

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x
WILLIAM CHRISTIE,

Index No. 705938/23

Plaintiff,

Motion

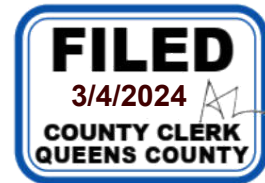
Date: August 14, 2023

-against-

M# 1

BREEZY POINT COOPERATIVE INC,

Defendant.
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The following papers numbered EF 7-26 read on this motion by the defendant Breezy Point Cooperative, Inc. (BPC) to dismiss the complaint.

Papers
Numbered

- Notice of Motion - Affirmation - Exhibits..... EF 7-14
- Answering Affidavit - Exhibits..... EF 16-24
- Reply Memorandum..... EF 26

Upon the foregoing papers it is ordered that the motion is decided as follows:

On March 20, 2023, the plaintiff William T. Christie commenced this action for a declaratory judgment and seeking damages for breach of contract and breach of fiduciary duty, and attorneys' fees arising from BPC's refusal to consent to assign plaintiff's lease in cooperative premises owned by BPC. BPC now moves to dismiss the complaint on the grounds of a documentary defense and failure to state a cause of action (see CPLR 3211 [a] [1], [7]).

Dismissal under CPLR 3211[a][1] is appropriate when the documentary evidence presented utterly refutes the complaint's factual allegations and conclusively establishes a defense as a matter of law (see *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]; *Members of the Dekalb Ave. Condominium Assn. v Klein*, 172 AD3d 1196, 1197 [2d Dept 2019]). Moreover, to qualify as documentary evidence, "it must be unambiguous, authentic and undeniable" (*Magee-Boyle*, 173 AD3d at

1159; *Members of the Dekalb Ave. Condominium Assn.*, 172 AD3d at 1197). In reviewing a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the court must liberally construe the pleadings, accept the allegations as true and accord plaintiff all possible favorable inferences (see *Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]; *Doe v Bloomberg, L.P.*, 36 NY3d 450, 454 [2021]). The court must determine whether the complaint alleges facts giving rise to a cause of action (*Sassi*, 37 NY3d at 239, see *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021]). Dismissal is warranted if plaintiff fails to assert facts supporting an element of a claim, or the facts and inferences therefrom do not allow an enforceable right of recovery (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP*, 37 NY3d at 175; *Connaughton, Inc. v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

BPC contends that the complaint should be dismissed because its refusal to consent to plaintiff's assignment of its lease was protected by the business judgment rule, which "[i]n the context of cooperative dwellings, . . . provides that a court should defer to a cooperative board's determination '[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith'" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 [2003] quoting *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). Application of the rule limits the court's inquiry to whether the board acted within the scope of its authority and in good faith and furthered the cooperative's legitimate interest (see *Griffin v Sherwood Vil., Co-op "C", Inc.*, 130 AD3d 780, 781 [2d Dept 2015]; *Oakwood On The Sound, Inc. v David*, 63 AD3d 893, 894 [2d Dept 2009]).

The complaint alleged that BPC improperly conditioned its consent to plaintiff's assignment of his lease on removing alterations to the unit performed in 2013, which BPC had not approved. To support its motion, BPC presents the proprietary lease dated November 26, 2003, between BPC and plaintiff and a now deceased joint tenant. A lease is documentary evidence under CPLR 3211 [a] [1] (see *Scialdone v Stepping Stones Assoc., L.P.*, 148 AD3d 953, 954 [2d Dept 2017]; *Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 103 AD3d 707, 709 [2d Dept 2013]). Article II, paragraph 7 of the lease requires BPC's "prior written consent" for any alterations (NY St Cts Elec Filing [NYSCEF] Doc No. 12 at 6). Among other things, Article II, paragraph 6, subdivision [d] of the lease provides that in order for an assignment of the lease or an interest in it to be effective, a "written consent to such assignment, authorized by a resolution of the Board of Directors,

or signed or approved by a majority of the directors, or by a majority of the stockholders of the Lessor holding proprietary leases then in force, must be delivered to the Lessor" (*Id.*).

In opposition, plaintiff maintains that BPC cannot condition its consent on correction of the unauthorized 2013 alteration because any claim to enforce that lease provision is time-barred. Plaintiff also contends that BPC was prohibited from conditioning its consent at all.

With respect to the first cause of action for a judgment declaring that BPC has no right to condition its consent to the assignment, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *Kennedy v Suffolk County*, 211 AD3d 926, 927 [2d Dept 2022]; *Matter of JDM Holdings, LLC v Village of Warwick*, 200 AD3d 880, 883 [2d Dept 2021]). A justiciable controversy requires showing that adverse parties have an actual dispute regarding "substantial legal interests for which a declaration of rights will have some practical effect" (*Kennedy*, 211 AD3d at 927 quoting *Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]). For a motion to dismiss a claim seeking a declaratory judgment, the court must consider only whether a declaratory judgment cause of action is stated, not whether plaintiff is entitled to the declaration sought (see *Matter of Riverkeeper, Inc. v New York City Dept. of Env'tl. Protection*, 214 AD3d 986, 987-88 [2d Dept 2023]; *WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018, 1024 [2d Dept 2021]).

At bar, in view of the liberal construction of pleadings as required by the CPLR, the first cause of action states a cause of action for a declaratory judgment.

The second cause of action asserts breach of contract and breach of fiduciary duty. The elements of a breach of contract claim "are (1) the existence of an enforceable contract, (2) the plaintiff's performance pursuant to that contract, (3) the defendant's breach of the contract, and (4) damages resulting from that breach" (*Nassau Operating Co., LLC v DeSimone*, 206 AD3d 920, 926 [2d Dept 2022]; see *Ripa v Petrosyants*, 203 AD3d 768, 769-70 [2d Dept 2022]).

Here, the lease does not specifically authorize BPC to condition its consent to the assignment of the lease. Indeed, BPC could have included such a condition in the proprietary lease but chose not to. (see *Zimiles v Hotel Des Artistes*, 216 AD2d 45, 45 [1st Dept 1995].) Indeed, conditions on subletting have been upheld

where conditions were expressly permitted in the proprietary lease. (see *Boland v 70-80 Gibson Blvd. Owners, Inc.*, NY Slip Op 33004 [U][Sup Ct, Nassau County 2009].) The proprietary lease only provides that the Lessor must consent to an assignment or transfer of the lease.

Moreover, the court finds that the defendant cannot now seek to condition the assignment of the lease to the removal of the alterations. The alterations were performed by the plaintiff in 2013. The defendant never objected to the alterations in any manner. It would be highly prejudicial to the plaintiff, after more than 10 years, to require the removal of the alterations at this juncture. (see *Barklee 94 LLC v O'Keefe*, 18 Misc 3d 134(A) (App Term, 1st Dept 2008].)


Turning to the alleged breach of fiduciary duty, the elements of that claim are the existence of a fiduciary duty, defendants' misconduct, and direct damages from that misconduct (see *Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum & Vitulli*, 215 AD3d 699, 702 [2d Dept 2023]; *P.S. Fin., LLC v Eureka Woodworks, Inc.*, 214 AD3d 1, 31 [2d Dept 2023]). Claims for breach of fiduciary duty must be pleaded with specificity (see CPLR 3016[b]; *Philip S. Schwartzman, Inc.*, 215 AD3d at 702; *J.D. v Roman Catholic Diocese of Brooklyn*, 203 AD3d 880, 882 [2d Dept 2022]). The complaint alleged that conditioning consent upon removal of the 2013 alteration "would constitute . . . a breach of the fiduciary duty of Apartment Corporation's Board of Directors to Christie." Since this conclusory allegation does not plead the existence of a fiduciary duty with specificity, dismissal of the breach of fiduciary duty claim is appropriate (see CPLR 3016 [b]; *Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 62 [2d Dept 2013]).

Finally, regarding the third cause of action, plaintiff, as tenant, may recover attorneys' fees where the lease allows BPC, as landlord, to recover them for suing to recover for tenant's breach of lease (see Real Property Law § 234 [1]). Here, Article II, paragraph 15 permits BPC to recover attorneys' fees if plaintiff was in default or it commenced an action or proceeding against plaintiff for that default. Recovery of attorneys' fees pursuant to Real Property Law § 234 [1] requires the tenant to prevail in the action (see *Graham Ct. Owners Corp. v Taylor*, 24 NY3d 742, 747 [2015]; *Round Dune, Inc. v Filkowski*, 197 AD3d 748, 749 [2d Dept 2021]; *Matter of 251 CPW Hous. LLC v Pastreich*, 124 AD3d 401, 403 [1st Dept 2015]). Inasmuch as the first cause of action and part of the second cause of action are not being dismissed, the cause of action for attorneys' fees is viable.

Accordingly, BPC's motion to dismiss is granted solely to the extent that the cause of action for breach of fiduciary duty is dismissed.

The remainder of the motion is denied, and the other cause of action shall remain.

Dated: February 29th, 2024



CARMEN R. VELASQUEZ, J.S.C.

