SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART 18**

Justice

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RAM AVRAHAMI, ANDREA GURAL,

Plaintiffs,

- v -

235 WEST 108TH STREET OWNERS CORPORATION,

Defendant.

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INDEX NO. 161297/2017

MOTION DATE 11/30/2022, 11/30/2022

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 198, 199, 200, 201, 202, 203, 214, 215, 216

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 006) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, defendant moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint in its entirety, CPLR 3001 for a declaration that plaintiffs are not entitled to install or re-install a jacuzzi-like whirlpool tub in their unit, and for attorneys' fees (motion sequence no. 005). Plaintiffs also move for summary judgment as to liability pursuant to CPLR 3212 (motion sequence no. 006).

BACKGROUND

This matter arises out of the claims asserted by the plaintiffs who are the lessees and stock owners of the shares allocated to apartment unit number 5 located within 235 West 108th Street, New York, NY (NYSCEF Doc. No. 150, Def's mem of law). Plaintiffs signed a proprietary lease to lease apartment number 5 on July 25, 2007 (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 3).

According to plaintiffs, at the time the lease was executed, the apartment's master bedroom included a whirlpool type bathtub, often called a jacuzzi (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 4). Plaintiffs also allege that prior to purchasing the apartment shares and signing the lease, there was no documentation that addressed the use of whirlpool style tubs in the building. Plaintiffs claim that their decision to enter the lease for the apartment was partly based on the existence of the whirlpool tub within the unit (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 10).

Plaintiffs allege that they used the whirlpool tub for years without any problem, complaint, or objection from anyone in the building (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 30). However, at some point in 2017, the building's superintendent, who lived below the plaintiffs, noticed that the gap between the bathtub and the wall titles above it seemed wider than usual, indicating that the bathtub within the plaintiffs' unit sank (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 31). Furthermore, sometime in April of 2017, the superintendent notified the plaintiffs that the toilet in the plaintiffs' master bedroom began to leak into her apartment (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 33). To resolve such matters, plaintiffs considered numerous contractors for the repair work (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 42). After selecting a contractor, plaintiffs notified the superintendent, who in return emailed the building's board of directors to inform them of the repair work that was going to take place, and that the superintendent would oversee the work as she did other projects in the building (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 40). According to plaintiffs, the repair work started on April 29, 2017 and included the temporary removal of the whirlpool tub, which was expected to be reinstalled after other work was completed. However, on the evening of May 3, 2017, during a monthly meeting with the building's board of directors, plaintiff's received an email from the superintendent, who was informed by the building's board of directors that the building's rules prohibited whirlpool tubs, and that the plaintiffs were to

replace their whirlpool tub with a standard tub (NYSCEF Doc. No. 153, Avrahami Aff at ¶ 50; see generally NYSCEF Doc No 51, amended complaint).

Plaintiffs commenced the instant action against defendant asserting claims for declaratory relief, breach of contract, negligent misrepresentation, breach of fiduciary duty, and unjust enrichment. Defendant's answer denied the complaint's material allegations, asserted affirmative defenses, including one based on the business judgment rule, and asserted counterclaims for declaratory judgment and attorneys' fees.[1]

Defendant argues that its decision to stop the plaintiffs from re-installing the whirlpool tub in their unit was a good faith decision, made in the interest of the co-op, therefore it is entitled to summary judgment because their decision is protected by the business judgment rule. Plaintiffs argue in opposition that defendant's decision is not covered by the business judgment rule because the business judgment rule does not protect bad faith, arbitrary conduct, or capricious decisions.

DISCUSSION

Pursuant to CPLR 3212, a motion for summary judgment may be granted when the moving party demonstrates that a genuine issue of material fact does not exist. A party seeking summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). To successfully oppose a motion for summary judgment, the opposing party must present "'facts sufficient to require a trial of any issue of fact'" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980], quoting CPLR 3212[b]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to withstand dismissal (id. at 562).

[1] Defendant withdrew the first and third counterclaims against plaintiffs for property damage (see NYSCEF Doc No 131 at ¶ 6).

Summary Judgment on the Complaint

"The business judgment rule 'bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (Ull v Royal Car Park LLC, 179 AD3d 469, 470 [1st Dept 2020] quoting Auerbach v Bennett, 47 NY2d 619, 629 [1979]). "[C]ourts must defer to a board's determination if it was taken in furtherance of the corporation's purposes, was within the scope of the board's authority and was taken in good faith" (Barbour v Knecht, 296 AD2d 218, 224 [1st Dept 2002]). Put differently, judicial scrutiny into the board's actions may only be triggered if "an aggrieved shareholder-tenant [can] make a showing that the 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. v Pullman, 100 NY2d 147, 155 [2003]).

Defendant argues that it is entitled to summary judgment because its decision to prevent plaintiff from re-installing the whirlpool tub in their unit was a good faith decision made in the interest of the co-op. Defendant argues that its decision to deny plaintiff the ability to reinstall the whirlpool tub is based on past practices of the board, which prohibited whirlpool tubs due to concerns regarding noise and/or vibration from the pump, which could transfer to neighboring apartments (NYSCEF Doc. No. 150, Def's Mem of Law). Defendant also contends that by signing the lease and buying shares in the co-op, plaintiffs agreed to be bound by the governing powers of the board, which notified plaintiffs that whirlpools were forbidden in the building. Defendant argues that plaintiffs entered into an alteration agreement with the co-op concerning an air conditioning unit in June of 2010, well before the renovation of plaintiffs' bathroom and the removal of the whirlpool tub occurred, and in said alteration agreement, plaintiffs acknowledged that the board did not allow the installation of whirlpools and agreed to such via signature

(NYSCEF Doc. No. 139, Alteration Agreement at ¶21 [stating "I acknowledge that you have not granted and will not grant me permission for installation of a . . . sauna or whirlpool"]).

As the plaintiffs' tub is a prohibited item under the building's rules, and it is conceded that the original whirlpool tub had been sinking and separating from the bathroom wall at the same time that there was a water leak from [plaintiffs' unit] into the unit below" (NYSCEF Doc No 132 at ¶ 6), and the deposition testimony of Steven Rosenberg clearly stated that the decision to deny reinstallation was based on the general policy of not allowing jacuzzi-like whirlpool tubs and concern for the structure of the building, and its plumbing and electrical operations (NYSCEF Doc No 136 at 199, 25), the Court finds that the board made a good faith decision to deny plaintiffs from reinstalling the prohibited tub, which was to prevent further damage to the building (see Bregman v 111 Tenants Corp., 97 AD3d 75, 83 [1st Dept 2012]).

In opposition to defendant's motion and in support of their motion for summary judgment, plaintiffs argue that the board does not have any documents that support their decision to prevent the reinstallation of the whirlpool. Additionally, plaintiffs argue that the board was not acting for the good of the co-op when it made such a decision, that the board refused to consult with an expert to determine if the board's concerns for damage to the property and neighboring properties within the co-op were legitimate, and that the board never considered if the tub was grandfathered in under the lease, since it was present when the plaintiffs moved in.

Plaintiffs' arguments fail to refute the standard of review imposed by the business judgment rule, and the lawful and legitimate corporate purpose the board has established in support of their decision. Absent a showing of a breach of fiduciary duty, the board's decisions may not be questioned. Plaintiffs allege that because the whirlpool like jacuzzi tub was present when they moved in and that they used the pool for years without complaint, that the board is without the

authority to rule that the whirlpool tub cannot be reinstalled. However, as stated within the co-ops proprietary lease at subset 16 (d), equipment and appliances:

> "[i]f, in the Lessor's sole judgment, any of the Lessee's equipment or appliances shall result in damage to the Building…the Lessee, on notice from the Lessor, shall immediately cease using any such appliance or equipment which may be creating the objectionable condition and shall take all other steps promptly to remedy such condition" (NYSCEF Doc. No. 13, Coop Proprietary Lease).

Additionally, plaintiffs' argument that they used the whirlpool for years without any problem, complaint, or objection from anyone in the building is irrelevant and does not preclude the building's board of directors from "enforcing a specific house rule addressed to this subject" (Cannon Point N., Inc. v Abeles, 160 Misc 2d 30, 32 [1st App Term 1993]). Though plaintiffs "can point to no writing where authorization for the [use of the whirlpool] was granted" (id.), the proprietary lease, page 10, ¶ 11 states "[d]irectors may alter, amend or repeal such House Rules and adopt new House Rules" (NYSCEF Doc. 137, Co-op Proprietary Lease). Therefore, "it cannot be reasonably argued that respondents had somehow acquired vested rights in the continued maintenance of [the whirlpool]," or that the whirlpool was grandfathered under their lease.

Plaintiffs also argue that defendants are unable to restrict the use of a whirlpool within their unit because there is allegedly another unit in the building with a whirlpool tub. But the existence of another jacuzzi like whirlpool tub in the building is insufficient by itself "to raise a triable issue of fact as to [an] allegation that the board deliberately singled [them] out for harmful treatment or selective enforcement" (Skouras v Victoria Hall Condo., 73 AD3d 902, 904 [2d Dept 2010]). Indeed, the email chain relied upon by plaintiffs infers that defendant had previously denied permission for jacuzzi like whirlpool tubs even 15 years before plaintiffs' situation arose (see NYSCEF Doc No 175).

Accordingly, the Court finds that defendant met its burden demonstrating that all of plaintiffs' claims are insulated from judicial scrutiny under the business judgment rule and must be dismissed.

Defendant's Counterclaims

The Court finds that defendant failed to show entitlement to judgment as a matter of law on its counterclaim for a declaratory judgment. "Failure to make such showing requires denial of [that branch of] the motion, regardless of the sufficiency of the opposing papers" (Winegrad, 64 NY2d at 853).

However, defendant demonstrated entitlement to judgment on its counterclaim for attorneys' fees. The proprietary lease provides:

> 26. If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expenses (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, *or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorney's fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent* (NYSCEF Doc No 137 [emphasis added]).

Plaintiffs provided essentially no opposition to this branch of the motion, except by claiming that an award for attorneys' fees "must await an outcome of the parties' motions" (NYSCEF Doc No 203 at 26). The counterclaim is independent of plaintiffs' success on their complaint and is ripe for adjudication, and should be granted (see, e.g., Loch Sheldrake Beach and Tennis Inc. v Akulich, 141 AD3d 809, 815-816 [3d Dept 2016] [awarding cooperative attorneys' fees under similar lease language]).

CONCLUSION

Accordingly, it is hereby ORDERED that plaintiffs' motion for summary judgment is denied (motion sequence no. 006); and it is further

ORDERED that the branch of defendant's motion for summary judgment on its counterclaim for declaratory relief is denied, and the motion is otherwise granted (motion sequence no. 005); and it is further

ORDERED that the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the defendant's counterclaim seeking the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees that defendant may recover against the plaintiffs is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh). This constitutes the decision and order of the Court.

7/13/2023
DATE

ALEXANDER M. TISCH, J.S.C.

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

[1] Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.