ABM Mgt. Corp. v Linden Towers Coop. #2, Inc.
2021 NY Slip Op 33166(U)
November 5, 2021
Supreme Court, Queens County
Docket Number: Index No. 724346/2020
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI IA Part 3
A. J. S. C.

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ABM MANAGEMENT CORP.,

Plaintiff,

-against-

LINDEN TOWERS COOPERATIVE #2, INC. and LISA WU,

Defendants.

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Index Number: 724346/2020

Motion Date: April 27, 2021

Motion Seq.: #1

DECISION/ORDER

The following numbered papers read on this motion by defendants Linden Towers Cooperative #2, Inc., and Lisa Wu, individually (collectively referred to as defendants), to dismiss plaintiff ABM Management Corp.'s (plaintiff), first, fourth and seventh causes of action on the ground that they seek declaratory relief where other alternative avenues for relief exist, to dismiss plaintiff's fourth, fifth, sixth, seventh, eighth and ninth causes of action pursuant to CPLR §3211(a)(4), to dismiss plaintiff's third cause of action pursuant to CPLR §3211(a)(7), and to disqualify plaintiff's counsel, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., from appearing as, acting as, and being the attorneys of record for plaintiff in this matter.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 17-30
Answering Affidavits - Exhibits	EF 31-40
Reply Affidavits	EF 41-42

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action for: 1) declaratory judgment, 2) anticipatory breach/accelerated damages, 3) tortious interference with contract, 4) declaratory judgment for unlawful discrimination under New York City Administrative Code, 5) compensatory and punitive damages, jointly and severally, 6) for reasonable attorneys' fees and costs, jointly and severally, 7) declaratory judgment/unlawful discrimination under New York State Human Rights Law, 8) New York State Human Rights Law compensatory and punitive damages, and 9) New York State Human Rights Law reasonable attorneys' fees and costs.

In the complaint, plaintiff has alleged that Linden Towers Cooperative #2, Inc. ("Linden Towers"), was the fee owner of buildings located on premises known as 138-25 31 Drive, and

31-31 138 Street, in the County of Queens, and that Lisa Wu ("Wu") was an individual who was the President of non-party the Board of Directors of Linden Towers ("the Board"). Plaintiff has further alleged that on or about January 1, 1988, plaintiff and Linden Towers entered into an agreement wherein plaintiff agreed to act as the managing agent for Linden Towers and to perform certain management services in relation to the subject premises. Plaintiff has alleged that various extensions took place, pursuant to extension letters and new agreements to have plaintiff continue performing various management services for Linden Towers, including an extension approved by the Board on January 29, 2018.

Plaintiff has alleged that Wu disbanded the Board Executive Committee, held Board meetings without the requisite notice required by Linden Towers' By-Laws, and held pre-Board meetings including only the Board members of Asian descent, that Wu excluded plaintiff's representative from attending Board meetings, and that Wu placed pressure on plaintiff to terminate plaintiff's existing on-site manager and to replace that manager with a Mandarin-speaking manager. Plaintiff has further alleged that it informed Wu that there was no rational basis to terminate the on-site manager and that, subsequently, on or about August 27, 2020, plaintiff received a letter from counsel for Linden Towers which terminated plaintiff's employment with Linden Towers, voided the 2018 extension of the management agreement, informed plaintiff that it was employed on a month-to-month basis with an initial term that ended on December 31, 2019, and that plaintiff's employment was to be terminated on September 30, 2020. Plaintiff has alleged that on or about September 1, 2020, plaintiff rejected Linden Towers' alleged termination of employment on the basis that a valid management agreement existed.

Plaintiff has alleged that after various disputes over plaintiff's collection of maintenance fees from shareholders, including, but not limited to Linden Towers hiring another management company which simultaneously collected maintenance fees, on October 1, 2020, Linden Towers locked plaintiff out of the on-site office at the subject premises, in violation of the management agreement. Plaintiff has further alleged that when it continued to collect maintenance fees from shareholders after October 2020, on about November 19, 2020, Linden Towers informed shareholders who made any maintenance payments to plaintiff that such payments would not be recognized and that Linden Towers would pursue legal action against those shareholders for non-payment.

Plaintiff subsequently filed the instant action and has alleged the above-stated nine causes of action. Defendants have now moved for various relief. As an initial matter, the court will first address the branch of defendant's motion to disqualify plaintiff's counsel, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., from appearing as, acting as, and being the attorneys of record for plaintiff in this matter based upon a conflict of interest. Defendants have argued that prior to plaintiff's commencement of the instant action, Linden Towers interviewed Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., in order to find counsel, and that even though Linden Towers did not retain Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., as counsel, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., was made aware of sensitive information that would be prejudicial to defendants.

"The disqualification of an attorney is a matter that rests within the sound discretion of

the court" (*Blauman-Spindler v Blauman*, 184 AD3d 636, 637 [2d Dept 2020][internal quotation omitted]; *see Legacy Builders/Developers Corp. v Hollis Care Group, Inc*., 162 AD3d 649, 649 [2d Dept 2018]; *Halberstam v Halberstam*, 122 AD3d 679, 679 [2d Dept 2014]). "A party's right to be represented by counsel of his or her own choosing is a valued right which will not be superseded absent a clear showing that disqualification is warranted" (*id*.; *see Blauman-Spindler v Blauman*, 184 AD3d at 638).

"A party seeking to disqualify an attorney or a law firm for an opposing party on the ground of conflict of interest has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Moray v UFS Indus., Inc*., 156 AD3d 781, 782 [2d Dept 2017]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.10; *see Tekni–Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]; *Blauman-Spindler v Blauman*, 184 AD3d at 637). "When the moving party is able to demonstrate each of these factors, an irrebuttable presumption of disqualification follows" (*Moray v UFS Indus., Inc*., 156 AD3d at 782).

After a careful examination of the evidence in the record, including but not limited to Wu's affidavit, which has been annexed to the record, the court has determined that defendants have failed to satisfy their burden on this branch of their motion. Furthermore, defendants have failed to sufficiently demonstrate actual prejudice or the substantial risk of prejudice. Therefore, defendants are not entitled to the relief sought on the branch of their motion to disqualify plaintiff's counsel, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., from appearing as, acting as, and being the attorneys of record for plaintiff.

Next, the court will address the branch of defendants' motion to dismiss plaintiff's first cause of action for declaratory judgment, fourth cause of action for declaratory judgment for unlawful discrimination under New York City Administrative Code, and seventh cause of action for declaratory judgment/unlawful discrimination under New York State Human Rights Law, on the ground that these causes of action seek declaratory relief where other alternative avenues for relief exist.

In support of this branch of their motion, defendants have argued that these three causes of action are improper. Defendants have argued that the first cause of action is improper because it seeks the same relief as the second cause of action alleged in the complaint, and that the fourth and seventh causes of action are improper because the relief sought is already available in a separate employment discrimination action commenced by non-party Francine Shine (Shine)[1], plaintiff's employee, with the New York State Division of Human Rights, bearing Case No. 10209273.

"An action for a declaratory judgment should not be entertained where there is no necessity for resorting thereto" (*Elmsford Properties Corp. v Daitch Crystal Dairies, Inc*., 13 AD2d 1026, 1026 [2d Dept 1961]; *see Holtzman v Supreme Ct. of State of N.Y.*, 152 AD2d

[1] The court notes that while plaintiff has referred to Francine Shine as "Fran Fine" in the complaint, defendants have referred to her as Francine Shine.

724, 725 [2d Dept 1989]). However, "CPLR 3017(b) makes clear that declaratory relief need not be sought by itself, but can be joined with a demand for more traditional relief. It usually is. A demand for a declaratory judgment is often joined with a demand for an injunction or for money damages. There is no bar to either, or to the joinder of any other category of legal or equitable relief to which the plaintiff fancies himself entitled along with the declaration" (Siegel & Connors, NY Prac § 436 [6th ed 2018]) [Note: online treatise]).

CPLR § 3017 [b], provides the following:

> "In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed."

In addition to Wu's affidavit, which was mentioned above, the record before the court contains, among other things, copies of the pleadings, copies of a management agreement and various extensions to said agreement between plaintiff and Linden Towers, a copy of a complaint in an action commenced by Shine with the New York State Division of Human Rights, bearing Case No. 10209273, and various correspondence between the parties.

Plaintiff has the ability to seek declaratory relief along with a demand for more traditional relief (CPLR §3017[b]). With regard to plaintiff's first cause of action for declaratory judgment, plaintiff has sought "a declaratory judgment, declaring and determining that Linden Tower's termination of the 2018 Extension Agreement is void and that the 2018 Extension Agreement remains in full force and effect." This cause of action differs from the second cause of action for anticipatory breach/accelerated damages seeking "a declaratory judgment, declaring and determining that [p]laintiff is owed $201,780.00 from Linden Towers, representing the balance of management fees due and owing under the 2018 Extension Agreement, plus interest from January 1, 2021." As such, defendants have failed to satisfy their burden as to this cause of action and are not entitled to the dismissal of the first cause of action on these grounds.

As to the fourth cause of action for declaratory judgment for unlawful discrimination under New York City Administrative Code, and the seventh cause of action for declaratory judgment/unlawful discrimination under New York State Human Rights Law, a review of the complaint in Shine's employment discrimination action commenced with the New York State Division of Human Rights and bearing Case No. 10209273, has demonstrated that Shine was the only plaintiff in that action and that plaintiff was, in fact, named as a party defendant in that action.

Therefore, contrary to defendants' contentions, given that plaintiff has sought to recover damages for defendants' alleged discrimination against plaintiff, itself, in this action, and defendants have not demonstrated that plaintiff has otherwise sought such relief, defendants have failed to satisfy their burden on this branch of their motion as to these causes of action and are not entitled to the dismissal of the fourth and seventh causes of action on these grounds.

Now, the court will address the branch of defendants' motion to dismiss plaintiff's fourth, fifth, sixth, seventh, eighth and ninth causes of action pursuant to CPLR §3211(a)(4). CPLR §3211(a)(4), provides that:

> "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires."

In support of this branch of their motion, defendants have argued that these causes of action arise from substantially the same set of facts, are all based upon, all pertain to and are duplicative of Shine's human rights action, there is a substantial identity of parties in this action and Shine's human rights action, and that both actions seek the same relief.

To reiterate, plaintiff's fourth cause of action is for declaratory judgment for unlawful discrimination under New York City Administrative Code, the fifth cause of action is for compensatory and punitive damages, jointly and severally, the sixth cause of action is for reasonable attorneys' fees and costs, jointly and severally, the seventh cause of action is for declaratory judgment/unlawful discrimination under New York State Human Rights Law, the eighth cause of action is for New York State Human Rights Law compensatory and punitive damages, and the ninth cause of action is for New York State Human Rights Law reasonable attorneys' fees and costs.

"Under CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief . . . is the same or substantially the same" (*Jaber v Elayyan*, 168 AD3d 693, 694 [2d Dept 2019][internal quotation and citation omitted]; *see Whitney v Whitney*, 57 NY2d 731, 732 [1982]).

Given this standard, and taking into consideration that a thorough reading of the allegations contained in the complaint has demonstrated that the instant action has been commenced on plaintiff's behalf, seeking to obtain relief for plaintiff and not for Shine, the court has determined that although, as defendants contend, they are defendants in both actions, the relief sought in this matter is not sufficiently similar to the relief sought in the Shine action. The relief sought in this matter concerns plaintiff and plaintiff's allegations against defendants in regards to the agreements and alleged actions or omissions of the parties.

Additionally, the court notes that to the limited extent that defendants contend that plaintiff lacked the standing to bring the fourth, fifth, sixth, seventh, eighth and ninth causes of action, defendants have neither affirmatively moved for that relief on that ground, nor have they sufficiently addressed this issue in their motion papers. Therefore, in light of the above, defendants are not entitled to the relief sought on the branch of its motion to dismiss plaintiff's

fourth, fifth, sixth, seventh, eighth and ninth causes of action pursuant to CPLR §3211(a)(4).

Lastly, the court will address the branch of defendants' motion to dismiss plaintiff's third cause of action for tortious interference with contract, which has been alleged only against Wu, pursuant to CPLR §3211(a)(7). CPLR §3211(a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR §3211, the complaint is to be afforded a liberal construction" (*Benitez v Bolla Operating LI Corp*., 189 AD3d 970 [2d Dept 2020]; CPLR § 3026; *see Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

"'In reviewing a motion pursuant to CPLR §3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory'" (*Benitez v Bolla Operating LI Corp*., 189 AD3d at 970, quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; *see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; *Gorbatov v Tsirelman*, 155 AD3d at 836; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d at 704).

In support of this branch of their motion, defendants have argued that plaintiff has no cognizable claim against Wu as an individual because Wu was president of the Board for Linden Towers, that Wu represented the Board on behalf of Linden Towers in contractual matters and was, thus, herself, a party to the Linden Towers' agreement with plaintiff, and that a party cannot tortiously interfere with their own contract. The elements of tortious interference with a contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp*., 81 NY2d 90, 94 [1993]; *see Klein v Deutsch*, 193 AD3d 707, 709 [2d Dept 2021]; *Kimso Apts., LLC v Rivera*, 180 AD3d 1033, 1035-36 [2020]).

Plaintiffs have alleged that Wu, individually, was aware of the agreement between plaintiff and Linden Towers, that she acted with discriminatory malice against plaintiff, and intentionally interfered with plaintiff's agreement with Linden Towers, which resulted in damages to plaintiff. Although defendants have argued that "Wu is Linden Towers for purposes of this contract," complaints are to be afforded a liberal construction and there are occasions when a legally cognizable cause of action may exist against a corporate officer for inducing a corporation to violate its contractual obligations (*see generally Robbins v Panitz*, 61 NY2d 967, 969 [1984]; *Baer v Complete Off. Supply Warehouse Corp*., 89 AD3d 877, 879 [2d Dept 2011]; *Stern v H. DiMarzo, Inc*., 77 AD3d 730, 731 [2d Dept 2010]).

Therefore, in light of the standard of review on a motion under CPLR §3211(a)(7), based upon a thorough examination of the allegations contained in the complaint, accepting the allegations as true and according them every favorable inference, the court has concluded that plaintiff has sufficiently alleged a cause of action for tortious interference (*see Benitez v Bolla*

Operating LI Corp., 189 AD3d at 970). Therefore, defendants have failed to satisfy their burden on the branch of their motion to dismiss plaintiff's third cause of action pursuant to CPLR §3211(a)(7). The parties' remaining contentions have been considered by the court and found to be without merit.

Accordingly, defendants' motion is denied in its entirety.

This is the decision and order of the Court.

Date: November 5, 2021

HON. JOSEPH RISI, A.J.S.C.