

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Carol R. Edhead
Justice

PART 35

28 Cliff St. Condominium et. al

INDEX NO. 653115/14

MOTION DATE 7/17/19

MOTION SEQ. NO. 004

Maguire et. al.

The following papers, numbered 1 to , were read on this motion tofor

- Notice of Motion/Order to Show Cause - Affidavits - Exhibits [No(s).]
Answering Affidavits - Exhibits [No(s).]
Replying Affidavits [No(s).]

Upon the foregoing papers, it is ordered that this motion is Pursuant to the accompanying memorandum opinion, it is

ORDERED that the Defendants' motion is granted to the extent that the Court finds that BCL §§ 722 and 724 apply to this action; and it is further

ORDERED that the following factual issues are severed and referred to a Special Referee to hear and determine the following issue:

Did defendant Philomena Maguire execute her duties as president of the condominium board in good faith following the subject fire; if so, what are the reasonable amount of attorney's fees Maguire expended to defend against the ten dismissed causes of action the Board brought against her relating to her conduct as board president?

and it is further

ORDERED that counsel for Defendants shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that Plaintiffs' cross motion is granted only to the extent that Defendants' counterclaims for breach of contract and common-law indemnification are dismissed.

This constitutes the decision and order of the Court;

ORDERED that counsel for Defendants shall serve a copy of this order on all parties, along with notice of entry, on all parties within 10 days of entry.

Dated: 9.9.19

[Signature] J.S.C.
HON. CAROL R. EDHEAD

- 1 CHECK ONE: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
BOARD OF MANAGERS OF THE 28 CLIFF STREET,
CONDOMINIUM, DAVI L. ABRAMSON, DAVID L.
ZINSSER, RENATO CAMPORA, and REBECCA
CAMPORA,

Index No. 653115/2016
Motion Seq. No. 004

Plaintiffs,

-against-

DECISION AND ORDER

PHILOMENA MAGUIRE, THOMAS MAGUIRE,
BELCOO CORP., RYAN'S CLIFF STREET CORP.,

Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

In an action involving a dispute in a condominium, defendant and counterclaimant Philomena Maguire (Maguire), moves for an interim order granting her indemnification from plaintiff Board of Managers of the 28 Cliff Street Condominium (the Board). This application involves a question of first impression: whether the Business Corporation Law (BCL) §§ 722 and 724 authorize indemnification in the condominium context. Plaintiffs the Board, Davi L. Abramson (Abramson), David L. Zinsser, Renato Campora, and Rebecca Campora (together, the Camporas) (collectively, Plaintiffs) oppose the motion and cross-move, pursuant to CPLR 3211 (a) (7), to dismiss the first, second, third, and tenth counterclaims of Maguire (Maguire), Thomas Maguire (together, the Maguires), Belcoo Corp. (Belcoo), and Ryan's Cliff Street Corp. (Ryan's Cliff) (collectively, Defendants). Alternatively, Plaintiffs seek summary judgment dismissing these claims.

BACKGROUND

This dispute began with a fire in the subject condominium. The condominium is four stories, with a commercial unit on the first floor and a portion of the cellar, and residential units

on the second, third and fourth floors. The first floor is occupied by a bar and restaurant owned by Belcoo and operated by Ryan's Cliff through Maguire. Maguire is a member of the condominium and the president of the board from 2005 through July 2011. The second-floor unit is owned and occupied by Abramson and Zinsser, while the fourth floor is owned and occupied by the Camporas. A fire broke out in the condominium on February 24, 2010, causing significant damage.

Plaintiffs filed their complaint on October 14, 2014. The thrust of Plaintiffs claims are that Maguire mismanaged and embezzled insurance funds earmarked for building repairs. In a decision dated February 22, 2018, this Court dismissed ten causes of action encompassing these allegations (the February 2018 decision) (NYSCEF doc No. 117). Specifically, the Court dismissed Plaintiffs claims for breach of fiduciary duty (first cause of action), aiding and abetting breach of fiduciary duty (second cause of action), fraud (third cause of action), aiding and abetting fraud (fourth cause of action), an accounting (fifth cause of action), violation of Real Property Law (RPL) § 339-w (sixth cause of action), unjust enrichment (seventh cause of action), breach of contract (eighth and ninth causes of action), and violation of RPL § 339-k (the twelfth cause of action). The Court, however, denied Defendants' motion as to the eleventh and twelfth causes of action, in which Plaintiffs allege private nuisance, relating to allegations of noise emanating from the first floor to the second floor, and seek damages (the eleventh cause of action) and injunctive relief (the twelfth cause of action).

While only Plaintiffs nuisance claims remain, Defendants are asserting 10 counterclaims. The thrust of the counterclaims is that, Defendants allege, Ryan's Cliff lent the condominium money to expedite repairs prior to receipt of the insurance payments, and Plaintiffs have failed to repay \$155,000 of the loaned amount. Defendants also allege that the Board misappropriated and

liquidated funds within a “roof escrow” account. Specifically, Defendants’ first counterclaim seeks the \$155,000 remaining on the alleged loan without specifying a cause of action, the second counterclaim seeks the same sum under a theory of restitution, while the third counterclaim seeks that amount under a theory of breach of contract; the fourth counterclaim alleges a breach of fiduciary duty related to the roof escrow account and seeks punitive damages, while the fifth counterclaim seeks an accounting, the sixth counterclaim alleges conversion related to the roof escrow account, the seventh counterclaim seeks restitution related to the roof escrow account, while the eighth counterclaim alleges a violation of RPL § 339-w; the ninth counterclaim alleges that Abramson struck the door of the bar with a hammer causing \$1,000 in damages; finally, the tenth counterclaim alleges that Maguire is entitled to indemnification for the legal fees she has expended in defending herself from Plaintiffs’ claims.

DISCUSSION

I. Interim Indemnification

Maguire seeks indemnification for approximately \$350,000 expended in legal fees pursuant to BCL § 722 (c) and BCL 724 (c). BCL § 722 is entitled “Authorization for indemnification of directors and officers.” Its subsection (c) provides:

“A corporation may indemnify any person made, or threatened to be made, a party to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director or officer of any other corporation of any type or kind, domestic or foreign, of any partnership, joint venture, trust, employee benefit plan or other enterprise, against amounts paid in settlement and reasonable expenses, including attorneys’ fees, actually and necessarily incurred by him in connection with the defense or settlement of such action, or in connection with an appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise, not opposed to, the best interests of the corporation, except that no indemnification under this paragraph shall be made in respect of (1) a threatened action, or a

pending action which is settled or otherwise disposed of, or (2) any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation, unless and only to the extent that the court in which the action was brought, or, if no action was brought, any court of competent jurisdiction, determines upon application that, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such portion of the settlement amount and expenses as the court deems proper.”

BCL § 724 is entitled, “Indemnification of directors and officers by a court,” and it allows for judicial enforcement of the indemnification rights outlined in BCL § 722. Its subdivision c provides:

“Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys’ fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.”

Plaintiffs argue that the BCL does not apply to an unincorporated condominium.

Plaintiffs distinguish a case relied upon by Maguire, *136 E. 56th St. Owners v Darnet Realty Assoc.* (248 AD2d 327 [1st Dept 1998]), on this basis. In *Darnet Realty*, the Court held that the defendants--the managing agent, directors, officers, and sponsor of a cooperative apartment--were entitled to indemnification for reasonable attorneys’ fees that the defendants spent in defending against a nonviable RICO claim brought against them (*id.* at 327-328).¹ Plaintiffs argue that *Darnet Realty* is inapplicable, as that case involved an incorporated cooperative, the incorporation of which brings the coop within the ambit of the BCL.

Condominiums, Plaintiffs argue, are subject to the Real Property Law (RPL) rather than the BCL. Plaintiffs cite to *Pomerance v McGrath* (143 AD3d 443 [1st Dept 2016]), which involved the question of inspection rights. *Pomerance* held: “Condominium unit owners’

¹ The First Department cited to BCL § 724 (c), “entitled Indemnification of directors and officers by a court,” which allows directors and officers to seek judicial enforcement of the indemnification rights granted to them under BCL § 722.

inspection rights are not governed by *Business Corporation Law* § 339-w, as condominium associations, unlike cooperative apartment corporations, are generally unincorporated. Rather, *Real Property Law* § 339-w governs the statutory inspection rights of condominium unit owners, and grants unit owners ...” (*id.* at 445).

Defendants argue that, where the RPL is silent, as it is with respect to indemnification for unsuccessful claim brought against officers, the BCL governs. *Tsui v Chou* (135 AD3d 597 [1st Dept 2016]), which, unlike *Darnet Realty*, involved a condominium rather than a cooperative building, supports this position. In *Tsui*, the First Department, citing to BCL § 626 (e), held that the plaintiffs—condominium owners suing derivatively on behalf of the condominium—“may pursue their claim for attorneys’ fees to the extent it relates to the breach of contract and breach of fiduciary duty causes of action” (*id.* at 598).

BCL § 626 is entitled “Shareholders’ derivative action brought in the right of the corporation to procure a judgment in its favor,” and its subsection (e) provides for circumstances in which such plaintiffs may be entitled to reasonable attorney’s fees:

“If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney’s fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them.”

Tsui stands for the propositions that the BCL governs the operation of a condominium where the RPL is silent, that condominium shareholders may bring derivative suits pursuant to BCL § 626, and that plaintiffs in condominium derivative suits may seek reasonable attorneys’ fees pursuant to BCL § 626.

As the RPL is silent as to the indemnification rights of officers and directors, BCL §§ 722 and 724 govern here. To rule otherwise would be to accept the nonsensical result that plaintiffs in derivative condominium actions, individual unit owners, may recoup attorney's fees pursuant to the BCL but defendant officers and directors may not do the same under the same statute. Finally, *Pomerance* is distinguishable, as, in that case, the RPL was not silent, and in fact had its own provision relating to condominium shareholders rights to inspection of records. In such a case, of course, the RPL governs. That is not the case here, where the RPL is silent.

Plaintiffs argue that even if the BCL applies, then the statute leaves the question of indemnification up to the condominium. Specifically, Plaintiffs point to the BCL § 722, which states that a corporation “may” indemnify. However, Plaintiffs do not reckon with BCL § 724 (a), which states that “[n]otwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board ... indemnification shall be awarded by a court ... to the extent authorized under section 722.”

However, Plaintiffs argue, in a further alternative, that Maguire is not entitled to indemnification as the claims against her were not dismissed on the merits. Here, Plaintiffs cite to *Mercado v Coes FX, Inc.* (12 Misc3d 766 [Sup Ct. Nassau Cty 2006]), which held that the fees expended by the plaintiff on counterclaims were not subject to indemnification under the BCL, as the counterclaims were disposed by stipulation, and BCL § 722 (c) provides an exceptions where the director or officer is liable and where a threatened or pending action “is settled or otherwise disposed of” (*id.* at 767). The court in *Mercado* found that the stipulation resolving the counterclaims fell into the category of “otherwise disposed” under this exception.

This exception is plainly for instances in which the parties resolve the claims amongst themselves rather than claims which are judicially resolved, as is the case here. As the February

2018 decision judicially resolved the claims related to Maguire's application for indemnification, the exception is not applicable here.

However, Plaintiffs are correct to the extent that the February 2018 decision did not contain a finding that Maguire had acted in good faith to further the interests of the condominium following the fire in 2010. Thus, having decided that BCL §§722 and 724 apply to condominium officers such as Maguire, the Court will send the question of attorney's fees to special referee with a two-part instruction: first, the special referee must determine if Maguire executed her duties in good faith following the fire; and, second, if so, what are the reasonable amount of attorney's fees Maguire expended to defend against the ten causes of action the Board brought against her which were dismissed by the February 2018 decision? If the special referee answers no to the first question, she will not reach the second as Maguire will only be entitled to attorney fees, pursuant to BCL § 722, if she executed her duties as president of the condominium board with good faith.

II. Plaintiff's Cross Motion

Plaintiffs move to dismiss Defendants' counterclaims for breach of contract, unjust enrichment, and common-law indemnification. Initially, Defendants do not oppose the branch of the cross motion that seeks dismissal of the breach of contract counterclaim. Accordingly, that counterclaim is dismissed. Moreover, there is no basis for Defendants to seek common-law indemnification, as that theory is reserved for parties that have been held vicariously liable (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011]). Accordingly, to the extent that the tenth counterclaim seeks common-law indemnification in addition to indemnification under the BCL, the branch seeking common-law indemnification is dismissed.

However, Plaintiffs fail to make a *prima facie* showing as to unjust enrichment. “[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks and citation omitted]). The theory “is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another” (*id.* [internal quotation marks and citation omitted]).

The elements of unjust enrichment are: “that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Moreover, for an unjust enrichment claim to succeed, the party making the claim “need not be in privity” with the party claimed against, but “there must exist a relationship or connection between the parties that is not too attenuated” (*Georgia Malone*, 19 NY3d 511 at 516 [internal quotation marks and citation omitted]).

Here, there is a question of fact as to the amount Defendants advanced to the condominium and whether it is against equity for the condominium to retain that amount. Accordingly, the branch of Plaintiffs’ motion that seeks dismissal of Defendants’ counterclaim for unjust enrichment must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the Defendants' motion is granted to the extent that the Court finds that BCL §§ 722 and 724 apply to this action; and it is further

ORDERED that the following factual issues are severed and referred to a Special Referee to hear and determine the following issue:

Did defendant Philomena Maguire execute her duties as president of the condominium board in good faith following the subject fire; if so, what are the reasonable amount of attorney's fees Maguire expended to defend against the ten dismissed causes of action the Board brought against her relating to her conduct as board president?

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This constitutes the decision and order of the Court;

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Dated: September 9, 2019

ENTER:



Hon. CAROL R. EDMED, JSC
HON. CAROL R. EDMED
J.S.C.