

Fricke v Beauchamp Gardens Owners Corp.

2022 NY Slip Op 34833(U)

January 11, 2022

Supreme Court, Westchester County

Docket Number: Index No. 52432/2020

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ALISON FRICKE and CAROL HANSEN,

Plaintiffs,

-against-

BEAUCHAMP GARDENS OWNERS CORP.,

Defendant.

-----X
HUBERT, J.

Index No.: 52432 / 20
Motion Date: 6 / 12 / 20
Motion Seq. #1
DECISION, ORDER AND
JUDGMENT

The following documents were read on this motion by Defendant, Beauchamp Gardens Owners Corp. (hereafter, "BGO"), for an order pursuant to rule 3211(a)(1), (5) and (7) of the Civil Practice Law and Rules dismissing each of the causes of action in the complaint in the above-captioned action as against it:

- Notice of Motion - Affirmation - Exhibits - Memorandum of Law - Affidavits of Service
- Affirmation in Opposition - Affidavit in Opposition - Exhibit - Memorandum of Law
- Memorandum of Law in Reply

Upon consideration of all of the foregoing, and for the following reasons, the motion is granted in part and denied in part as academic, and the action is dismissed.

Factual and Procedural Background

Plaintiffs, Alison Fricke (hereinafter, "Fricke") and Carol Hansen (hereafter, "Hansen"), commenced the above-captioned action by filing a Summons and Verified Complaint via the New York State Courts E-Filing system (hereafter, "NYSCEF") on February 17, 2020, in which Complaint Plaintiffs plead, inter alia, the following.

"BGO is a two-building-cooperative apartment complex in New Rochelle" (Complaint at

1); Fricke and Hansen are sisters, each of whom own shares, and each of whom owns a separate apartment, in the BGOC cooperative (*see id.*)

In the Complaint, Plaintiffs plead that in 2012, BGOC's Board of Directors (hereafter, "the Board") passed a resolution (hereafter, "the 2012 Resolution") which "limits the right of a shareholder to sublet to two years and preemptively prohibits any subletting beyond that term" (*id.* at ¶5). However, in opposition to the instant motion Plaintiffs' counsel now represents that,

Plaintiffs' Complaint originally misstated the terms of that resolution, but, on further inspection and contrary to [Plaintiffs'] claim, neither the 2012 resolution nor its 2013 amendment curtailed the right to sublet, assessed fines, nor did it deprive shareholders of any property rights" (Memorandum Of Law In Opposition To Defendant's Motion To Dismiss [NYSCEF DOC. NO. 20] [hereafter, "Plaintiffs' MOL"] at 2).

In the Complaint, Plaintiffs plead that "[i]n 2017 [the] Board, impermissibly altered the terms of the [Plaintiffs' Proprietary] Lease[s, i]mposing restrictions on the shareholders' rights to sublet" (Complaint at ¶15). In opposition to the instant motion Plaintiffs' counsel now represents that said resolution was actually passed "in or about October 2016," and that "the new sublet rules stated that they would take effect as of January 1, 2017" (Plaintiffs' MOL at 1) (Said resolution will be referred to hereafter as "the 2017 Resolution").

The Complaint pleads three separately stated and numbered causes of action.

In the first cause of action for breach of contract Plaintiffs allege that in limiting their right to sublet, BGOC breached the terms of their Proprietary Leases.

In the second cause of action for tortious interference with business relationships Plaintiffs allege that BGOC wrongfully sent eviction notices to their subtenants based upon the 2017 Resolution. In opposition to the instant motion Plaintiffs' counsel now represents that "Plaintiff [sic] withdraws the action for tortious interference" (Plaintiffs' MOL at 5).

In the third cause of action Plaintiffs allege that the Board's passage of the 2017 Resolution constituted misconduct in violation of section 720 of the Business Corporation Law.

In lieu of an answer, on June 12, 2020, BGOC made the instant motion pursuant to CPLR 3211(a)(1) and (5) to dismiss the first and third causes of action, and pursuant to CPLR 3211(a)(7) to dismiss the second and third causes of action.

On July 10, 2020, Plaintiffs filed papers in opposition.

On July 30, 2020, BGOB filed reply papers in further support of its motion, which motion was deemed fully submitted on August 6, 2020, the date to which the original return date had been adjourned pursuant to a stipulation so-ordered by this Court.

Discussion

The motion to dismiss the first and third causes of action as time-barred is granted.

Pursuant to CPLR 3211(a)(5) “[a] party may move for judgement dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . statute of limitations.”

The applicable statute of limitations with respect to the first cause of action is CPLR 217(1), pursuant to which “a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” A proceeding against a body or officer is commenced under CPLR art. 78. “Where . . . a cooperative shareholder seeks to challenge a co-op board’s action, such challenge is to be made in the form of an article 78 proceeding” (*Musey v 425 East 86 Apartments Corp.*, 154 AD3d 401, 403 [1st Dept 2017] *lv dismissed* 31 NY3d 1065 [2018]). Plaintiff’s allege that the Board’s action in passing the 2017 Resolution “was an ultra vires and impermissible exercise, clearly beyond the authority of the Board” (Complaint at ¶31). Regardless of Plaintiff’s characterization of the claim as one for breach of contract, their first cause of action asserts a challenge cognizable in an article 78 proceeding, not in a plenary action (*see, e.g., Ciccone v One W. 64th St.*, 171 AD3d 481, 481 [1st Dept 2019] [holding that plaintiff’s causes of action challenging the propriety of the cooperative corporation’s amendments of the proprietary lease and alleging that the corporation acted in bad faith were subject to four month statute of limitations for article 78 proceeding]; *Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012][holding that plaintiff’s cause of action challenging cooperative corporation’s amendments of the bylaws and proprietary leases as ultra vires was subject to four month statute of limitations for article 78 proceeding]). Thus, the applicable statute of limitations with respect to the first cause of action is CPLR 217(1), and the applicable limitations period is four

months after the determination at issue became final and binding upon Plaintiffs.

The first cause of action is time-barred. Plaintiffs do not dispute, and indeed confirm, that the determination at issue in the first cause of action became final and binding upon them as early as October 2016, and no later than January 1, 2017. In either event, the statute of limitations expired no later than May 1, 2018, and well before February 17, 2020, the date on which Plaintiffs commenced the instant proceeding. Therefore, the motion to dismiss the first cause of action as time-barred is granted.

The applicable statute of limitations with respect to the third cause of action is CPLR 214(2), pursuant to which “an action to recover upon a liability, penalty or forfeiture created or imposed by statute” must be commenced within three years.

Pursuant to Business Corporation Law § 720(a)(1)(A), “[a]n action may be brought against one or more directors or officers of a corporation to procure a judgment . . . to compel the defendant to account for his official conduct in [t]he neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.” An action brought pursuant to Business Corporation Law § 720 by a shareholder, officer or director in her own name for the alleged misconduct of corporate directors is subject to a three year statute of limitations (*see Gillette v Sembler*, 34 Misc. 3d 1220(A), 2012 N.Y. Slip Op. 50188[U] at 4-5 [S. Ct. Suff. Co. 2012]; *Davis v CornerStone Tel. Co., LLC*, 19 Misc. 3d 1142(A), 2008 WL 2329176 at 9-11 [S. Ct. Albany Co. 2008] *affd as mod on other grounds* 61 AD3d 1315, 1316-1317 [3d Dept 2009]; *cf., JSC Foreign Economic Assn. Technostroyexport v Intl. Dev. and Trade Servs., Inc.*, 295 F. Supp. 2d 366, 382-384 [S.D.N.Y. 2003][distinguishing between statutes of limitation applicable to direct action for violation of section 720 brought in plaintiff’s own name and derivative action brought in behalf of corporation]). Plaintiffs brought the above-captioned action in their own names. Thus, the applicable statute of limitations with respect to the third cause of action is CPLR 214(2), and the applicable limitations period is three years from the date of the alleged misconduct.

The third cause of action is time-barred. Plaintiffs plead that the misconduct upon which the third cause of action is based was the Board’s passage of the 2017 Resolution, which took effect on January 1, 2017. The three year statute of limitations expired no later than January 1, 2020, and before February 17, 2020, the date on which Plaintiffs commenced the above-captioned action.

Therefore, the motion to dismiss the third cause of action as time-barred is granted.

The motion to dismiss the second cause of action is denied as academic as that claim has been withdrawn.

Because the first and third causes of action are the only remaining claims and BGOC's motion to dismiss each as time-barred is granted, the Court has not considered BGOC's motion to dismiss the third cause of action for failure to state a cause of action.

Accordingly, for the foregoing reasons, it is hereby

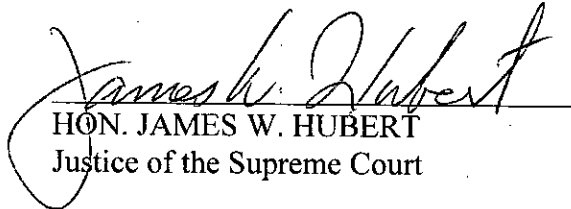
ORDERED that the motion of Defendant, Beauchamp Gardens Owners Corp., for orders dismissing the three causes of action in the complaint in the above-captioned action, is granted to the extent that the motion to dismiss the first and third causes of action is granted, and denied to the extent that the motion to dismiss the second cause of action is academic, and it is further

ORDERED, ADJUDGED AND DECREED that the above-captioned action is dismissed.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: White Plains, New York
January // , 2022

ENTER,


HON. JAMES W. HUBERT
Justice of the Supreme Court