

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20501
G/hu

_____AD3d_____

Argued - September 9, 2008

ROBERT A. SPOLZINO, J.P.
DAVID S. RITTER
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

2007-02332

DECISION & ORDER

Lisa Aguilera del Puerto, et al., appellants, v
Port Royal Owner's Corp., et al., respondents,
et al., defendant.

(Index No. 9341/03)

Coughlin Duffy LLP, New York, N.Y. (Daniel F. Markham of counsel), for appellants.

Winget, Spadafora & Schwartzberg, LLP, New York, N.Y. (Dianna D. McCarthy and Melissa L. Morais of counsel), for respondents Port Royal Owner's Corp., Kathleen Sagona, James P. Kelly, Eric Lehmann, Philip Micklaus, Alan J. Huber, Esther Ruiz, Paula Cappelluzzo, Ann del Guercio, and Wendy Burrell Mintzer.

Abraham, Lerner & Arnold, LLP, New York, N.Y. (Johnathan C. Lerner of counsel), for respondents Jack Olivero and Miriam Olivero.

In an action, inter alia, to recover damages for breach of fiduciary duty, the plaintiffs appeal from an order of the Supreme Court, Kings County (Lewis, J.), entered January 9, 2007, which denied their motion for summary judgment on their second cause of action and granted the respective cross motions of the defendants, except the defendant Jean-Pierre Kerr, for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

September 30, 2008

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AGUILERA del PUERTO v PORT ROYAL OWNER'S CORP.

This action stems from the plaintiffs' failed attempt to purchase an additional unit in a cooperative residential property located in Montauk. After their purchase application was rejected, the plaintiffs commenced this action against, among others, the cooperative board and the individual board members (hereinafter collectively the Board Defendants).

The Supreme Court correctly determined, as a matter of law, that the Board Defendants' decision to reject the plaintiffs' purchase application was protected by the business judgment rule (*see 40 W. 67th St. v Pullman*, 100 NY2d 147; *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530; *Walden Woods Homeowners' Assn. v Friedman*, 36 AD3d 691; *Captain's Walk Homeowners Assn. v Penney*, 17 AD3d 617; *Hochman v 35 Park W. Corp.*, 293 AD2d 650). In opposition to the Board Defendants' prima facie showing, the plaintiffs failed to raise a triable issue of fact by submitting evidence in admissible form that the Board Defendants "acted (1) outside the scope of [their] authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (*40 W. 67th St. v Pullman*, 100 NY2d at 155; *see Walden Woods Homeowners' Assn. v Friedman*, 36 AD3d at 692; *Martino v Board of Mgrs. of Heron Pointe on Beach Condominium*, 6 AD3d 505).

The plaintiffs' remaining contentions are without merit.

SPOLZINO, J.P., RITTER, SANTUCCI and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court