

**Mishkin v The Board of Managers of the 155
Condominium**

2003 NY Slip Op 30096(U)

October 30, 2003

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. WALTER B. TOLUB
Justice

PART 15

RUTH MISHKIN, individually and on behalf of
THE 155 CONDOMINIUM,

INDEX NO . 106769/2003

Plaintiffs,

MOTION DATE 6/24/03

- v -

MOTION SEQ. NO . 001

THE BOARD OF MANAGERS OF THE 155 CONDOMINIUM,
GARY DONG, ARNOLD GITOMER, NEW BEDFORD
MANAGEMENT CORP., MICHAEL WECHSLER, and THE
155 CONDOMINIUM,

MOTION CAL. NO .

Defendants.

SCANNED
NOV 05 2003

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, motion sequence 001 and 002 are consolidated for disposition and decided in accordance with the accompanying memorandum decision.

This constitutes the decision and order of the court.

Dated: 10/31/03



WALTER B. TOLUB, J.S.C.

Check one: [] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
RUTH MISHKIN, individually and on behalf
of THE 155 CONDOMINIUM,

Plaintiffs,

Index No. 106769/03
Mtn Seq. 001, 002

-against-

THE BOARD OF MANAGERS OF THE 155
CONDOMINIUM, GARY DONG, ARNOLD GITOMER,
NEW BEDFORD MANAGEMENT CORP., MICHAEL
WECHSLER and THE 155 CONDOMINIUM,

Defendants.

-----x

WALTER B. TOLUB, J.:

Motion sequence 001 and 002 are consolidated for disposition and disposed of in the following memorandum decision.

By motion sequence 001, defendants by their respective counsels, seek dismissal of the instant complaint. By motion sequence 002, defendants Board of Managers of the 155 Condominium (defendant "Board"), Gary Dong (defendant "Dong"), and Arnold Gitomer (defendant "Gitomer"), seek leave to submit additional papers in support of their notice of motion to Dismiss dated May 20, 2003 and submitted June 24, 2003.

Motion sequence 002 is granted. Motion sequence 001 is granted in part and denied in part.

Plaintiff's complaint is comprised of three causes of action. The first cause of action alleges that defendants Board, Dong and Gitomer breached their fiduciary duty to the condominium and the unit owners by failing to comprehensively investigate and address

the improper withdrawal of \$150,000.00 from the Condominium's operating account **by** defendants New Bedford and Wechsler. Plaintiff's second cause of action seeks to compel an accounting as to defendants New Bedford and Wechsler in connection with the use of the misappropriated funds, and a determination of sums due to the Condominium, including interest. By the second cause **of** action, plaintiff additionally seeks **an** award **of** costs, attorneys, fees, and expenses for pursuing this action. Plaintiff's third cause of action seeks an order discharging defendants New Bedford and Wechsler from their duties as managing agents.

Facts

Plaintiff is the unit owner of unit 17B of the 155 condominium (the Condominium). Pursuant to the Condominium's By-Laws, the Board of Managers, an elected body, is responsible for the management of the affairs of the Condominium. At the time of the commencement of this action, defendant Dong was the president of the Board, and defendant Gitomer was the Board's treasurer. Defendant New Bedford was the managing agent retained by the Condominium to manage the Building', and defendant Wechsler was the owner and principal of defendant New Bedford.

The complaint alleges that on June 26, 2000, defendants New

'The Court notes that as of May 16, 2003, defendant New Bedford was terminated as the managing agent for the Condominium. As of June 16, 2003, the Condominium's managing agent is **AKAM** Associates, Inc.

Bedford and Wechsler withdrew \$150,000.00 via electronic transfer from the Condominium's operating account without authorization. The unauthorized withdrawal of funds was discovered when the accounting firm of Marin and Montayne, LLP (M&M) reviewed the Condominium's books and records for the year 2000. It was further determined that as of December 31, 2000, those funds had not been repaid. It **is** unclear as to whom or where the funds were transferred, and to date, neither defendant Wechsler nor defendant New Bedford have disclosed this information.

The complaint further alleges that upon discovering the missing funds, defendant Wechsler sought to have M&M "hide the funds" so as not to have them appear on the financial statements (Complaint, para. 24). According to the complaint, defendants Dong, Gitomer and Wechsler objected to M&M's characterization that the funds had been "erroneously withdrawn" (Complaint, para. 30). The unauthorized withdrawal of funds was not disclosed to the unit owners until April, 2002.

In the 1999/2000 financial statement for the Condominium, prepared by M&M, the statement indicates that for the year 2000, \$154,140 was due from the managing agent, noting that

[o]n June 26, 2000, \$150,000 was erroneously withdrawn from the Association's [the Condominium] operating account by New Bedford Management. Interest **is** being accrued on these funds, computed using the prevailing interest rate of 5.26% (Complaint para. 36).

However, subsequent financial statements show that defendants New Bedford and Wechsler repaid \$50,000.00 to the Condominium on January 25, 2001, and by May or June of 2001, it appears that the initial debt was repaid, along with some interest (\$4,140). This transaction **is** detailed within **the** 2000/2001 financial statement, produced by the Condominium's newly hired accountants, Leon, Tarlowe & Saper (LT&S).

Upon learning of the unauthorized withdrawal in 2002, plaintiff sought to obtain additional information from the Board concerning these events. Faced with opposition, in the Spring of 2003, the instant action was commenced.

Discussion

Motion to Dismiss

On a motion to dismiss, the Court, accepting all of plaintiffs allegations as true and affording all favorable instances to be drawn from them, is strictly limited to determining "whether the facts as alleged fit within any cognizable legal theory" (Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]). However, each allegation or cause of action **must be** supported by facts. Accordingly, failure to support a cause of action with adequate evidence, or failure to demonstrate the existence of an element of the cause of action warrants dismissal of that cause of action (DiPalma v. Phelan, 81 N.Y.2d 754 [1992]; Creed v. United Hospital et al., 190 A.D.2d 489 [2nd Dept. 1993]).

Breach of Fiduciary Duty

While it is well established that board members of a cooperative or condominium property do owe a fiduciary duty to unit owners, the business judgment rule prohibits judicial inquiry into the propriety of actions taken **by** the board on behalf of the cooperative or condominium "in good faith in the exercise of honest judgment" (Hochman v. 35 Park West Corp., 293 A.D.2d 650 [2nd Dept. 2002] *citing* Matter of Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530, 537-538 [1990]). Moreover, absent allegations of individually tortious conduct, the individual directors of the board are insulated from personal liability under the business judgment rule (Dinicu v. Groff Studios Corp., 257 A.D.2d 218, 222 [1st Dept. 1999; see also Murtha v. Yonkers Child Care Assoc., 45 N.Y.2d 913, 915 [1978]; Decastro v. Bhokari, 201 A.D.2d 382, 333 [1st Dept. 1994], Kravistov v. Thwaites Terrace House Owners Corp. et al., 267 A.D.2d 154, 155 [1st Dept. 1999]).

In the instant case, plaintiff's first cause of action (and to some extent, the third cause of action) alleges that the condominium board along with defendants Dong and Gitomer, breached their fiduciary duty to the condominium and the unit owners 'by failing to act to protect the Condominium with respect to the \$150,000.00 improperly withdrawn without authorization from the Condominium's operating account by New Bedford and Wechsler" (Complaint, para. 55). Based on the papers submitted in opposition

to the instant motion to dismiss, it is this court's opinion that plaintiff may in fact be able to establish a prima facie case for breach of fiduciary duty. Accordingly, defendants' motion to dismiss the first cause of action is denied.

Remaining Causes of Action

Defendants' motion to dismiss plaintiff's second cause of action is granted to the extent that the portion of plaintiff's second cause of action seeking an award of costs, attorneys' fees and expenses to plaintiff in connection with pursuit of this action is dismissed. Condominium associations are not governed by the Business Corporation Law but by Real Property Law article 9-B (4260 Broadway Realty Co. v. Assimakopoulos, 264 A.D.2d 626 [1st Dept. 1999]) and absent specific statutory or contractual authority, attorney's fees are not recoverable (Devlin v. 645 First Avenue Manhattan Company, 229 A.D.2d 343 [1st Dept. 1996]). As plaintiff has not demonstrated statutory or contractual authority entitling her to recovery, the portion of the second cause of action seeking costs, attorneys' fees and expenses is dismissed.

Plaintiff's third cause of action seeking an order discharging defendants New Bedford and Wechsler from their duties as managing agents of the Condominium is dismissed as moot. As of June 16, 2003, defendants New Bedford and Wechsler are no longer involved as managing agents of the Condominium. Accordingly, it is

ORDERED that motion sequence 002 **is** granted; and it is further

ORDERED that defendants' motion to dismiss the complaint in motion sequence 001 is **granted** to the extent that the portion of the second cause of action wherein plaintiff seeks costs and attorneys' fees is dismissed, and the third cause of action **is** dismissed.

Counsel for the parties are directed to appear for a Preliminary Conference on January **16**, 2004 **at** 11:00 a.m. in I.A. Part 15, Room 335, 60 Centre Street, New York, New York.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/30/13



HON. WALTER B. TOLUB, J.S.C.