Grasid Realty, LLC v 162 W. 56 Classic II Equities LLC

2023 NY Slip Op 31719(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 651712/2020

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 651712/2020

GRASID REALTY, LLC,

Plaintiff,

MOTION DATE 07/19/2022, 07/19/2022, 07/19/2022, 07/19/2022

- v -

MOTION SEQ. NO. 001 002 003 004

162 WEST 56 CLASSIC II EQUITIES LLC,ERICA FRANK, TEJASWI PATEL, SHARON EDREI, SCOTT KLATSKY, NEIL RITTER, KEVIN SUN, MARIA NOBREGA, SACKS REAL ESTATE MANAGEMENT CORP., MERYL SACKS, JENNILEE DE LEON, JOHN DOES, JANE ROES, BOARD OF MANAGERS OF CARNEGIE PLAZA CONDOMINIUM, NOMINAL DEFENDANT

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 63, 69, 70, 71, 72, 73, 74, 75, 99, 100, 101, 102, 114, 116, 118, 119, 120, 121, 122, 138

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 64, 76, 77, 78, 79, 80, 81, 82, 103, 104, 109, 113, 123, 124, 125, 126

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 65, 83, 84, 85, 86, 87, 88, 89, 105, 106, 110, 115, 127, 128, 129, 130

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 66, 90, 91, 92, 93, 94, 95, 96, 107, 108, 111, 117, 131, 132, 133, 134

were read on this motion to/for DISMISSAL.

Facts

The case arises out of disputes among plaintiff GRASID REALTY, LLC, the commercial unit owner of the Carnegie Plaza Condominium located at 162 West 56th Street, the board of managers of the property, and the retail unit owner 162 WEST 56 CLASSIC II EQUITIES LLC over a special assessment of some capital repairs on plaintiff, the nuisance created by the tenants

of the retail unit owners and the right to use the residential elevators while the commercial unit elevators are under maintenance. Plaintiff brought direct and derivative suits against all defendants, claiming breach of fiduciary duties, implied easement, private nuisance and seeking declaratory judgment and injunctive relief on several board decisions.

Motion to dismiss general standard

On a motion to dismiss the court "merely examines the adequacy of the pleadings", the court "accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boeheim*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (emphasis added). "[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable". *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

CPLR § 3211(a)(7)

"In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" *Leon v. Martinez*, 84 N.Y.2d 83, 88. "What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading "will seldom if ever

warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that plaintiff has no cause of action". *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept 2014]. "[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim." *Id.*

CPLR § 3001 Declaratory Judgment

Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. CPLR 3001. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action, the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 94 [1st Dept 2009].

Preliminary Injunction

"A party seeking a preliminary injunction must demonstrate, by clear and convincing evidence, (1) a *likelihood of success* on the merits, (2) *irreparable injury* absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court." *Ping Xie v Andrews Bldg. Corp.*, 2012 NY Slip Op 32826[U], *2 [Sup Ct, NY County 2012].

Derivative claims brought on behalf of the condominium

The Carnegie Plaza Condominium, the Homeowners Association (HOA), is a nonprofit corporation, governed by the New York Not-For-Profit Corporation Law (N-PCL)[1]. NYSCEF Doc. No. 8, ¶ 18. Section 623 of N-PCL states in pertinent part that: (a) an action may be brought

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in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members or by such percentage of the holders of capital certificates or of the owners of a beneficial interest in the capital certificates of such corporation. (b) In any such action, it shall be made to appear that each plaintiff is such a member, holder or owner at the time of bringing the action. (c) In any such action, the complaint shall set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board of the reason for not making such effort.

Here, the law is clear that the right to sue the board members belongs to the corporation, here the HOA, not the board, as plaintiff erroneously claims in the complaint. NYSCEF Doc. No. 8. Plaintiff brings this derivative suit on behalf of the HOA to advocate for the latter's interest. Therefore, unless the HOA's interest is harmed by the board's decision, there is no derivative suit to bring in the first place.

Second, the law is clear about plaintiff's standing to bring the suit: plaintiff must be a member of the HOA when the action was commenced, and plaintiff must represent at least five percent of the members. Here, it appears plaintiff meets this standard—the suit was brought on July 10, 2020, and plaintiff was and still is the owner of the commercial unit. Since the commercial unit owner was assessed its *pro rata* share of the Special Assessment at 27.52% for the residential elevator expenses, plaintiff does represent at least five percent members when it brought the suit. NYSCEF Doc. No. 51, ¶ 17.

Third, the law is clear about the prerequisite for the derivative suit: plaintiff shall either make demands on the board to take action to address the wrongdoing or explain why such an effort would be futile.

On the first note, the First Department held that the complaint shall set forth with particularity "as to who made the demands, when they were made, which Board members they were made to, the content of the demands or why the Board refused to take action." *Tomczak v Trepel*, 283 AD2d 229, 230 [1st Dept 2001]. Here, the amended complaint makes three mentions of plaintiff's request to the board and all of them concern the odor emanating from the eateries within the retail unit. NYSCEF Doc. No. 8, ¶170, ¶174 & ¶ 175. But these requests lack the specificity required by the First Department. The court cannot tell the demand was addressed to which board member, when the conversation happened, and why the demand was rejected. The cursory narration does not meet the demand requirement. Therefore, unless plaintiff can convince the court that making such a demand would be futile, all derivative claims must be dismissed pursuant to CPLR § 3211(a)(7).

On the second note, given that § 623(c) of N-PCL is modeled after § 626(c) of the Business Corporation Law (BCL), a useful reference would be the case law interpreting the demand futility prong of BCL § 626(c). The Court of Appeals has settled the law on this issue— "demand would be considered futile if complaint alleges with particularity (1) that majority of directors are interested in transaction, (2) that directors failed to inform themselves to degree reasonably necessary about transaction, *or* (3) that directors failed to exercise their business judgment in approving transaction." *Marx v Akers*, 88 N.Y.2d 189, 198 [1996]. "It is not sufficient, in a shareholder's derivative action, merely to name a majority of the directors as party defendant with conclusory allegations of wrongdoing or control by wrongdoers to justify failure to make a demand." *Id* at 192.

Among the ten causes of action, only the private nuisance claim touches on the allegedly harmed corporate interest when the board did not take the advice proposed by plaintiff to deal with

odors emanating from the eateries, thus a potential hazard to the entire building. NYSCEF Doc. No. 8 ¶ 175. All other nine allegations only concern the commercial unit's interest, and thus fail to meet the threshold of filing a derivative suit. The court agrees with defendants that unless plaintiff is excused from paying its obligation and the duty falls on the condominium, the special assessment dispute does not impact the corporate interest and there is no real harm to the corporation. NYSCEF Doc. No. 116, pages 6-7. Therefore, all derivative actions except the fifth count should be dismissed pursuant to CPLR § 3211(a)(7).

As to the private nuisance claim, the court looks for any allegation of demand futility. The complaint failed to allege that the board's inaction was not an informed decision, and the board did not discharge its duty of care when making that decision. NYSCEF Doc. No. 8, ¶ 169. The complaint also fails to allege that this is an interested director transaction and that the agreement between the board and the retail unit was reached under the table. *Id.* at ¶ 171. Finally, the complaint fails to plead that the board's inaction is a bad faith decision and that the board should be stripped of the protection of the business judgment rule.

Merely claiming the majority of the board is composed of residential unit owners and they have the incentive to divert partial repair cost to plaintiff does not make the special assessment an interested director transaction. The truth is there are 65 units within the residential unit and residential owners do compose the majority of members. NYSCEF Doc. No. 47, Exhibit C. Without any specific evidence alleging demand futility, all derivative actions should be dismissed in accordance with CPLR § 3211 (a)(7). The court now turns to the direct claims to see if they meet the pleading standards.

Judicial Review of the Condominium Board's Decisions—General Standard

Since plaintiff is asking the court to review the board's decisions, the court must settle the review standard here. "A governing board owes its duty of loyalty to its cooperative—that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available." *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 533 [1990]. "In order to trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the cooperative corporation's board acted: (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." *40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 149 [2003].

The Court of Appeal's holding in *Levandusky-Pullman* is the seminal case of pleading sufficiency when a shareholder-owner attacks the integrity of the condominium board's decisions. Unless the complaint sufficiently pleads that the decision is outside the board's scope of authority, the decision does not further the corporation's purpose or it was made in bad faith, the court would not second-guess the board's decision and all relevant claims must be dismissed pursuant to CPLR § 3211(a)(7).

As a threshold issue, since plaintiff is suing both the individual board members and the board, all claims against individual board members are not viable and should be dismissed if the complaint is lacking any specificity alleging individual wrongdoings by the members that can be separate from the collective decision made by the board. "It is well-settled that a breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of 'individual wrongdoing by the members . . . separate and apart from their collective

actions taken on behalf of the' cooperative." *Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 500 [1st Dept 2018].

Declaratory Judgment and Injunctive Relief concerning the Special Assessment (The First and Second Causes of Action)

At issue here is whether the residential passenger elevators are solely within the residential units, thus becoming a limited common element. If so, then residential unit owners "shall be responsible for paying for the entire cost of such capital repairs, alterations, improvements or additions." NYSCEF Doc. No. 48, page 43. If not, then the board "shall assess all Unit Owners for the cost thereof as a Common Charge" and the decision was made within the board's authority. *Id.*

To determine the nature of the residential elevators, the court looks to the Declaration for answers. The Declaration defines Limited Common Elements as "all portions of the Common Elements that are for the use of one Unit to the *exclusion* of all other Units". NYSCEF Doc. No. 47, page 14. Since plaintiff stipulated that "for a period of approximately 40 years, the Condominium has allowed the commercial Unit owner to have access to and use of the Residential Passenger Elevators while the Commercial Elevator is being repaired or not operational", the elevators are not for the use of residential unit owners exclusively, thus not a limited common element. NYSCEF Doc. No. 8, ¶ 260. Also, the stipulation proves that residential elevators are not solely within the residential part, otherwise how can commercial tenants access the elevators in the first place?

Since the residential elevators are not limited common elements, they should be regarded as general common elements. Here, the elevators do fit in with the catch-all clause of the definition of general common element: "All other equipment and facilities in the building on whatever floor they may be located which serve or benefit or are necessary or convenient for the existence

maintenance, operation or safety of the building." NYSCEF Doc. No. 47, page 13. Accordingly, the board does have the authority to assess plaintiff for the capital repair cost pursuant to the Declaration. Therefore, claims about the special assessment should be dismissed according to CRPL § 3211(a)(1) & (a)(7) since plaintiff did not sufficiently plead the necessity for a heightened review standard. The business judgment rule would protect the board's decision.

Additionally, the prior approval of the $33,000 for the capital improvement of the residential elevators also falls within the board's authority even if it is paid from the operation account. NYSCEF Doc. No. 8, ¶ 86. As long as the operation account can be used for the repair of general common elements, it is within the board's discretion to use the operation funds instead of charging owners separately to pay for such expenses. Therefore, unless plaintiff can prove that the repair is unrelated to the welfare of the condominium or it was an arbitrary decision, this part of the claims should also be dismissed pursuant to CPLR § 3211(a)(1) & (a)(7).

Declaratory Judgment and Injunctive Relief Concerning The Division and Partition of The Storage Room (The Third and Fourth Causes of Action)

Relying on § 13(b)(i) of the Declaration, plaintiff alleged that defendants unlawfully reached an agreement with the retail unit and partitioned the storage areas within the cellar without plaintiff's consent.

§ 13(b)(i) of the Declaration states in pertinent part that "without the written consent of all Unit Owners affected, the provisions of this Declaration dealing with the following matters may not be altered: (i) the Common Interest appurtenant to each Unit as expressed in this Declaration." NYSCEF Doc. No. 47, page 28. To find out the common element appurtenant to the commercial unit, the court turns to the annex of Section 5 which delineates the limited common elements to which the commercial unit has immediate access, and they include corridor, elevator, and stairs.

Id at Exhibit C. Storage space is not one of the appurtenant common elements. Section 5 also contours the area of the retail unit which does contain "three storage rooms in the cellar." *Id.* at page 3. Consequently, the court couldn't understand why division and partition of the cellar storage rooms affect the common interest appurtenant to the commercial unit, thus need the latter's approval if "appurtenant" means "limited" and the storage space is not a limited interest to plaintiff from the beginning. *Id.* at page 15 (Each Unit Owner whose Unit has one or more of the *appurtenant Limited* Common Elements set forth on Exhibit C…)

The Ritter affidavit submitted by the board chronicles the basis for the board's decision. The agreement is to "memorialize the then-existing use of the storage areas and memorialize any designations that were already provided for in the Declaration" given that the storage areas had been reconfigured and subdivided since the initial assignment of the space. NYSCEF Doc. No. 51, ¶ 18. It is also to settle a dispute over the utilities bill. *Id.* at ¶ 19. This is a legitimate business decision made in good faith within the authority of the board to further the corporate purpose. Therefore, the business judgment rule should take over and the court refuses to second-guess the board's decision. Unless proved otherwise, both claims should be dismissed pursuant to CPLR § 3211 (a)(1) & (a)(7).

<u>Breach of Fiduciary Duties Against The Board (The Sixth Cause of Action)</u>

The claim is wholly based on the board's decision on the disputed special assessment. Since the "special assessment" for capital repair of the residential elevators is a business decision made in good faith by the board within its authority to further the corporate purpose, the board did not breach any fiduciary duty when reaching the decision and it should be protected by the business judgment rule. The claim should be dismissed pursuant to CPLR § 3211(a)(7) unless plaintiff can make a showing of one of the three disqualifying scenarios.

Injunctive Relief Against The Board for Barring Plaintiff From Using The Freight and Residential Elevators (The Seventh Cause of Action)

The claim is based on the board's decision to bar plaintiff from accessing the freight and residential elevators after plaintiff refused to pay the special assessment. NYSCEF Doc. No. 8, ¶ 253. Since the "special assessment" on plaintiff is a business decision made in good faith by the board within its authority, the board should be allowed to bar plaintiff's access to the elevators if plaintiff refused to pay its dues. Otherwise, the board's authority to assess the cost has no teeth in it. Plaintiff also failed to plead the "irreparable injury" element of the injunctive relief claim. Loss of access to residential elevators for about six to eight weeks while commercial elevators are under maintenance is not an irreparable injury since plaintiff and its invitees can use the staircase to reach the offices. Therefore, this claim should be dismissed pursuant to CPLR § 3211(a)(7).

Implied Easement to Use The Residential Elevators (The Eighth Cause of Action)

To establish a claim for an easement implied by existing use, the plaintiff must show: "(1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land retained." *Bd. of Mgrs. of Atelier v 627 W. 42nd LLC*, 2017 NY Slip Op 32877[U], *11 [Sup Ct, NY County 2017].

Here, plaintiff failed to plead that there is a unity and subsequent separation of title to the residential elevators. Forty years of usage by the commercial unit may be long enough to prove that the easement was meant to be permanent, but without any evidence of separation of title, the court has no choice but to dismiss the claim for insufficient pleading. NYSCEF Doc. No. 8, ¶ 260.

Claim Against The Property Management Entity and Its Agents (The Ninth Cause of Action)

Here, plaintiff is seeking a declaratory judgment on two issues: first, if the board defends its decisions on reliance upon the property management's advice, plaintiff has a claim of vicarious or derivative liability against the latter. Second, the property manager owes a duty of loyalty to all unit owners.

The court refuses to entertain the first issue because doing so would be equivalent to issuing an "advisory opinion" when the board has not stated that it relies on the property manager's advice to defend its decisions, hence no justiciable controversy is presented here.

On the second note, "a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant *self-dealing*, but also requiring avoidance of situations in which a fiduciary's personal interest possibly *conflicts with the interest* of those owed a fiduciary duty." *Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014] (emphasis added).

Here, the complaint is missing any allegation of self-dealing or conflict of interest by property managers when advising the board on how to handle the dispute, thus failing to plead a sufficient case. Therefore, this claim must be dismissed pursuant to CPLR § 3211(a)(7).

The Private Nuisance Claim Against The Retail Unit Owner and The Board (The Fifth Cause of Action)

"The elements of a cause of action for a private nuisance are: (1) an interference substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with a person's property right to use and enjoy land; (5) caused by another's conduct in acting or failure to act." *Ewen v Maccherone*, 32 Misc 3d 12, 13 [App Term 2011]. "The relevant question is whether a defendant's use of his or her property constitutes an *unreasonable* and *continuous* invasion of the plaintiff's property rights." *Id*. "A board of managers of a condominium is specifically authorized to make

determinations regarding the operation, care, upkeep, and maintenance of the common elements in the building, and *to enforce any bylaws and rules among unit owners*, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners." *Id*.

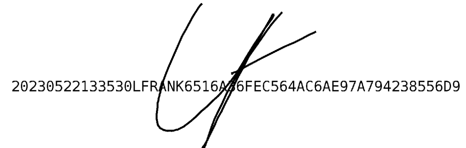
Here, the court believes the complaint is sufficient enough at the pleading stage to overcome the motion to dismiss pursuant to CPLR § 3211 (a)(7). The detailed allegation of air quality at three corners of the building and the elaborate report issued by a professional workplace hygiene institute regarding the PM 2.5 reading sufficiently demonstrate the seriousness of the nuisance. NYSCEF Doc. No. 8, ¶ 137-179. The tenant's intention can be deduced from their reluctance to remedy the issue. The only remaining question here is whether the odor is unreasonably noxious after the board and the retail unit reached the agreement to extend the duct to improve the air quality. This is a factual issue that needs to be decided in discovery or at trial.

The board did not take any mandatory measures to enforce the relevant sections in the by-laws and failed to explain the inaction. NYSCEF Doc. No. 48, page 40. Until the issue is solved, the board should not be protected by the business judgment rule.

The court disagrees with Classic Equities, the retail unit owner, on its argument that the tenants, not the owner, should be responsible for the nuisance. The by-laws provide that the owner of the retail unit shall not "permit the use of the Retail Unit or any part thereof in any way which would violate the Certificate of Occupancy for the Retail Unit or the Building." *Id*. at page 41. The retail unit owner could be held responsible for the nuisance if it is determined that the noxious odor does violate the Certificate of Occupancy for the building. Based on the foregoing, it is hereby

ORDERED that the matter is dismissed against all entities except for Classic Equities and the Board of Managers of the Carnegie Plaza Condominium, against whom all causes of action are dismissed except the fifth cause of action which continues; and it is further

ORDERED that Classic Equities and the Board of Managers of the Carnegie Plaza Condominium, shall answer the complaint not more than 20 days following service of this Decision and Order with notice of entry.



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DATE

LYLE E. FRANK, 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