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Board of Mgrs. of the Clermont Greene Condominium v Vanderbilt Mansions, LLC
2014 NY Slip Op 51023(U)
Decided on July 2, 2014
Supreme Court, Kings County
Demarest, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 2, 2014

Supreme Court, Kings County

The Board of Managers of the Clermont Greene Condominium, Plaintiff,

against

Vanderbilt Mansions, LLC, Defendant.

504278/2013

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Carolyn E. Demarest, J.

The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*5-13*

Opposing Affidavits (Affirmations)*21-27*

Reply Affidavits (Affirmations)

Affidavit (Affirmation)

Memoranda of Law*14, 28, 29*In this action by plaintiff the Board of Managers of the Clermont Greene Condominium (plaintiff) against defendant Vanderbilt Mansions, LLC (defendant) seeking compensation for alleged defects in a condominium and asserting claims for, among other things, breach of contract, defendant moves, under motion sequence number one, for an order dismissing plaintiff's complaint pursuant to CPLR 3016 (b) and 3211 (a) (1), (5), and (7).

BACKGROUND

Plaintiff is the board of managers of the Clermont Greene Condominium (the Condominium), a New York unincorporated association of condominium unit owners (unit owners). The Condominium was organized and exists pursuant to Real Property Law article 9-B, and was created by a declaration dated May 8, 2009 and filed and recorded on July 8, 2009 by defendant, who is the Sponsor of the Condominium. On May 22, 2007, defendant submitted an offering plan for the sale of condominium units at the building (the Offering Plan), which is a six-story apartment building with 74 residential units located at 174 Vanderbilt Avenue/181 Clermont Avenue, in Brooklyn, New

York (the building). The Offering Plan was accepted for filing by the Office of the Attorney General of the State of New York on May 22, 2007 and, thereafter, was amended ten times by defendant. Defendant was never a member of plaintiff. According to the ninth amendment to the Offering Plan, there are seven members and officers of plaintiff, with three members affiliated with defendant, including Aaron Klein (Klein).

A certificate of occupancy for the building was obtained with an effective date of May 15, 2009. The sale of the first condominium unit closed on July 16, 2009, with sales of another 19 units also closing in 2009. In 2010, the sale of another 21 units closed, and, in 2011, the sale of another 24 units closed. In 2012, eight units closed, and the last unit closed in May 2013. Purchase Agreements were entered into between the Sponsor and each unit owner.

Plaintiff, as the representative of the unit owners, operates the Condominium, [*2]which includes the 74 residential units on the first through sixth floors, along with common elements. There are, among other things, two six-story towers above a cellar with a central ground level garden, 39 parking units in the cellar, and 17 rooftop terrace units on a portion of the roof of the building. Plaintiff alleges that there are significant construction defects, building code violations, hazardous conditions, and other material deviations from the Offering Plan and Purchase Agreements for the Condominium. Plaintiff retained Howard L. Zimmerman Architects, P.C. (Zimmerman) to investigate and issue an investigative report detailing the defects in the Condominium. A report was issued by Zimmerman on October 12, 2012 (HLZA Report), and was provided to defendant subsequent to its preparation.According to the HLZA Report, there are various defects and deficiencies found throughout the building, which relate to inadequate and poor workmanship and/or design that fail to meet acceptable industry standards, and which violate the New York City Department of Buildings (the DOB) Code. Included among these deficiencies are problems with fire barriers and fire-stopping and deficiencies in the unit windows and doors which allegedly present issues of life safety, courtyard leaks, an opening trench at neighboring property, roof leaks, sound transmission class ratings which do not meet the DOB Code, insulation problems, non-compliance with FHA and LL58 requirements in the kitchen and bathrooms, cracks and splintering of floors, railings at the interior stair and outlets near the kitchen sink which do not meet DOB Code requirements, exposure of the concrete structure, back up of the garage door, a defective refuse disposal, and numerous deficiencies in the electrical systems, the heating, ventilation and air conditioning system, and the plumbing and fire protection system.

On July 26, 2013, plaintiff filed this action, pursuant to Real Property Law § 339-dd, as the

representative of the unit owners of the Condominium. Plaintiff's complaint sets forth five causes of action, namely, a first cause of action for breach of contract, a second cause of action for breach of express warranty, a third cause of action for breach of implied warranty, a fourth cause of action for breach of fiduciary duties, and a fifth cause of action for an accounting. Plaintiff's first, second, third, and fourth causes of action seek compensatory damages, plus reasonable attorneys' fees, and plaintiff's fourth cause of action additionally seeks punitive damages. Plaintiff's fifth cause of action seeks an accounting of all books and records for the period of 2007 to the present.

On November 11, 2013, defendant e-filed its instant motion to dismiss. Klein has submitted an affirmation in support of defendant's motion. Joshua Brown (Brown), as the current president of plaintiff, has submitted an affidavit on behalf of plaintiff in opposition to defendant's motion.

DISCUSSION

Defendant, as a threshold matter, argues that plaintiff lacks standing and the legal capacity to sue because it has failed to authorize this lawsuit at an appropriately noticed meeting of the board of managers of the Condominium. "Capacity is a threshold [*3]question involving the authority of a litigant to present a grievance for judicial review'" (*Caprer v Nussbaum*, 36 AD3d 176, 181-182 [2d Dept 2006], quoting *Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41 [2005]). Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer*, 36 AD3d at 182). "Without both capacity and standing, a party lacks authority to sue" (*Matter of Graziano v County of Albany*, 3 NY3d 475, 479 [2004]).

While acknowledging that Real Property Law § 339-dd (also known as the Condominium Act) expressly confers standing and legal capacity upon a condominium board to prosecute this action, defendant relies upon plaintiff's failure to comply with sections 8 and 9 of Article II of the Condominium's bylaws, in arguing that plaintiff lacks capacity to prosecute herein because such suit was never authorized by the Board. Section 8 of the bylaws provides that notice of regular meetings of plaintiff must be given to each of its members by personal delivery mail, facsimile, e-mail, or overnight delivery service at least three business days prior to the day named for such meeting. Section 9 of the bylaws provides that special meetings may be called by the president or secretary on written request of any of its members on three business days' notice to each of its members, which is to be given by personal delivery mail, facsimile, e-mail, or overnight delivery

service, and that such notice shall state the time, place, and purpose of the meeting. Notably, section 11 of the bylaws, entitled "Quorum of Board of Managers," provides that "the votes of a majority of the Members of the Board of Managers shall constitute the decision of the Board of Managers." It further provides that "any action required or permitted to be taken by the Board of Managers may be taken without a meeting if all Members of the Board consent in writing to the adoption of a resolution authorizing such action, and the writing or writings are filed with the proceedings of the Board." It is not disputed that none of these procedures were followed here.

Klein, who is a member of plaintiff and has submitted an affidavit in support of defendant's motion, asserts that no meeting authorizing the commencement of this action was properly noticed as he never received notice three business days in advance of any such meeting pursuant to Article II of the Condominium's bylaws. In addition, it is undisputed that no resolution was adopted pursuant to section 11 of the bylaws authorizing the commencement of this action.

In seeking dismissal pursuant to CPLR 3211(a)(3), defendant relies upon *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.* (32 Misc 3d 1219[A], 2009 NY Slip Op 52809[U], *4 [Sup Ct, NY County 2009], *affd on other grounds* 73 AD3d 581 [1st Dept 2010]), in which it was held that a board of managers lacked authorization to bring claims against the defendants therein because, similar to the by-laws here, the bylaws at issue required special meetings of the board to be called by the president on three days' notice to each member sent by mail, telegraph, telefax, or telephone, and the board of managers did not convene a formal meeting prior to filing the complaint to [*4]commence that action. In so holding, the Supreme Court, New York County, noted that three of the Board members, who were appointed by the sponsor, were not included in the discussions regarding the decision to file the complaint, and that these interested directors were excluded from the notice required by bylaws and prevented from addressing the question of whether their alleged conflict barred them from voting on the matter in question. In affirming the lower court's dismissal of the action upon different reasoning, the Appellate Division, First Department, found it unnecessary to address whether the board was authorized to commence the action (73 AD3d at 582). Although the facts of the *Chelsea 19* case are distinguishable, this Court agrees with the finding of the Supreme Court, New York County, that the failure to comply with procedures delineated in the bylaws in obtaining authorization to commence suit requires dismissal of the action.

Plaintiff, however, maintains that no corporate resolution, nor any duly-noticed meeting, was necessary to authorize the commencement of this lawsuit. Plaintiff relies upon Real Property Law §

339-dd, which provides, in pertinent part, that "[a]ctions may be brought or proceedings instituted by the board of managers in its discretion, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit". It has been expressly held that a condominium board has standing to bring claims on behalf of individual condominium unit owners by reason of Real Property Law § 339-dd (*see Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 636 [1st Dept 1993]). Although the statute contains no requirement that there be a resolution passed or a vote taken to commence litigation at a noticed meeting, the legal effectiveness of the actions of the Board depends upon the Board acting as a body within the constraints of the by-laws.[FN1] While it is well-settled that a condominium board such as plaintiff has standing to bring the action herein pursuant to Real Property Law § 339-dd (*see Caprer v Nussbaum*, 36 AD3d at 184-85; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sqaure-14th St. Assoc.*, 190 AD2d at 636; *Board of Mgrs. of the Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc 3d 1223[A], 2012 NY Slip Op 50826[U], *3 [Sup Ct, Kings County 2012]; *Board of Mgrs. of Arches at Cobble Hill Condominium v Hicks & Warren, LLC*, 14 Misc 3d 1234[A], 2007 NY Slip Op 50297[U], *2 [Sup Ct, Kings County 2007]), and Section 2 of the bylaws, entitled [*5]"Powers and Duties," expressly grants plaintiff Board the powers and duties necessary for the administration of the affairs of the Condominium, including "[r]epresenting the Unit Owners in any proceedings . . . relating to . . .repairs to and restoration of the Property" (subsection m), and authorizes "[b]ringing and defending actions pertinent to the operation of the Property" (subsection t),[FN2] there is not even a suggestion that commencement of suit was authorized by a vote of the Board. Plaintiff's president, Joshua Brown, merely states that the Board "retained counsel and agreed to commence this lawsuit . . . once it became clear to the non-sponsor board members that the Defendant had no intention of fulfilling its promises and obligations to the Plaintiff" (Paragraph 12 of Affidavit in Opposition). It appears to be conceded that no notice was given and no formal action was taken by the Board. While the bylaws of the Condominium do not specifically require authorization at a meeting for the commencement of a lawsuit, and nothing contained in the bylaws or the Condominium's Offering Plan expressly required plaintiff to specifically notice a meeting or hold a vote authorizing or passing a resolution in order for plaintiff to commence a lawsuit, some form of vote is clearly required in order for the Board to act. Thus, the plaintiff's authority to sue, its capacity to prosecute this action, is in issue.

Defendant argues that a board can only act through a meeting of the board, citing Business Corporation Law § 708 (a), which provides that "[e]xcept as otherwise provided in this chapter, any

reference in this chapter to corporate action to be taken by the board shall mean such action at a meeting of the board." In the absence of contrary statutory authority directly relevant to condominiums *per se*, notwithstanding that "[c]ondominium ownership is a hybrid form of real property, created by statute" (*Caprer*, 36 AD3d at 183), and the fact that a condominium, unlike a cooperative, is not organized pursuant to the Business Corporation Law (*id*. at 187), Business Corporation Law § 708 provides the clearest relevant authority on the subject of board action. It is noted that the bylaws for Clermont Greene Condominium track the language of Business Corporation Law §§ 708(b) and (c) in authorizing action without a formal meeting "if all members of the board. . . consent in writing to the adoption of a resolution authorizing the action" and the resolution and written consents are filed with the minutes of the proceedings (*see* Bylaws, Section 11), and in providing for waiver of notice upon appearance at a meeting and for participation by telephone (Bylaws, Section 10)[FN3] , evidencing an intent to conform to the [*6]procedures set forth in the Business Corporation Law, as applicable. There is no evidence or representation, however, that any meeting or vote of any kind effected a decision by the Board to commence this action.

""[E]xclusive authority to manage the common elements and joint finances of the condominium is vested in the board of managers" (*Caprer*, 36 AD3d at 184; *see also* Real Property Law § 339-e [9]; § 339-v [1] [a]). "As an incident of such control, the board of managers is also authorized by the Condominium Act to sue for any injury to the common elements on behalf of two or more unit owners" (*Caprer*, 36 AD3d at 184-185; *see also Residential Bd. of Mgrs. of Zeckendorf Towers*, 190 AD2d at 636). It is clear that plaintiff has standing to maintain this action against defendant, but in the absence of any indication that it acted as a board by voting to authorize commencement of suit, defendant's motion pursuant to CPLR 3211 (a) (3), must be granted as plaintiff lacked capacity to sue at the time the action was filed (*see Matter of Gersen v Mills*, 290 AD2d 839, 840 [3d Dept 2002]; *Board of Managers of Stewart Place Condominium v Stewart Place Acquisition Corp.*, 225 AD2d 351 [2d Dept 1998]; *cf. Matter of Renauto v Board of Directors of Valimar Homeowners Assoc.*, 23 AD3d 564 [2d Dept 2005] (suggesting that the Court's review of the propriety of actions of a board requires some record of the communal vote of the members of the board); *see also Town of Caroga v Herms*, 62 AD3d 1121, 1123 [3d Dept 2009] (explaining that dismissal was required in *Gersen* because of "the missing record of an official vote")).

In light of this disposition, it is unnecessary to consider the other arguments raised in support of dismissal.

CONCLUSION

Accordingly, defendant's motion to dismiss plaintiff's complaint is granted.This constitutes the decision and order of the court.E N T E R,

J. S. C.

Footnotes

Footnote 1: It has been held, in the context of a contractually-mandated arbitration, that in the absence of a prohibition by a board, "the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation" (*Matter of Arbitration between Paloma Frocks, Inc. and Shamokin Sportswear Corp.*, 3 NY2d 572, 575-76 [1958]. However, in this case the complaint is merely signed by counsel and is neither signed, nor verified, by the president of the Board. There is no representation regarding authorization by the Board to commence the suit, and no indication in the pleading that the president commenced suit in the discharge of his duties.

Footnote 2: While the by-laws authorize the Board to delegate some of its powers to a managing agent, the provision expressly excludes the powers set forth in subdivision t, to bring an action (Article II, Section 3). Nor does the by-law defining the role of the president include the power to commence suit (Article IV, Section 4).

Footnote 3: The by-laws also define the general powers and duties of the president as those "incident to the office of president of a stock corporation organized under the Business Corporation Law of the State of New York" (Article IV, Section 4), indicating the intent to apply the Business Corporation Law where appropriate.

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