Cooper Sq. Mut. Hous. Assn. & Hous. Dev. Fund Co., Inc. v Cooper Sq. Mut. Hous. Assn. II Hous. Dev. Fund Co., Inc.

2024 NY Slip Op 31240(U)

April 8, 2024

Supreme Court, New York County

Docket Number: Index No. 652462/2022

Judge: Lori S. Sattler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02M**

Justice

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COOPER SQUARE MUTUAL HOUSING ASSOCIATION AND HOUSING DEVELOPMENT FUND COMPANY, INC.,

Plaintiff,

- v -

COOPER SQUARE MUTUAL HOUSING ASSOCIATION II HOUSING DEVELOPMENT FUND COMPANY, INC, ARC ON 4TH STREET INC., DAVID POWELL

Defendant.

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INDEX NO. 652462/2022

MOTION DATE 01/23/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISS.

Plaintiff Cooper Square Mutual Housing Association and Housing Development Fund Company, Inc. ("MHA I") commenced this action alleging breach of contract, violations of the Real Property Actions & Proceedings Law ("RPAPL") and New York City Administrative Code ("Admin. Code"), conversion, and aiding and abetting. Defendants Cooper Square Mutual Housing Association II Housing Development Fund Company, Inc. ("MHA II") and David Powell ("Powell") (collectively, "the MHA II Defendants") move, pre-answer, to dismiss the Complaint as against them. MHA I opposes the motion. Defendant Arc on 4th Street Inc. ("Arc") has answered the Complaint, takes no position on the motion, and has not moved to dismiss the cause of action asserted solely against it.

According to the Complaint (NYSCEF Doc. No. 18), MHA II, together with non-party Cooper Square Land Trust ("CLT"), is the owner of a number of apartment buildings in the East Village which are organized as a Housing Development Fund Corporation cooperative. MHA II

has a 15-member board, comprised of five members appointed by CLT and 10 who are residents elected by the cooperative residents/shareholders. Prior to the events that led to this action, MHA I was the property manager for MHA II. MHA I operated from a commercial space located at 59-61 East 4th Street, which it leased from Arc. Powell was the Executive Director of MHA I from April 20, 2017 until July 20, 2021, at which point he resigned and was immediately hired as Executive Director of MHA II.

MHA I has its own 11-member board, some of whom also served on the MHA II board. In November 2020, CLT commenced an Article 78 proceeding challenging a decision made by MHA I's board to remove the CLT-appointees from that board. In a decision entered July 7, 2021, the Court (Engoron, J.), explained the dynamic between the organizations:

> Over the years, the distinctions between MHA I and MHA II have eroded to the point where the two boards were treated, met, and acted as one. One effect of this comingling was that when CLT designated five of the 15 directors to sit on MHA II's Board, such members behaved as if they were also on the MHA I Board. This occurrence can be traced back to a March 27, 1997 joint meeting of the MHA I and MHA II board of directors, during which the MHA I Board was expanded for the purpose of making all members of the MHA II Board, including the five CLT-designated directors, members of the MHA I Board.

(*Cooper Square Housing Development Land Trust, Inc. v Cooper Square Mutual Housing Association and Housing Development Fund Company, Inc. and Barry Keating*, Sup Ct, New York County, July 6, 2021, Engoron, J., Index No. 159356/2020; NYSCEF Doc. No. 40, at 2). This practice had the effect of increasing MHA I's board to 16 members although its by-laws permitted no more than 11. In May 2020, during a joint meeting between the two boards, a member raised the issue of non-compliance, resulting in the MHA I's board's decision to remove the CLT members. CLT challenged the decision and on July 6, 2021, the Court dismissed CLT's Article 78 proceeding, finding that, "contrary to [CLT]'s assertions, the challenged action was

not unlawful, but, rather a long overdue attempt by [MHA I] to bring its board back into compliance with its by-laws."

The instant Complaint alleges that in response to the Court's decision, the President of MHA II called a special meeting, which occurred on July 19, 2021. Eight of MHA II's board members attended the meeting: all five of the CLT appointees, and three of the residents. The other seven resident board members did not attend. At the meeting, the MHA II board voted to transfer the responsibility of the cooperative's property management from MHA I to MHA II. Thereafter, Powell and all other MHA I staff resigned from their positions and were hired for the same positions at MHA II.

The Complaint, brought by members of the MHA I board, further alleges that MHA II, Arc, and Powell then locked MHA I out of its office. It claims that MHA II sent MHA I a letter on July 24, 2021 that stated, in part, that it was in legal possession of MHA I's former office space and that "MHAII will take all legal steps necessary should MHAI or any officer, director or agent of MHAI engage in any interference with such possession or any interference with any of the operations of MHII [sic]." It further claims that Arc sent its own letters terminating its lease of the office space and requiring MHA I to vacate the premises by a certain date.

MHA I commenced an Article 78 proceeding against MHA II, which was dismissed based upon a determination that MHA I lacked standing to challenge the MHA II board's decision (*Cooper Square Mutual Housing Association and Housing Development Fund Company, Inc. v Cooper Square Mutual Housing Association II Housing Development Fund Company, Inc.*, Sup Ct, New York County, July 17, 2023, Love, J., Index No. 160491/2021).

While that proceeding was pending, MHA I commenced the instant action. The Complaint asserts eight causes of action: 1) breach of a management agreement with MHA II,

against MHA II only; 2) breach of a loan forgiveness agreement against MHA II only; 3) violation of RPAPL § 853 against all three Defendants; 4) breach of the office lease against Arc only; 5) violation of Admin. Code § 22-902 against all Defendants; 6) breach of employment contract against Powell only; 7) aiding and abetting against all Defendants; and 8) conversion, against MHA II and Powell only.

On a motion to dismiss pursuant to CPLR § 3211, courts must accept as true the facts as alleged in the complaint and grant plaintiffs every possible inference (*Sokoloff v Harriman Estates Development Corp*., 96 NY2d 409, 414 [2001]). Nevertheless, favorable inferences "may be properly negated by affidavits and documentary evidence" (*Whilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005] [quotation omitted]). Dismissal is warranted pursuant to § 3211(a)(1) "where the documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also 511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144, 152 [2002]).

First and Second Causes of Action – Breach of Contract

The MHA II Defendants argue that the causes of action for breach of contract brought against MHA II must be dismissed. These claims relate to a Management Agreement (NYSCEF Doc. No. 22, "Management Agreement") and Loan Forgiveness Agreement (NYSCEF Doc. No. 25, "Loan Forgiveness Agreement") between MHA I and MHA II. As to the Management Agreement, the MHA II Defendants point to the fact that the agreement expired in March 2021, and therefore maintain that MHA II's acts in July 2021 cannot be considered a breach. MHA I concedes that the Agreement was expired, but argues that the parties had continued to abide by the Agreement, which amounted to an implied contract to continue the terms. The Management

Agreement, dated March 27, 2020, provides: "The terms of this Agreement will be for the period of one year, commencing on the date hereof, unless sooner terminated by the parties" (Management Agreement, 1).

A cause of action for breach of contract requires a plaintiff to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010], *citing Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [2007]). As the contract had already expired during the period in question, there can be no performance thereunder or breach thereof. Although the parties continued to abide by some of the terms of the agreement, prior to its expiration, MHA II took no steps to renew the Management Agreement, MHA I had removed the CLT members from its board, and CLT had commenced its Article 78 proceeding. The issues that were ongoing between the three entities preclude a finding that the parties had an implied contract to continue the expired agreement (*Levina v Citibank, N.A.*, 16 AD3d 160, 161 [1st Dept 2005], citing *Daskolopoulos v European Am. Bank & Trust Co.*, 104 AD2d 1020, 1021 [2d Dept 1984]). Accordingly, the first cause of action is dismissed.

The Loan Forgiveness Agreement, dated January 1, 2018, provided, *inter alia*, that MHA II would pay MHA I the sum of $44,400 per year for five years beginning in 2018 through 2022 (Loan Forgiveness Agreement, 1). It further provides: "This agreement may be cancelled by either party in writing upon 60 days' notice to the other party" (*id.*). MHA II argues that Plaintiff repudiated this Agreement by its "bad faith actions, encroachment into MHA II business, obstructionist behavior, and dereliction of duties as property manager" (NYSCEF Doc. No. 33, MHA II Defendants' Memorandum of Law, 9). The branch of the motion seeking to dismiss this cause of action is denied. While it cannot be disputed that MHA II was entitled to terminate the

contract, the Complaint sufficiently pleads facts to support a claim that it did so without giving MHA I the requisite 60 days' notice. Whether MHA I by its own acts repudiated the agreement is an issue for trial.

To the extent MHA I also raises the issue of a breach of a regulatory agreement between MHA II and the New York City Department of Housing Preservation and Development, it fails to assert that cause of action in its Complaint, and in any event would not have standing to do so as it is not a party to that agreement.

Third and Fifth Causes of Action – RPAPL § 853 and Admin Code § 22-902

The MHA II Defendants argue the cause of action based on RPAPL § 853, which authorizes recovery for those "disseized, ejected, or put out of real property in a forcible or unlawful manner," must be dismissed. They contend that although the Complaint alleges that MHA II and/or Powell changed the locks on the MHA I office, MHA I board members previously admitted that they were the ones who changed the locks.

The Complaint alleges "When MHA I director Barry Keating went to the MHA I office at approximately 11pm on Monday, July 19th after the vote to terminate MHA I as property manager, he found a note on the door reading that Powell had closed the office until further notice" (Complaint, 16). In response, the MHA II Defendants annex a picture of a handwritten letter that states "By order of the President of the Board of the CSMHA 1, the lock to the CSMHA1 office has been changed" signed "Barry Keating, President, CEO CSMHA1" (NYSCEF Doc. No. 29). They further quote an affidavit of an MHA I board member, Donna Brodie, submitted in MHA I's Article 78 proceeding, in which she stated:

> On July 19, 2021 at approximately 11:00 pm, together with MHA I President Barry Keating, I went to the offices of MHA I, from which I had previously been denied access by David Powell, gained access by means of calling a locksmith to

> change the locks, and inspected and took possession of certain documents belonging to MHA I.

(MHA II Defendants' Memorandum of Law, 11; *see also* NYSCEF Doc. No. 38, 4-5). Brodie was also an MHA II board member.

The parties present different accounts of the events surrounding MHA I's ability to access to its former office. When read in the light most favorably to Plaintiff, the Complaint states a claim for a violation of RPAPL § 853 by alleging that Powell locked MHA I board members out of the office. The evidence presented by the MHA II Defendants, while at odds with the Complaint, does not utterly refute MHA I's allegations or conclusively establish a defense as a matter of law. Therefore, the motion to dismiss this cause of action is denied.

However, the MHA II Defendants are entitled to dismissal of the cause of action based on Admin Code § 22-902. This section provides: "A landlord shall not engage in commercial tenant harassment." By its plain language, the statute cannot apply to MHA II and Powell, who were not MHA I's landlords. MHA I's argument that it can nevertheless be applied to MHA II because MHA II and Arc have a relationship is unavailing. Accordingly, the fifth cause of action is dismissed as to MHA II and Powell.

Sixth Cause of Action – Breach of Employment Contract

The cause of action alleging breach of contract against Powell must be dismissed because there was no employment agreement between MHA I and Powell. The MHA II Defendants annex an affidavit sworn to by Powell in which he states that he was an at-will employee working without a contract (NYSCEF Doc. No. 21, 3). The Complaint likewise does not allege the existence of any contract.

Eighth Cause of Action – Conversion

With respect to the eighth cause of action, for conversion against the MHA II Defendants only, the Complaint alleges that the MHA II Defendants "intentionally sequestered and took possession of MHA I's owned property and business records located within its office" (Complaint, 29). The Complaint further claims that the MHA II Defendants unjustly interfered with MHA I's right to the remaining value of the Loan Forgiveness Agreement and prospective fees it could collect as property manager (*id.* at 30).

In support of their motion to dismiss this cause of action, the MHA II Defendants first argue that to the extent the Complaint refers to personal property, it must be dismissed because it fails to plead with specificity the property purportedly converted. It further argues that the claims as to money it would have received as property manager are duplicative of the breach of contract claims. In response MHA I maintains: "[w]hat was converted was the benefit of MHA I nonprofit's leasehold, or right to enter upon the premises as a licensee of the demised premises, plus business records, office equipment, and specific funds and right to receive specific funds as detailed in the Verified Complaint" (NYSCEF Doc. No. 46, MHA I's Memorandum of Law, 17).

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). The Court finds that the Complaint sufficiently states a cause of action as to MHA I's business records and office equipment, however its remaining conversion claims are duplicative of the breach of contract causes of action (*M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409 [1st Dept 2008]).

Seventh Cause of Action – Aiding and Abetting

Finally, the seventh cause of action for aiding and abetting must be dismissed. No cause of action exists for aiding and abetting a breach of contract (*Pomerance v McGrath*, 124 AD3d 481, 484 [1st Dept 2015], citing *Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509 [1st Dept 2015]). Likewise, Plaintiff fails to provide any support that a cause of action exists for aiding and abetting violations of RPAPL § 853 or Admin Code § 22-902. Lastly, "[a]iding and abetting conversion requires the existence of conversion by the primary tortfeasor, actual knowledge, and substantial assistance" (*William Doyle Gallaries, Inc. v Stettner*, 167 AD3d 501, 505 [1st Dept 2018]). As the MHA II Defendants are the alleged primary tortfeasors in that claim and are the sole defendants against whom the aiding and abetting claim is asserted, the cause of action cannot be maintained.

Accordingly, for the reasons set forth herein the motion is granted in part and it is hereby,

ORDERED that the first, sixth, and seventh causes of action are dismissed in their entireties; and it is further

ORDERED the fifth cause of action is dismissed as to MHA II and Powell only; and it is further

ORDERED that all other relief sought is denied; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on May 15, 2024 at 2:30 pm via Teams.

This constitutes the Decision and Order of the Court.

4/8/2024
DATE

LORI S. SATTLER, J.S.C.

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