

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

THE BOARD OF MANAGERS OF THE WARREN HOUSE
CONDOMINIUM on its own behalf and on behalf of
individual unit owners,

INDEX NO. 152052/2013
MOTION DATE 06-04-2014
MOTION SEQ. NO. 001
MOTION CAL. NO.

Plaintiffs,

-against-

34TH STREET ASSOCIATES LLC, 4-34TH LLC,
EAST 34TH PARTNERS LLC, and 155 PARTNERS LLC,

Defendants.

The following papers, numbered 1 to 7 were read on this Motion to Dismiss Counterclaims.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that this Motion to dismiss the Second Counterclaim asserted in the Amended Answer, is granted.

Plaintiff is the Board of Managers of the Warren House Condominium (herein "Board") of a building with a total of three-hundred and thirty (330) residential units (herein "Total Units"), located at 155 East 34th Street New York, New York. Defendant 155 Partners LLC was the sponsor of the conversion of the building. Defendants collectively own one-hundred and twenty-three (123) units (herein "Unsold Units") of the Total Units and are the successor-sponsors to the condominium conversion.

The Complaint alleges that defendants have violated the purpose of the building's October 31, 1986 offering plan by rejecting prospective purchasers and refusing to sell their Unsold Units. The Board asserts that this refusal to sell the Unsold Units has frustrated the other unit owners' ability to resell their apartments and interfered with their ability to refinance their mortgages as lenders are reluctant to loan money in buildings in which there is a high percentage of sponsor-owned units. The Board seeks a declaratory judgment requiring defendants to undertake commercially reasonable efforts to market and sell the Unsold Units.

Defendants deny these allegations and in their Amended Answer assert counter-claims for (1) a declaratory judgment that there is no legal or contractual basis by which the Board may compel the sale of the Unsold Units, and (2) breach of fiduciary duty due to the Board's harassing, disparate, and unreasonable treatment of defendants and awarding defendants attorneys' fees for said breach.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The Board moves to dismiss the Second counterclaim arguing that defendants have failed to meet the heightened pleading requirements of CPLR § 3016(b) and that attorneys' fees are improper because defendants fail to assert specific statutory or contractual authority for said fees.

Defendants argue that the counterclaim is sufficiently plead and further amplified by defendants interrogatory responses and that dismissal of attorneys' fees would be premature and improper.

On a motion to dismiss, non-moving parties are accorded the benefit of every possible favorable inference (See *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976], and "determine only whether the facts as alleged fit within any cognizable legal theory" *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (*Union Brokerage, inc., v. Dover Insurance Company*, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept. 1983]).

CPLR § 3016(b) states that where a cause of action or defense is based upon breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail. "To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 700, 924 N.Y.S.2d 77 [1st Dept., 2011]; also see *RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840, 841–842, 907 N.Y.S.2d 476 [2010]; (*Kurtzman v. Bergstol*, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644, 646 [2nd Dept., 2007])). A breach of fiduciary duty cause of action is not sustainable through vague and conclusory allegations "made without any specific instances of the alleged misconduct" (*Berardi v. Berardi*, 108 A.D.3d 406, 969 N.Y.S.2d 444, 446 [1st Dept., 2013]).

Here, it is undisputed that defendants are the successor-sponsors to the condominium conversion and as such, are owed a fiduciary duty by the Board.

In their Amended Answer, defendants assert that the Board requested that defendant 155 Partners LLC - the original sponsor of the building conversion - "take steps to transfer ownership of its units to other entities so as to obviate the purported problem created by a single holder of unsold units." The Amended Answer alleges that 155 Partners LLC transferred ownership of the Unsold Units, at its own expense, to defendants "solely to accede to Plaintiff's request," in order to resolve the finance issues for unit owners to refinance or sell their units.

However, defendants do not allege any misconduct committed by the Board. Defendants' Amended Answer alleges that The Board made a request and the defendants voluntarily complied with that request.

The Amended Answer then claims the Board demanded that defendants sell all of their Unsold Units, and when Defendants declined, the Board undertook "a campaign to harass defendants" and has "singled out [defendants] for disparate and unreasonable treatment." Defendants do not plead in detail the Board's alleged acts of harassment or how they were singled out for disparate and unreasonable treatment. Defendants make vague and conclusory allegations without any specific instances of alleged misconduct thereby failing to meet the heightened pleading requirements of CPLR § 3016(b).

The Board moves to strike defendants' plea for an award of attorneys fees. Defendants do not assert a contractual basis nor a statutory basis for attorneys fees.

Accordingly, it is ORDERED that plaintiff's motion to dismiss the Second Counter Claim for breach of fiduciary duty and an award for attorneys fees, is granted, and it is further,

ORDERED, that defendants' plea for reasonable attorneys fees is denied, and it is further,

ORDERED, that the Second Counterclaim asserting breach of fiduciary duty is severed and dismissed, and it is further,

ORDERED, that the parties shall appear in Part 13 located at 71 Thomas Street, Room 210 New York, N.Y. for a Conference on the 10th Day of Septemeber, 2014 at 9:30 A.M.

ENTER: **MANUEL J. MENDEZ**
J.S.C.

Dated: July 14, 2014


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE