SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **37**

Justice

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BIRINDER S. MADAN,

Plaintiff,

- v -

57TH & 6TH GROUND LLC, THE BOARD OF DIRECTORS OF THE CARNEGIE HOUSE TENANTS CORPORATION, THE CARNEGIE HOUSE TENANTS CORPORATION, WAYNE SENVILLE, RONALD COOK, JASON GALLEA, DIANE GOLDSTEIN, RICHARD HIRSCH, JOSEPH MAFFIA, DARREN WALKER, CHRISTOPHER KELLY, JOSEPH FALANGA, MONICA SIMON, JM ZELL PARTNERS LTD.,

Defendants.

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INDEX NO. 154931/2022

MOTION DATE 09/18/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to DISMISS.

Upon the forgoing documents, and for the reasons stated hereinbelow, defendant's motion to dismiss plaintiff's remaining cause of action is granted.

Background

Plaintiff, Birindir S. Madan, is a shareholder and resident of defendant The Carnegie House Tenants Corporation ("Co-op" or "Carnegie House"), a 324-unit cooperative apartment complex that holds a ground lease (the "Lease") at 100 West 57th Street, New York, New York. NYSCEF Doc. No. 71 and 74. The Lease, signed in 1959, has been amended, as relevant, twice, first in 1974 and again in 2004, and entitles Carnegie House to three 21-year renewal options. NYSCEF Doc. Nos. 75, 76.

Pursuant to the second Lease amendment, "the annual net rent payable during each renewal term shall be in an amount equal to 8.1667% of the fair market value of the demised land considered as vacant, unimproved and free of this Lease as of a date six (6) months prior to the commencement date of the particular renewal term." NYSCEF Doc. No. 76. Accordingly, at the start of the current term in 2004, the Co-op's annual rent was $3.8 million, and at the end of the term in 2004 it will be roughly $4.4 million (estimating the value of vacant land beneath the Co-op at roughly $54 million in 2025). NYSCEF Doc. No. 77.

Since the second Lease amendment several residential skyscrapers have been built in the immediate area around Carnegie House, lending that area the nickname "Billionaire's Row."

In 2014 defendant 57th & 6th Ground LLC ("Ground"), whom plaintiff identifies as the Werner Group, purchased the land under Carnegie House for an amount purported to be roughly $270 million (the exact amount is not clear). NYSCEF Doc. No. 71 ¶ 8.

The current Lease term expires March 14, 2025, and, pursuant to the second Lease amendment, the annual rent that the Co-op will owe Ground is expected to increase dramatically to, according to plaintiff, roughly $24 million. NYSCEF Doc. No. 77.

After purchasing the land, Ground commenced discussions with defendant, The Board of Directors of the Carnegie House Tenants Corporation ("Board"), contemplating a resale, and Board has retained co-defendant JM Zell Partners, Ltd., in the negotiations. NYSCEF Doc. No. 71. In 2019, Ground offered to sell to Carnegie House for $280 million, but the Co-op voted to reject the offer. NYSCEF Doc. No. 71 ¶ 55. Since then, the parties have continued to negotiate.

On June 10, 2022, plaintiff, individually and derivatively on behalf of the Co-op, commenced this action by filing a verified summons and complaint asserting six causes of action and, on August 19, 2022, he filed an amended verified complaint asserting the same six causes of action: (1) for an emergency declaratory judgment and contract reformation; (2) equitable fraud as against the Board and Zell; (3) breach of fiduciary duty as against the Board; (4) aiding and abetting breach of fiduciary duty as against Ground and Zell; (5) accounting as against the Board; and (6) breach of duty of good faith and fair dealing as against the Board and Ground. NYSCEF Doc. Nos. 1, 71.

In a Decision and Order dated, March 31, 2023, this Court granted the motions, pursuant to CPLR 3211, of various defendants and dismissed plaintiff's second, third, fourth, fifth, and sixth causes of action. NYSCEF Doc. No. 60.

On September 18, 2023, Ground moved, pursuant to CPLR 3211(a)(3), (5) and (7), to dismiss the remaining cause of action, or in the alternative, pursuant to CPLR 3212, to grant summary judgment dismissing the same. NYSCEF Doc. No. 67.

Ground argues, inter alia, that: plaintiff lacks standing, as he was not a party to the second amendment of the Lease and cannot now sue derivatively because the Board's current actions are protected by the business judgment rule; plaintiff's attempt to reform the second amendment of the Lease is barred by the statute of limitations because it was signed in 1974; and, that plaintiff cannot, as a matter of law, establish a claim for either reformation or unconscionability. NYSCEF Doc. No. 78.

In opposition, plaintiff argues, inter alia, that: he has standing to bring this action derivatively because the board has failed adequately to inform itself about its options and to represent shareholders' interests, as the potential increase in rent on the ground lease would "destroy the investment [plaintiff] and the other shareholders have made in the cooperative"; that the action is timely because, citing Trump Vil. Section 4, Inc. v Young, 217 AD3d 711, 714 (2d Dept 2023), an "action for declaratory relief accrues when there is a bona fine, justiciable controversy between the parties," and here the controversy occurred not when the second Lease amendment

was signed but when the Board told its shareholders that they anticipated either buying the land for hundreds of millions of dollars or facing a 600% increase in base rent; and, that any statute of limitations on reformation would apply only to mistakes, not unconscionability. NYSCEF Doc. No. 80.

Plaintiff also argues that, if the Court is inclined to find for defendant, the equities "strongly favor" holding the instant motion *sub judice* pursuant to pending legislation in Albany called the "residential cooperative ground lease bill," Assembly Bill A5031 and Senate Bill S7825, that, if passed, would limit the amount of annual rent increases for residential ground lease cooperative apartment buildings to three percent. NYSCEF Doc. No. 82.

In reply, Ground argues, inter alia: that the Board's actions are protected by the business judgment rule; citing George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211, 219 (1978), that plaintiff fails to show the "evidence of a very high order" that reformation requires "to overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties"; that nothing on the record implies the second Lease amendment was "procedurally and substantively unconscionable when made," Dabriel, Inc. v First Paradise Theaters Corp., 99 AD3d 517, 520 (1st Dept 2012); and, finally, that purportedly pending legislation still in committee is no basis to hold a motion *sub judice*. NYSCEF Doc. No. 83.

Discussion

Generally, shareholder derivative actions "infringe upon the managerial discretion of corporate boards" and, therefore, the Courts "have historically been reluctant to permit shareholder derivative suits, noting that the power of courts to direct the management of a corporation's affairs should be 'exercised with restraint.'" Marx v Akers, 88 NY2d 189, 194 (1996) (citation omitted). When allowing such actions to go forward based on a shareholder's argument that it would be futile to make a demand on the corporation's directors, the

> the object is for the court to chart the course for the corporation which the directors should have selected, and which it is presumed that they would have chosen if they had not been actuated by fraud or bad faith. Due to their misconduct, the court substitutes its judgment *ad hoc* for that of the directors in the conduct of its business.

Id., quoting Gordon v Elliman, 306 NY 456, 462 (1954).

The Court of Appeals has repeatedly held that "the business judgment rule is the proper standard of judicial review when evaluating decisions made by residential cooperative corporations." 40 W. 67th St. v Pullman, 100 NY2d 147, 149-50 (2003) citing Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530 (1990). "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.'" Owen v Hamilton, 44 AD3d 452, 456 (1st Dept 2007), quoting Auerbach v Bennett, 47 NY2d 619, 629 (1979).

Here, plaintiff lacks standing to bring his first cause of action for emergency declaratory judgment and contract reformation derivatively, as he was not a party to the second Lease amendment. In addition, according plaintiff the benefit of every possible inference, he fails to plead that the Board, in negotiating with Ground, acted fraudulently or in bad faith. Indeed, the Board has repeatedly updated the Co-op as to its negotiating efforts (e.g., NYSCEF Doc. Nos. 40-46, 71 ¶ 13) and spent significant time and resources, including taking on outside help, to try and solve an intractable problem. The unfortunate truth of the matter is that the value of the land beneath Carnegie House rose faster than anyone in Carnegie House anticipated when negotiating the Lease. Therefore, the Court must, pursuant to the business judgment rule, defer to the Board.

Even if plaintiff had standing, he fails to plead that the second Lease amendment, signed in 1974, is "at variance with the intent of both parties" such that it should be reformed. George Backer Mgt. at 219 ("Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties."). Nor does plaintiff plead that the second Lease amendment was in any way unconscionable when it was made.

The Court recognizes that the "residential cooperative ground lease bill," currently in committee in Albany, could be of great service to many New Yorkers, including plaintiff and the residents of Carnegie House, but its existence is not a reason to hold the instant motion *sub judice*.

The Court has considered plaintiff's remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

The motion of defendant to dismiss plaintiff's remaining cause of action is granted and the Clerk is hereby directed to enter judgment accordingly and dismiss the instant action entirely.

JAN 10 2024 HON. ARTHUR F. ENGORON, J.S.C.

1/9/2024
DATE

ARTHUR F. ENGORON, J.S.C.

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