaration is necessary in this case.

This court need not consider the Co-op's argument that plaintiffs' claims for the DOB violation should be dismissed under CPLR 3211 (a) (1).

2. Claims for the ADA-accessible entrance

The Co-op's motion to dismiss plaintiffs' first cause of action about the ADA-accessible entrance is granted under CPLR 3211 (a) (1) and (a) (7).

The motion to dismiss this part of the first cause of action is granted under CPLR 3211 (a) (7). Regulations adopted pursuant to the ADA impose access requirements only on alterations made after January 26, 1992. (28 CFR § 36.402 [a].) Plaintiffs acknowledge that the alteration was made in 1974 and do not allege any other alteration made after January 26, 1992. Plaintiffs' ground for asserting the duty to install ADA-accessible entrance to the apartment is fatally flawed.

The motion to dismiss is also granted under CPLR 3211 (a) (1). Plaintiffs allege that the New York's Multiple Dwelling Law § 78 requires all owners of multiple dwellings to keep every part of the multiple dwelling in good repair. Under the lease agreement between the Co-op and plaintiffs, the Co-op is obligated to keep in good repair the entrances; therefore, the Co-op is obligated to repair and maintain the entrance to the apartment in a code-compliant manner, and the Co-op breached its obligation by not installing the ADA-compliant entrance. The Co-op argues that "good repair" does not necessarily mean that the Co-op warrants that the leases premise complies with all laws and regulations, and rather, complying with all laws and regulations is plaintiffs' duty. The lease provides that "Lessee will comply with all the requirements of governmental authorities and with all laws, ordinances, rules, and regulations with respect to the apartment." (NYSCEF Doc No. 10, Exhibit B.) Therefore, the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law regarding the Co-op's duty to install the ADA-compliant entrance to the apartment.

3. Claims for the allocation of shares

The Co-op's motion to dismiss plaintiffs' first cause of action for the allocation of shares is granted under CPLR 3211 (a) (7).

Plaintiffs' basis for this cause of action is the by-laws of the Co-op and Business Corporation Law § 501 (c). Plaintiffs argue that under the Co-op's by-laws, if the size within the apartment is changed, the Co-op may adjust the number of shares. Their shares are being treated unequally because the Co-op did not reduce the number of shares of the apartment after the alteration, and plaintiffs pay more and other shareholders pay less in maintenance per square foot of floor space. According to plaintiffs, this disparate treatment violates Business Corporation Law § 501 (c).

A court may not question the reasonableness of a board of directors' decisions "[a]bsent proof of a breach of fiduciary duty to the cooperative corporation." (*Katz v 215 W. 91st. St. Corp.*, 215 AD2d 265, 266-267 [1st Dept 1995].) No proof exists that there was a breach of a fiduciary duty to the Co-op; therefore, this court will not question the Co-op Board's decision to maintain the number of shares allocated to the apartment.

Plaintiffs assert that the business-judgment rule does not protect the Co-op's decision when the Co-op violates BCL 501 (c), mandating that "each share shall be equal to every other share of the same class." But plaintiffs fail to establish that the Co-op violated BCL 501 (c). Plaintiffs allege only that they have too many shares; thus, they are charged more "per square foot." Plaintiffs do not allege that their shares are being treated differently from others in the same class of shares; for example, they do not allege that they are being charged more "per share" than other shareholders in the same class.

This court need not consider the Co-op's argument that plaintiffs' claims for the allocation of shares should be dismissed under CPLR 3211 (a) (1).

B. Second Cause of Action

The Co-op's motion to dismiss plaintiffs' second cause of action is granted under CPLR 3211 (a) (7).

In the second cause of action, plaintiffs seek preliminary and permanent injunctive relief requiring the Co-op: (a) to cure the violations imposed by DOB against the Co-op; (b) to restore the ADA-compliant entrance; (c) to repair and maintain the entrance to the Apt; and (d) to reduce the number of shares allocated to the Apt.

To obtain an injunction, a movant must demonstrate (1) a probability of success on the merits, (2) danger of irreparable harm absent an injunction, and (3) a balance of equities in its favor. (*Council of City of New York v Guiliani*, 248 AD2d 1, 4 [1st Dept 1998].)

As to the need for injunctive relief, in order to prevent irreparable harm to plaintiffs, plaintiffs have not made a clear showing of irreparable harm absent an injunction. Damages compensable in money and capable of calculation are not irreparable. (*SportsChannel Am. Assoc. v Nat'l Hockey League*, 186 AD2d 417, 418 [1st Dept 1992].) Plaintiffs also do not allege the elements of equities.

This court need not consider the Co-op's argument that plaintiffs' second cause of action should be dismissed under CPLR 3211 (a) (1).

C. Third Cause of Action

The Co-op's motion to dismiss plaintiffs' third cause of action is granted under CPLR 3211 (a) (1) and (a) (7).

In the third cause of action, plaintiffs allege that the Co-op breached the lease as it failed to repair and maintain the entrance to comply with the ADA.

This argument lacks merit. As discussed above, plaintiffs failed to establish the Co-op's obligation to repair and maintain the entrance of the Co-op.

D. Fourth Cause of Action

The Co-op's motion to dismiss plaintiffs' fourth cause of action is granted under CPLR 3211 (a) (1) and (a) (7).

In the fourth cause of action, plaintiffs allege that if their allegations should be determined to be outside the scope of the lease, they alternatively allege that the Co-op was unjustly enriched by charging plaintiffs maintenance based on the allocation of 200 shares for the apartment.

To state a claim for unjust enrichment, a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011].) Plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue." (*Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005].) But where a valid and enforceable written contract governing the subject matter exists, plaintiff is precluded from recovery on a quasi-contract claim. (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987].)

Plaintiffs do not dispute that the lease exists and that it governs plaintiffs' claims for maintenance charges. Thus, there is no dispute about whether a contract exists. Plaintiffs' argument that the court may find, in the future, that the lease is void or unenforceable is insufficient. (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Plaintiffs set forth no factual basis from which it may be inferred that the lease is void or unenforceable, or that their claims fall outside the scope of the lease. Nor do plaintiffs challenge the authenticity of the lease. Therefore, based on the allegations in the complaint and the lease, the complaint fails to state a cause of action for unjust enrichment and the lease conclusively establishes the Co-op's defense to the unjust enrichment claim as a matter of law.

E. Fifth Cause of Action

The Flagg's motion to dismiss plaintiffs' fifth cause of action is granted under CPLR 3211 (a) (7).

In the fifth cause of action, plaintiffs allege breach of the fiduciary duty against the individual director, Flagg.

The individual board members are protected by the business judgment rule absent allegations of tortious acts outside of legitimate purposes. (*Murtha v Yonkers Child Cre Assn.*, 45 NY2d 913, 915 [1978].)

Plaintiffs have failed to state a claim against Flagg. Plaintiffs have made no allegations that Flagg committed any independent tortious act.

III. Cross-Motion

Plaintiffs' cross-motion for disclosure is denied. Plaintiffs make no showing that disclosure may lead to evidence of facts essential to justify opposition to the motion. (CPLR 3211 [d].)

Plaintiffs' request for leave to replead is denied. Plaintiffs' request is unsupported by a showing of "any new facts that would overcome the legal defects" in the original complaint. (*Pollak v Moore*, 85 AD3d 578, 579 [1st Dept 2011]; *Fletcher v Boies. Shiller & Flexner, LLP*, 75 AD3d 469, 470 [1st Dept 2010] [rejecting plaintiff's "cursory request" for leave to replead "because there was no proposed pleading accompanied by an affidavit of merit"].)

ACCORDINGLY, it is

ORDERED that defendants' motion to dismiss is granted and plaintiffs' cross-motion for disclosure and leave to replead is denied; and it is further

ORDERED that defendants must serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment accordingly.

2/1/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE