2023-04-25

1710 Owners Corp. v. Sussman

1710 Owners Corp. v Sussman
2023 NY Slip Op 31680(U)
April 25, 2023
Civil Court of the City of New York, Kiings County
Docket Number: Index No. LT#320415-22
Judge: Hannah Cohen

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART H
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1710 Owners Corp.,

Petitioner Index No. LT # 320415-22

- against - **DECISION/ORDER**

Madeleine J. Sussman
Stephen Hansen
Richard Sussman
Mary Jay Jones
"John" "Doe"
"Jane" "Doe"
1710 Avenue H
Apartment 3F
Brooklyn, New York 11230

Respondent(s).

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HON. HANNAH COHEN:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion to dismiss respondent's affirmative defenses and counterclaims and upon such dismissal seeks summary judgment and ensuing opposition.

Papers	**Numbered**
Notice of Motion	1
Opposition	2

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Petitioner 1710 Owners Corp., commenced this holdover proceeding seeking possession of the premises after service of a notice to cure and notice of termination. The premises is a cooperative unit owned by Madeline J. Sussman who does not reside at the premises. An answer was filed by Richard Sussman and Stephen Hansen. Richard Sussman is the son of the lessee Madeline Sussman,

Stephen Hansen is his partner and both are licensee's of Madeline Sussman.

Respondent Richard Sussman and Stephen Hansen appeared with counsel and asserted the following affirmative defenses in addition to a general denial: (1) all conduct referenced in the notice to cure was cured prior to issuance of notice of termination and the board does not have the right to terminate respondents occupancy; (2) the notice of termination is dated June 9, 2022, many months after the notice to cure and is therefore defective; (3) improper service of the notice of petition and petition. Mr. Sussman's attorney verified answer states Richard Sussman was home when service was attempted and no one knocked on Mr. Sussman's door and requests a traverse hearing.

Mary Jones, daughter of Madeline Sussman, who also does not reside at the premises alleges she is attorney in fact of Madeline Sussman and asserts the following affirmative defenses and counterclaims: (1) petition fails to state a cause of action as the alleged acts do not rise to a level of nuisance and do not allege any acts of nuisance by the lessee; (2) any nuisance behavior was cured and a (1) counterclaim for attorney fees.

Petitioner by motion pursuant to CPLR 3211(b) seeks to dismiss respondent's affirmative defenses and counterclaims. Petitioner argues that the cooperative properly terminated the lessee's proprietary lease after calling a special board meeting and giving the licensees an opportunity to present testimony and be heard. Petitioner asserts the cooperative has the authority to terminate the lessee's tenancy for impermissible and objectionable conduct and said occupancy was properly terminated by a vote by the board.

Courts have held on a motion to strike pursuant to CPLR 3211(b) when moving to dismiss or strike an affirmative defense as merit less, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law. McKinney's CPLR 3211(b); *Mazzei v.*

Kyriacou, 98 A.D.3d 1088, 951 N.Y.S.2d 557 (2012);"A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]; see *Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 882, 917 N.Y.S.2d 664). "[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law' " (*Greco v. Christoffersen*, 70 A.D.3d 769, 771, 896 N.Y.S.2d 363, quoting *Vita v. New York Waste Servs., LLC,* 34 A.D.3d 559, 559, 824 N.Y.S.2d 177). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 723, 869 N.Y.S.2d 597); *Mazzei v. Kyriacou*, 98 A.D.3d 1088, 1088 89, 951 N.Y.S.2d 557, 559 (2012); *Greco v. Christoffersen*, 70 A.D.3d 769, 771, 896 N.Y.S.2d 363, 366 (2010).

The court will address each respondent's affirmative defenses separately.

Mary Jones affirmative defenses:

Respondent Mary Jones's first affirmative defense is a failure to state a cause of action as the allegations do not rise to the level of nuisance as to the lessee. Petitioner asserts that respondent's affirmative defense lacks merit as the proprietary lease has already been terminated and said decision is not subject to review by the court.

In determining whether there is a cause of action fo failure to state a cause of action a court must determine whether accepting as true the factual allegations in the petition and according the plaintiffs the benefits of any favorable inferences, the plaintiff can succeed upon any reasonable views of the facts and whether the pleadings have a cause of action (See *Rochdale Village Inc., v Zimmerman*, 2 AD3d 827 [AD 2nd Dept 2003]). Additionally, the allegations in the pleadings cannot

be vague or conclusory (see *Stolanoff v Gahona*, 248 AD2d 525 [AD 2nd Dept 1998]). The standard is not whether a party has artfully drafted the pleadings, but whether deeming the pleading to allege whatever can be reasonably implied for its statements, a cause of action may be sustained *(Stending Inc. v Thom Rock Realty* co., 163 AD2d 46 [1st Dept 1990]). The pleading must be liberally construed and the court must accept the allegations as true (see *MBK associated of New York LLv Waddell*, 2005 WL 5959961 [NY Co Supreme 2005]). In evaluating the sufficiency of a predicate notice in a summary proceeding, "the appropriate test is one of reasonableness in view of the attendant circumstances." (*Oxford Towers Co. LLC v. Leites*, 41 AD3d 144, 144-145 [1st Dep't 2007]; citing, *Hughes v. Lenox Hill Hosp*., 226 AD2d 4, 18 [1st Dep't 1996], lv denied 90 NY2d 829 [1997]). Thus, a notice which provides "the necessary additional information to enable the tenant respondent to frame a defense ... was therefore adequate to meet the tests of reasonableness and due process." (See, *The Jewish Theological Seminary of America v. Fitzer*, 258 AD2d 337, 338 [1st Dep't 1999]; see also, *Rascoff/Zsyblat Org., Inc. v. Directors Guild of Am., Inc*., 297 AD2d 241, 242 [1st Dep't 2002]); *Surfair Equities, Inc. v. Marin*, 66 Misc. 3d 1216(A), 120 N.Y.S.3d 718 (N.Y. Civ. Ct. 2020). As the petition states a cause of action the respondent's first affirmative defense is stricken.

Here petitioner alleges on multiple specified dates, Stephen Hansen permitted an unauthorized individual to access the storage space in the basement and allowed that person to sleep in the space, moved large planters to block ingress/egress to the entry steps of the cooperative, ripped plants out of the garden and spread pesticide on the basement floor, damaged plants, reports of occupants being intoxicated and physically assaulting a shareholder, verbally accosting another resident with abusive behavior, threatening a resident, uprooting a tree in the yard, over turned .planters, removing iron tabletop and hanging base from fence, cutting/destroying plants in the

backyard, tampering with video surveillance camera, taking a leaf blower and accusing another shareholder of stealing said item, multiple noise complaints between 12:00 am to 5:00 am and loud shouting on multiple days, Richard Sussman falsely called fire department under another tenant's unit and taking power tools without permission.

As the petition states a cause of action as to the occupants of the unit, respondent's first affirmative defense is stricken.

Respondent's second affirmative defense, that the alleged conduct was cured. Courts have held that once a proprietary lease is property terminated, in is inconsequential whether the conduct has been cured (*Rockaway One Co LLC v Califf*, 194 Misc2d 191 [AT 2nd Dept 2002]). Petitioner argues that the proprietary lease does not require a notice to cure, only a notice of termination and any curing is immaterial once the occupancy has been terminated. As such, petitioner's motion to strike respondent's second affirmative defense is granted.

Richard Sussman and Stephen Hansen affirmative defenses:

Petitioner seeks to strike respondent's first affirmative defense of curing timely and lack of authority by the board to terminate respondents occupancy, (2) notice of termination served several months after notice to cure and is therefore untimely;(3) improper service of notice of petition and petition.

Respondent's motion to dismiss based upon curing is denied as the board was not required to permit respondent's to cure as stated above. Upon a vote by the board, the board was authorized to terminate respondents occupancy pursuant to the proprietary lease. Petitioner's motion to dismiss respondent's first and second affirmative defenses are granted.

Respondent's third affirmative defense, disputing proper service and requesting a traverse

is denied. Although an attorney may verify an answer if they are in a different county than the respondent, an attorney lacking personal knowledge cannot dispute service. As such, respondent's attorney's assertions of improper service are insufficient to defeat an affidavit of service. It is well settled that affidavits of service attesting the service of process constitute prima facie evidence of proper service unless rebutted by a sworn statement of someone with personal knowledge (*Bidetti v Salter*, 108 AD2d 890 [2nd Dept 1985]. Based upon the foregoing, petitioner's motion to dismiss respondent's third affirmative defense as to jurisdiction is granted.

Petitioner seeks summary judgment pursuant to CPLR 3212 alleging that there are no issues of fact as the courts must defer to the business judgment rule of the cooperative. Respondent Richard Sussman and Stephen Hansen only oppose and argue that there are issues of fact and therefore summary judgment is inappropriate. Respondent produce landscaping contracts between Stephen Hansen and the board in previous years and argue that this holdover proceedings stems from a fee dispute between the parties.

Courts have held that summary judgment will be granted "if upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In considering a summary judgment motion, the courts function is to determine whether a material issue of fact exists, not to determine said issues (*Esteve v Abad*, 271 AD 725 [1st Dept 1947]). Summary judgement should be granted when the moving party makes a prima facie showing of entitlement to judgment as a mate of law,

giving sufficient evidence to eliminate any material issues of fact from the case. See (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

The business-judgment rule is a standard of reviewing business decisions that courts use to prevent judicial interference and second guessing of corporate decisions made in good faith and in furtherance of the corporate purpose. (*Levandusky*, 75 N.Y.2d at 537 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317, citing,*Auerbach v. Bennett* 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 393 N.E.2d 994 [1979].) Courts have given business-judgment deference to a wide range of cooperative board actions and decisions. (See e.g. *Horwitz v. 1025 Fifth Ave., Inc*., 7 A.D.3d 461, 462, 777 N.Y.S.2d 482 [1st Dept. 2004, mem] [applying business-judgment deference to cooperative house rule banning awnings]; *Han Fui Hui v. Tieh Chi Ho*, 1 A.D.3d 274, 274, 767 N.Y.S.2d 582 [1st Dept. 2003, mem] [according deference to cooperative's decision to issue and sell new shares of stock to parties other than plaintiff]; *Konrad v. 136 E. 64th St. Corp*., 254 A.D.2d 110, 110, 678 N.Y.S.2d 629 [1st Dept. 1998, mem] [deferring to cooperative board's decision about repairs and renovations]; *Glassmeyer v. 310 Lexington Owners Corp*., 232 A.D.2d 229, 230, 647 N.Y.S.2d 784 [1st Dept. 1996, mem] [applying deference to cooperative board's refusal to re-allocate shares]; *Rubinstein v. 242 Apt. Corp*., 189 A.D.2d 685, 686, 592 N.Y.S.2d 378 [1st Dept. 1993, mem] [holding that shareholder could not challenge board's adoption of rules expanding amount of time common roof garden was open]; *Cannon Point North, Inc. v. Abeles*, 160 Misc.2d 30, 33, 612 N.Y.S.2d 289 [App. Term, 1st Dept. 1993, per curiam] [applying deference to cooperative board's decision to prohibit washing machines and dryers in individual units]).

The Pullman Court held that courts should only scrutinize the facts underlying a board's decision if a shareholder-tenant can show that the cooperative 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. (See id. at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174.) These three exceptions to the business-judgment rule balance protecting the interests of the entire cooperative community and the judiciary's interest in protecting against the board's possible abuse of its broad powers to terminate a shareholder-tenant's proprietary lease. (Id.) If the shareholder satisfies its burden, the court moves to phase two: an independent evaluation, from competent, admissible evidence, of whether the shareholder committed objectionable conduct. (*Kennedy*, 4 Misc.3d at 938, 782 N.Y.S.2d 554.)

In *40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [2003], the court invoked the "business judgment rule" to uphold a cooperative residence board's termination of a stockholder's proprietary lease. The rule requires the courts to "exercise restraint and defer to good faith decisions made by boards of directors in business settings" (id., at 153, 760 N.Y.S.2d 745, 790 N.E.2d 1174) "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*Matter of Levandusky v. One Fifth Ave. Apt. Corp*., 75 N.Y.2d 530, 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990]). "[T]he competent evidence that is the basis for the shareholder vote will be reviewed under the business judgment rule ... [and the] courts will normally defer to that vote and the shareholders' stated findings as competent evidence that the tenant is indeed objectionable" (*40 W. 67th St. v. Pullman*, 100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174) even if "the results show that what they did was unwise or inexpedient" (*Matter of Levandusky v. One Fifth Ave. Apt. Corp*., 75 N.Y.2d at 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [internal quotation marks and citation omitted]; see also *Martino v. Board of Mgrs. of Heron Pointe on Beach Condominium*, 6 A.D.3d 505, 506, 774 N.Y.S.2d 422 [2004]); *Breezy Point Co-op., Inc. v. Young*, 16 Misc. 3d 101, 104, 842 N.Y.S.2d 150, 152 (App. Term 2007).

The Pullman Court has recognized that cooperative shareholders voluntarily share control over who lives in the cooperative community. (See *Pullman*, 100 N.Y.2d at 158, 760 N.Y.S.2d 745, 790 N.E.2d 1174.); and represents the interests of the collective. (See id. at 154, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [quoting *Levandusky* that boards protect cooperative-community's interests]. The *Pullman* Court recognized the concerns of limiting judicial review of board decisions, but the Court articulated with unambiguous clarity that procedurally proper cooperative board votes that terminate a shareholder's tenancy for objectionable conduct are entitled to deference under the business-judgment rule. (See id. at 153 154, 159, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [noting that courts must exercise "heightened vigilance" when faced with board votes to terminate proprietary leases].); *London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 613, 790 N.Y.S.2d 813, 823 (Civ. Ct. 2004).

With respect to a board's conduct, the Pullman court acknowledged that "the broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decision making or favoritism," which conduct is "incompatible with good faith and the exercise of honest judgment" (*40 W. 67th St. v. Pullman*, 100 N.Y.2d at 157, 760 N.Y.S.2d 745, 790 N.E.2d 1174). To "overcome the presumption that the [board members] exercised their honest judgment to promote the lawful and legitimate interests of the corporation" (*Horwitz v. 1025 Fifth Ave., Inc.*, 7 A.D.3d 461, 462, 777 N.Y.S.2d 482 [2004]), a tenant must raise sufficient facts with respect to fraud, self-dealing, or other misconduct by the board to "trigger further judicial scrutiny" (*40 W. 67th St. v. Pullman*, 100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174; see also *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 10, 825 N.Y.S.2d 28 [2006]; *Walden Woods Homeowners' Assn. v. Friedman*, 36 A.D.3d

691, 692, 828 N.Y.S.2d 188 [2007]). When scrutinizing a cooperative's conduct in terminating a tenancy, the courts will, inter alia, examine the corporate rules and bylaws to determine whether the action was authorized, whether the cooperative followed its own procedures for terminating a tenancy, and whether the cooperative acted in good faith and in the corporate interest to terminate the tenancy for the reasons alleged (*40 W. 67th St. v. Pullman*, 100 N.Y.2d at 156, 760 N.Y.S.2d 745, 790 N.E.2d 1174; *1050 Tenants Corp. v. Lapidus*, 39 A.D.3d 379, 383, 835 N.Y.S.2d 68 [2007]).

The business judgment rule prevents judicial interference and second-guessing of corporate decisions made in good faith and in furtherance of the corporate purpose. (*London Terrace Towers, Inc. v. Davis*, 6 Misc 3d 600 [Civ Ct, New York County 2004] citing, *In Matter of Levandsusky v. One Fifth Ave. Apt. Corp*., 75 NY2d 530 [1990]). "If the business judgment rule applies, the court must grant summary judgment to the cooperative corporation if the cooperative moves for it, and, otherwise, must grant a final possessory judgment after trial without requiring the cooperative corporation to prove whether the shareholder-tenant is innocent or guilty of the purported objectionable conduct. It is the shareholder-tenant's burden to show that the board vote is not entitled to deference." (*London Terrace Towers, Inc. v. Davis*, 6 Misc 3d 600, 610 [Civ Ct, New York County 2004]); citing, *40 W. 57th Street Corp v. Pullman*, 100 NY2d at 155; *13315 Owners Corp. v. Kennedy*, 4 Misc 3d 931, 938 [Hous Part, Civ Ct, New York County 2004]).

Under this deferential standard, if the business judgment rule applies, Courts defer to a decision rendered by a co-op as "competent evidence" that a shareholder's conduct is objectionable under RPAPL § 711(1). (See, *40 W. 57th Street Corp v. Pullman*, 100 NY2d 147 [2003]). The Court affords the same level of deference to a Board vote as a shareholder vote. (*London Terrace Towers, Inc. v. Davis*, 6 Misc 3d 600 [Civ Ct, New York County 2004]). "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." (*40 W. 57th Street Corp v. Pullman*, 100 NY2d 147,155 [2003]). As such, it is Respondent's burden to persuade the Court why it should not apply the business judgment rule and defer to the co-op's decision to terminate Respondent's proprietary lease for objectionable conduct. If the shareholder satisfies its burden, only then will the Court conduct "an independent evaluation, from competent, admissible evidence, of whether the shareholder committed objectionable conduct." (*London Terrace Towers, Inc. v. Davis*, 6 Misc 3d 600 [Civ Ct, New York County 2004]); citing, *13315 Owners Corp. v. Kennedy*, 4 Misc 3d 931, 938 [Hous Part, Civ Ct, New York County 2004]); *Surfair Equities, Inc. v. Marin*, 66 Misc. 3d 1216(A), 120 N.Y.S.3d 718 (N.Y. Civ. Ct. 2020).

Absent proof of one or all of the three exceptions, a shareholder vote to terminate a tenancy because of the shareholder-tenant's objectionable conduct satisfies the "competent evidence" standard required by RPAPL 711(1), entitling the cooperative to summary judgment. (100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [finding that "relationships among shareholders in cooperatives are sufficiently distinct from traditional landlord-tenant relationships" and that courts should not look behind proper board votes] (*London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 609 10, 790 N.Y.S.2d 813, 820 21 (Civ. Ct. 2004). .

The only issue in this case is whether a board vote terminating a shareholder-tenant's proprietary lease is entitled to business-judgment deference. Here, the cooperative established that board called a special meeting, that respondents were permitted to appear and present any information or evidence to the board and that the board voted after said meeting to terminate respondents proprietary lease based upon objectionable conduct. In support petitioner has presented

a copy of the deed, copy of the proprietary lease, copy of the stock certificate, copy of the notice to cure, copy of the March 4, 2022 Notice of Special Meeting, Copy of Resolution, copy of termination notice, copy of MDR, amended copy of the proprietary lease, amended copy of the stock certificate, second amended copy of the proprietary lease and affidavit from Katrina Anderson, president of the board of directors.

Although the respondent may have demonstrated there was in the past, financial dealing between Stephen Hansen and the board, respondents have failed to demonstrate any indication of bad faith, arbitrariness, favoritism, discrimination or malice on the cooperative's part. Respondent's proffer of landscaping contracts signed between the cooperative and Stephen Hansen in the past, does not raise sufficient facts that the termination of the proprietary lease was not concluded in good faith or was based upon impermissible considerations.

For the reasons stated, the Court finds that the co-op's decision to terminate Respondent's proprietary lease was authorized, made in good faith, and in furtherance of the co-op's legitimate interests. As such, applying the business judgment rule, the Court is required to defer to the good faith decision made by the Board. Therefore, Petitioner's motion for summary judgment is granted to the extent that Petitioner is awarded a final judgment of possession against all Respondents, warrant to issue forthwith, and execution is stayed to November 30, 2023 for Respondent to vacate the premises. The time allotted will allow time for a sale of the cooperative shares and to secure an alternate residence.

This constitutes the Decision and Order of this Court.

Dated: April 25, 2023
Brooklyn, New York

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Hannah Cohen, J.H.C.