2020-04-10

Clinton 510 Owners HDFC Inc. v. DiPietro

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART D

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CLINTON 510 OWNERS HDFC, INC., **INDEX #: 58231/19**

***Petitioner*,** **DECISION / ORDER**

-against-

HON. KIMON C. THERMOS

MICAEL Di PIETRO,

Respondent.

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Recitation, as required by CPLR §2219(a), of the papers considered in review of the instant moving papers.

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit and Annexed (Ex. A-F)…….....	1
Notice of Cross-Motion, Affirmation and Annexed (Ex. 1-4) and Affidavit and Annexed (Ex. 1-9)…….....	2
Memo of Law…….....	3
Affirmation and Affidavit in Opposition to Cross-Motion and Annexed (Ex. A-B)……...4	
Affirmation in Reply in Further Support of Cross Motion and Annexed (Ex. 1)……5	

Appearing for Petitioner: Ingram Yuzek Gainen Carroll & Bertolotti, LLP, By: Shari S. Laskowitz, Esq.
Appearing for Respondent: Manhattan Legal Services, By: Dao Sun, Esq.

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

PROCEDURAL HISTORY

In this nuisance holdover, Petitioner HDFC seeks to regain possession of the subject cooperative apartment from Respondent shareholder after the board of directors decided, by vote, at a special meeting to terminate his tenancy and served a Five (5) Day Notice of Termination dated March 12, 2019. The notice contained a recitation of the purported objectionable conduct, which included an allegation that Respondent consistently subletted the apartment on a short term basis, and had attached a copy of the minutes of the special meeting held on February 28, 2019 which resulted in the termination.

Respondent, by counsel, now moves pre-answer for an Order, pursuant to CPLR §3211(a)(7), dismissing the petition on the grounds that the termination notice is defective, in

that it does not contain sufficient facts to establish *prima facie* nuisance conduct by Respondent and/or that the alleged conduct does not otherwise constitute objectionable conduct in violation of the proprietary lease. Respondent further argues that Petitioner cannot remedy this defect by resorting to the application of the cooperative business judgment rule, where the court must defer to a properly taken "termination of tenancy vote" by the cooperative board, because the action taken by the board of directors terminating the tenancy was done in bad faith since Respondent was not served with notice to attend the special meeting and, therefore, did not the meeting. Additionally, Respondent argues that, in any event, the board's decision is not binding, since the grounds for termination do not constitute a breach of the lease and, therefore, given this defect, the decision taken by the board was not authorized and is, therefore, a nullity.

Petitioner opposes the motion and cross moves for summary judgment of possession, asserting that the predicate notice is factually sufficient under the law and that, under the prevailing authority, the board's decision to terminate the proprietary lease, and the grounds upon which it is based, cannot be collaterally challenged herein, since the business judgment rule precludes review of the board's action by this Court. Petitioner submits that Respondent was properly notified of a hearing that was to be held to discuss the board's accusations and that Respondent failed to appear. Petitioner avers that, since Respondent did not appear at the fact-gathering hearing, there was no obligation to notify him of the special meeting, where only a vote was taken on whether to adopt the committee's motion to terminate the tenancy for breach of lease and nuisance conduct as delineated in the predicate notice of termination which followed. Petitioner further argues that Respondent's conduct was objectionable under the terms of the lease and, therefore, the board's decision to terminate the lease was both authorized and rendered in good faith. In its cross-motion, Petitioner also seeks leave to amend its pleadings to correct the spelling of Respondent's first name and zip code and to set this matter down for a hearing on legal fees.

DISCUSSION

When considering a motion to dismiss pursuant to CPLR §3211, the court must determine whether the pleadings state a cognizable cause of action or defense. In doing so, the Court must "afford the pleadings a liberal construction, take the allegations in the [pleadings] are true and afford the [pleadings] the benefit of every possible inference". *EBC I, Inc. v. Goldman,*

Sachs & Co., 5 N.Y.3d 11, 19 (2005). "The motion must be denied if, from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action [or defense] cognizable at law." *511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002),* quoting *Polonetsky v. Better Homes Depot, 97 N.Y.2d 46 (2001).*

Cooperative Business Judgment Rule

Petitioner argues that the court cannot scrutinize the termination notice for facial sufficiency because the board is shielded by the business judgment rule; therefore, the court must defer to its finding of grounds for termination as it satisfies the competent evidence rule under RPAPL §711.

It is well settled that the decision of a cooperative board of directors to cancel a proprietary lessee's shares, terminate the proprietary lease and seek to regain possession of the apartment is to be treated deferentially; and that the court's independent evaluation of the grounds for termination is prohibited. However, an aggrieved shareholder can challenge the validity of such a decision in court by showing that any of the 3 criteria outlined in *40 West 67th Street v. Pullman, 100 N.Y.2d 147 (2003),* were not met.

In *Pullman*, the Court of Appeals affirmed the extent to which the business judgment rule can act as shield to scrutiny of a cooperative board's decision to terminate a proprietary lease and the standard utilized to determine whether the shield should be upheld given the facts presented, as first enunciated in the seminal case of *Levandusky v. One Fifth Ave. Corp., 75 N.Y.2d 530 (1990)*. In *Pullman,* the court heard a challenge to the application of the business judgment rule to summary proceedings and the requirements of proof under RPAPL §711. In that case, Respondent argued that *Levandusky,* an Article 78 proceeding to lift a stop work order issued by the cooperative board, should be limited to non-summary proceedings given the different requirements and burdens of proof in the two types of actions. The court disagreed and found that the business judgment rule can be applied in summary proceedings to satisfy the evidentiary burden required under RPAPL §711. In so holding, the court stated that

> "…the procedural vehicle driving this case is RPAPL §711(1), which requires 'competent evidence' to show that a tenant is objectionable. Thus, in this context, the competent evidence that is the basis for the shareholder vote will be reviewed under the business judgment rule, which means courts will normally defer to that vote and the shareholders' stated findings as competent evidence that the tenant is indeed objectionable under the statute. …Despite this deferential standard, there

> are instances when courts should undertake review of board decisions. To trigger further judicial scrutiny, an aggrieved shareholder-tenant must 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."

Pullman, supra. at 155.

In this case, Respondent argues that Petitioner's actions should not be given differential treatment, because the board's decision to terminate his lease failed to meet the 3 criteria outlined in *Pullman, supra.* First, Respondent points to the grounds for termination to show that the board acted without authority under the proprietary lease to terminate his tenancy, because the alleged conduct, even if true, does not violate any specific term of the agreement and, in any event, lacks sufficient factual support to a nuisance claim.

However, this Court finds that Respondent's argument lacks merit. The issue of articulating sufficient facts to constitute objectionable conduct does not negate the fact that the board had the authority to terminate the lease for such conduct, which is downplayed by Respondent as merely having too many guests, The court cannot use the lack of specificity in the predicate termination notice, if any, to find that the board lacked authority to terminate the proprietary lease.

Notwithstanding, Respondent is correct in stating that the court in *Pullman* held that, in acting within its authority, the board must give proper notice by the mode required pursuant to the lease. Respondent correctly argues that, since he was indisputably not given notice of the special meeting where the vote was taken to terminate his tenancy, the board acted *ultra vires*.

Petitioner counters that Respondent was not invited to the special meeting because it was not a fact-finding meeting and his presence would have yielded no benefit to him, since he would not have been able to address the board. Petitioner further argues that Respondent was given proper notice of a fact-finding hearing scheduled on July 24, 2018, which Respondent did not attend. Petitioner contends that, since Respondent did not attend the hearing, there was no need to notify him of the special meeting.

Putting the issue of whether Petitioner was required to serve Respondent with notice of the special meeting aside, Respondent, in his affidavit, claims that he was not properly served with notice of the hearing. Notwithstanding, Respondent claims that he did not feel the need to attend the hearing, since he was told by Donna Van Der Linden, the President of the cooperative board of directors, that they only wanted to generally speak to him about subleasing and Airbnb

activity and not about any public area nuisance or the fact that the board deemed his alleged conduct to constitute an actionable nuisance. Based upon this conversation, Respondent claims that he did not attend the hearing, particularly since, by then, he had ceased subletting.

In support of its argument that Respondent was given proper notice of the hearing, Petitioner submitted another affidavit by Respondent, averring to his understanding of his conversation with Ms. Van Der Linden as referenced in a letter sent as notice about the hearing. However, this affidavit does not contradict Respondent's current stance as to his understanding of the purpose of the hearing. Moreover, pursuant to the proprietary lease, service of all notices, including notices regarding hearing and meeting dates, must be completed by registered or certified mail, return receipt requested. Although Petitioner asserts that Respondent was sent a notice dated July 9, 2018 by Mr. Kaye, its managing agent, advising of the hearing to be held on July 24, 2018, Petitioner has failed to show compliance with the notice delivery requirement of the lease and has made no averment as to the mode of service, let alone provide proof of same.

The aforementioned set of events serves to undermine the board's decision by evincing bad faith. No proof was submitted to show that Respondent was properly advised that his alleged nuisance conduct would be the basis of the hearing. On the contrary, he was incontrovertibly told that the hearing would be about illegal subleasing in general, not specifically about any nuisance allegations against him. The letter sent by the managing agent, even if it had been properly sent and received, did not spell out the purpose of the hearing, but merely references the conversation previously had between Respondent and Ms. Van Der Linden. Based upon this, Respondent, understandably but perhaps unwisely, did not appear at the hearing, because he had endeavored to cure the issue and, therefore, felt there was no need to appear. In light of these facts, this Court finds that the board acted in bad faith by lulling Respondent into a false sense of security that the issue discussed with Ms. Van Der Linden, as stated in Mr. Kaye's letter, was, or would be, resolved in his favor.

Given this Court's finding that the board acted in bad faith, and thus outside the scope of its authority, the procedural aspect of the vote taken at the special meeting to which Respondent undisputedly was not invited, can not be shielded by the business judgment rule. Therefore, the sufficiency of the factual allegations contained in the subject termination notice is now subject to examination by this Court.

Sufficiency of the Predicate Notice

In a holdover proceeding, the sufficiency of the pleadings in stating a cause of action depends upon the facial sufficiency of the predicate notices, which terminate the tenancy and serves as the basis of the holdover. *Chinatown Apts. v. Chu Cho Lam, 51 N.Y.2d 786 (1980).* This is particularly true when, as here, the petition incorporates the allegations of the predicate notices. A petition predicated on a defective notice must be dismissed for failure to state a cause of action. *Chinatown Apts. v. Chu Cho Lam, supra.* See also, *Golub v. Frank, 65 N.Y.2d 900 (1985); 520 East 81 St. Associates v. Lenox Hill Hospital, 77 N.Y.2d 944 (1991); Ansonia Associates v. Consiglio, 163 A.D.2d 98 (1st Dept. 1990).*

The standard of review utilized by the courts, upon determining the sufficiency of the factual allegations in a predicate notice, is "reasonableness in view of all attendant circumstances." *Cruz v. Davis, 20 Misc.3d 1135A (Civ. NY 2008); 297 Lenox Realty Co. v. Babel, 19 Misc.3d. 1145A (Civ. Kings 2008); Black Veterans for Social Justice, Inc. v. Killeen, 2007 N.Y. Misc. Lexis 982 (Civ. NY 2007)*. Courts will uphold a predicate notice as long as it sufficiently advises the tenant of the claimed allegations to enable the tenant to prepare a defense. *Black Veterans for Social Justice, Inc. v. Killeen, supra.; Domen Holding Co. v. Aranovich, 1 N.Y.3d 117 (2003); 297 Lenox Realty Co. v. Babel, supra*.

Herein, the subject termination notice fails to state with specificity how the alleged conduct by Respondent of having several visitors at early morning hours over a six-month period violates any rule within the proprietary lease or how that activity alone creates a nuisance. The allegation that some of Respondent's guests "have been found roaming throughout the building and buzzing the intercom for other apartments other than the premises to gain entry…" is too vague, highly presumptive and conclusory and does not state the basis of the knowledge that these persons are Respondent's guests. Furthermore, it is not stated how often this activity occurs and which other cooperators were complaining about the alleged disturbance in either the predicate notice or the minutes of the board's special meeting, which is annexed to the predicate notice. In fact, the minutes do not recite any of the specific facts considered by the board upon its determination to terminate Respondent's tenancy.

As such, this Court finds that the subject predicate notice is insufficient to apprise Respondent of the claimed allegations to enable him to prepare a defense and is otherwise not reasonable under the attendant circumstances.

CONCLUSION

Accordingly, Respondent's motion seeking dismissal, pursuant to CPLR §3211(a)(7), for failure to state a cause of action is granted; and the petition is hereby dismissed, without prejudice.

In light of the dismissal, Petitioner's cross-motion is rendered academic and is, therefore, denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: April 10, 2020
New York, New York

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Kimon C. Thermos, J.H.C.