

Lima v Cleveland Arms Apt. Corp.
2020 NY Slip Op 32017(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 158107/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 158107/2015

JAMES LIMA,

MOTION SEQ. NO. 003

Plaintiff,

- v -

CLEVELAND ARMS APARTMENT CORPORATION,
TIMOTHY WRIGHT, ROCHELLE GUTMAN, JOSHUA
LEVIN, LINDSAY PITZER and JILL RACKMILL,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65,
66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 86

were read on this motion to/for DISCOVERY.

In this action sounding, inter alia, in breach of fiduciary duty, plaintiff James Lima
("Lima"), individually and derivatively on behalf of the shareholders of defendant Cleveland Arms
Apartment Corporation ("Cleveland Arms" or "the cooperative"), moves, pursuant to CPLR 3124,
to compel the production of certain documents and the deposition of nonparty John Cummings
("Cummings") (Docs. 61-69). Defendants oppose the motion (Docs. 70-81). After a review of the
parties' contentions, as well as a review of the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this
Court entered June 13, 2019 ("the 6/13/19 order"), which denied Lima's discovery motion seeking
to compel, in relevant part, the deposition of Cummings, an employee of Key Real Estate
Associates, LLC ("Key"), who was the cooperative's managing agent from 2009 through 2016, on

the grounds that, *inter alia*, the subpoena was overbroad and that the affirmation of plaintiff's counsel failed to articulate the basis for plaintiff's request to depose Cummings (Doc. 77).

In September 2019, Lima served Cummings with a second subpoena to produce documents relating to Cleveland Arms from January 1, 2009 through December 31, 2016 (Doc. 72). The subpoena also directed Cummings to appear for a deposition, indicating that his testimony was relevant to the issue of the cooperative's financial affairs insofar as "[p]reviously obtained testimony disclosed irregularities in Key's budgeting efforts, vendors used and other financial matters" (Doc. 72). A second document demand was served on defendants in September 2019 (Doc. 71), but defendants objected to the demand by notice of rejection, claiming, *inter alia*, that, pursuant to a discovery order dated September 12, 2019, discovery was complete (Doc. 79).

Lima now moves, pursuant to CPLR 3124, to compel defendants to produce the documents itemized in its second document demand (Doc. 62). Specifically, Lima requests board meeting minutes from 2016 through 2019; a list of present board members; shareholder meeting minutes for 2016 through 2019; a list of shareholders in Cleveland Arms as of September 1, 2019, with dates of acquisition; accounting records for Cleveland Arms from January 1, 2016 to date; bank statements of accounts for Cleveland Arms from January 1, 2016 to date; audited financial statements (income statement and balance sheets) for Cleveland Arms for 2016, 2017 and 2018; and contracts with interested board members, pursuant to Business Corporation Law ("BCL") § 727 (Doc. 62 ¶ 4).

Lima asserts, *inter alia*, that he is entitled to these documents because the second document demand essentially seeks to "update" the first document demand dated May 18, 2016, with which defendant complied without objection (Doc. 62 ¶ 6-8). Lima further argues that he is independently entitled to these documents pursuant to both the proprietary lease and BCL §§ 624

and 727 (Doc. 62 ¶ 10-12). Moreover, Lima maintains that Cummings' deposition testimony is "plainly warranted" because one of the cooperative's board members, defendant Rochelle Deutsche (sued herein as Rochelle Gutman), opined during her deposition that Key's termination may have been related to discrepancies in its annual budget (Doc. 62 ¶ 19-21).

In opposition to the motion, defendants contend, *inter alia*, that Lima is not entitled to the documents requested because "(a) [d]efendants already provided the [cooperative's] books and records from the relevant time period framed by the [c]omplaint, (b) the documents demanded by the [s]econd [d]ocument [d]emand are from a time period beyond that which is alleged in the [c]omplaint, and (c) [p]laintiff fails to establish a factual predicate that the discovery sought is nonduplicative[,] material and necessary information pertinent to the disputed issues in this action" (Doc. 70 ¶ 20). Defendants also reject Lima's contention that his alleged contractual and statutory rights, pursuant to both the proprietary lease and the BCL, afford him an independent right to compel discovery in this litigation (Doc. 70 ¶ 18).

In his reply papers, Lima asserts, *inter alia*, that the post 2016 documents may shed light on the pre 2016 breaches of fiduciary duty because "[c]hanges in behavior . . . bring into focus the wrongfulness of prior behavior" (Doc. 83 ¶ 19). Moreover, Lima claims that he is entitled to explore the circumstances surrounding Key's, and by extension, Cummings' termination in order "to ascertain if the [b]oard was doing its job given the existence of improper behavior during the precise period of time" that defendants allegedly breached their fiduciary duty (Doc. 83 ¶ 30).

LEGAL CONCLUSIONS

The motion is denied in all respects. Since defendants sufficiently responded to most of the document demands at issue here in their response to the first document demand, the discovery

sought in Lima's second document demand, other than expanding the time frame of said documents, is largely duplicative (*see GS Plasticos Limitada v Bur. Veritas Consumer Prods. Servs., Inc.*, 112 AD3d 539, 539 [1st Dept 2013]; *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007]). Moreover, Lima has failed to establish that the documents sought beyond 2016 are material and necessary to this action insofar as the allegations in the complaint concern acts by defendants occurring before 2016. Given Lima's failure to lay a factual predicate for these additional documents, that branch of the motion seeking to compel production of the documents itemized in the second document demand is denied (*see GS Plasticos Limitada v Bur. Veritas Consumer Prods. Servs., Inc.*, 112 AD3d at 540; *Pronti v Belletti*, 37 AD3d 966, 967 [3d Dept 2007]; *Cerasaro v Cerasaro*, 9 AD3d 663, 664-665 [3d Dept 2004]).

That branch of the motion seeking to compel Cummings' deposition is also denied. In the 6/13/19 order, this Court found that the first subpoena served on Cummings, which sought documents from January 1, 2009 to May 25, 2016, was overbroad (Docs. 72, 76, 77). The second subpoena served on Cummings is broader than the first subpoena since Lima now seeks documents from January 1, 2009 through December 31, 2016 (Doc. 72). Further, although Lima asserts that Cummings' deposition testimony is relevant to the "finances and proper handling of the cooperative's money," he fails to demonstrate that the testimony will not be duplicative of the financial documents already provided or that the deposition testimony of the two board members previously produced by defendants was inadequate (*see Haron v Azoulay*, 132 AD3d 475, 475-476 [1st Dept 2015]; *Gaston v Trustees of Columbia Univ. in the City of NY*, 2017 NY Slip Op 31896[U], 2017 NY Misc LEXIS 3405, *6-7 [Sup Ct, NY County 2017]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied in all respects, and it is further

ORDERED that within 30 days, counsel for defendants shall serve a copy of this order, with notice on entry, on plaintiff; and it is further

ORDERED that parties are directed to appear for a status conference on October 6, 2020, at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of this Court.

6/26/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE