

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

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AMY M. HOMES, (on behalf of herself and her minor  
daughter) and KATHERINE GREENBERG,

Plaintiffs,

-against-

Index # 150890/15

DECISION/ORDER

BOARD OF DIRECTORS OF THE WEST SQUARE  
CORPORATION, WEST SQUARE CORPORATION,  
ROGER ZISSU AND CHARLES H. GREENTHAL  
MANAGEMENT CORP.,

Defendants.

Present:

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the  
review of this Motion/Order to Dismiss/Summary Judgment.

| PAPERS                                       | NUMBERED     |
|--|--------------|
| Notice of Motion and Affidavits Annexed..... | ___ 1 ___    |
| Order to Show Cause and Affidavits Annexed   | _____        |
| Answering Affidavits.....                    | ___ 2 ___    |
| Replying Affidavits.....                     | ___ 3 ___    |
| Exhibits.....                                | _____        |
| Memoranda.....                               | ___ 4, 5 ___ |
| Cross-Motion .....                           | _____        |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Co-defendant, Roger Zissu ("Zissu") moves for an Order pursuant to CPLR 3212, and 3211 granting summary judgment dismissing Plaintiffs Amy M. Homes (on behalf of herself and her minor daughter) and Katherine Greenbergs' complaint as against him for failure to state a cause of action. Specifically, Zissu argues there are no triable issues of fact as against him; as a matter of law, as he cannot be held liable due to the corporate shield doctrine; and, he cannot be held personally liable due to the business judgment rule

absent a showing of separate and independent tortious conduct. For the reasons discussed below the motion is granted.

The West Square Corporation is a corporation organized and existing under the laws of the State of New York and is the owner of 32 Washington Square West, New York, New York. Zissu is the President of the seven member Board of Directors of West Square Corporation.

In their complaint, Plaintiffs allege that Defendants were negligent in the "effort to discover the source of a water leak" and in the ensuing "demolition" and remediation resulting from a leak/steam riser pipe burst, undertaken in Plaintiffs' apartment located at 32 Washington Square West, New York, New York, a cooperative apartment complex. Plaintiffs claim that Defendants' careless and grossly negligent acts during demolition undertaken in Plaintiffs' apartment caused the release of asbestos, mold and other toxins into the air. They further allege that Zissu specifically failed to address the asbestos, mold and other toxins present in the unit, that this refusal to remediate the conditions affected Plaintiffs and caused them bodily harm, emotional distress, property and monetary damage. They further claim that they were singled out for disparate treatment by Defendants and Zissu specifically, out of animus towards them.

Plaintiff complaint asserts causes of action for (1) nuisance; (2) breach of contract ; (3) negligence; (4) breach of warranty of habitability; (5) rent abatement; (6) constructive eviction; and(7) breach of fiduciary duty as against Roger Zissu, and injunctive relief and damages.

In the motion Zissu argues that Plaintiffs' claim as against him must be dismissed as he cannot be personally held liable because of the business judgment rule. Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purpose. "( Levandusky v. One Fifth Ave. Apartment Corp.), 75 N.Y.2d 530, (N.Y. 1990); citing Auerbach v Bennett, 47 NY2d 619, 629). The rule has been long recognized in New York (Flynn v Brooklyn City R.R. Co., 158 N.Y. 493, 507, 53 N.E. 520 [1899]; Pollitz v Wabash R.R. Co., 207 N.Y. 113, 124, 100 N.E. 721 [1912]). In the context of cooperative dwellings, the business judgment rule 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" (Levandusky, 75 N.Y.2d at 538).

In support of their opposition, Plaintiffs include an affirmation from their attorney, Anne W. Salisbury and a copy of an email chain between Board Members, Peter Gethers,

Zissu and other defendants. The Attorney Affirmation discusses discovery issues and attempts to further the argument that Zissu's motion is premature because of the lack of discovery. Additionally, the Affirmation references the email chain and argues that the emails are evidence that Plaintiffs were unfairly singled out and treated disparately. The emails purport to demonstrate that Mr. Gethers received approval to have the same contractor requested by Plaintiffs, fix his floors immediately and without argument, while Plaintiffs request for the same contractor was denied. However, aside from one email which was sent directly to Zissu and another person, Zissu is copied on all of the other emails and does not respond, in the negative or the affirmative, to any of the emails regarding the contractor for Mr. Gethers. Plaintiffs claim that the emails are proof that Zissu's conduct is outside of the business's judgment rule.

Levandusky cautions that the broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decision making or favoritism. (40 W. 67th St. v Pullman, 100 NY2d 147, 153, 790 N.E.2d 1174, 760 N.Y.S.2d 745, quoting Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538, 553 N.E.2d 1317, 554 N.Y.S.2d 807; Cohen v Kings Point Tenant Corp., 126 AD3d 843, 844-845, 6 N.Y.S.3d 93)). "[D]ecision making tainted by discriminatory considerations is not protected by the business judgment rule" (Cohen v Kings Point Tenant Corp., 126 AD3d at 845, quoting Fletcher v Dakota, Inc., 99 AD3d 43, 48, 948 N.Y.S.2d 263; 40 W. 67th St. v Pullman, 100 NY2d at 157)).

However in this case, Plaintiffs have not shown the slightest indication of any bad faith, arbitrariness, favoritism, discrimination or malice on the part of Zissu, and the record reveals none. Though Plaintiffs contend they have raised sufficient facts to circumvent the business judgment rule, this Court disagrees. Aside from arguing that depositions have not commenced, and limited discovery has been exchanged, the strength of their case seems to rely on the email which does little to substantiate Plaintiffs claims. Plaintiffs have made unsupported allegations and conclusions against Zissu, none of which are evidenced in the record before the Court.

Additionally, aside from Plaintiffs' claims that Zissu breached his fiduciary duty by specifically calling for delays in remediation out of personal animosity, it is not apparent from the record exactly how Zissu breached his fiduciary duty or what independent tortious actions were taken by him separate and independent from the alleged actions of the Board of Directors. Indeed, Plaintiffs provides no specifics to support their claims or to show how Zissu's conduct is not protected under the business judgment rule.

To the extent that Plaintiffs argue that further discovery will “bear out” their allegations, it is well settled that an argument opposing summary judgment on the grounds of insufficient discovery “is unavailing where the nonmoving party has failed to ‘produce some evidence indicating that further discovery will yield material and relevant evidence’” (Heritage Hills Soc., Ltd. v Heritage Development Group, Inc., 56 AD3d 426, 427, 867 N.Y.S.2d 149 [2d Dept 2008], quoting Fleischman v Peacock Water Co., Inc., 51 AD3d 1203, 1205, 858 N.Y.S.2d 421 [3d Dept 2008]; Hayden v City of New York, 26 A.D.3d 262, 809 NYS2d 75, 76 [1st Dept 2006]. [“Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a ‘mere hope,’ which is insufficient to defeat summary judgment”]; Steinberg v Abdul, 230 AD2d 633, 633, 646 N.Y.S.2d 672 [1st Dept 1996]).

As such, Plaintiffs have failed to raise any triable issues of fact warranting denial of the motion.

Accordingly, it is

ORDERED that the motion by defendant Zissu for summary judgment dismissing the case as against him only is granted.

ORDERED that the Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

  
**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: December 14, 2015

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court