Matter of Peters v Caton Towers Owners Corp.
2023 NY Slip Op 30142(U)
January 11, 2023
Supreme Court, Kings County
Docket Number: Index No. 526106/21
Judge: Peter P. Sweeney
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73
---X
In the Matter of the Application of:

JACQUELINE PETERS,
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

CATON TOWERS OWNERS CORP.

Respondent.
---X

Index No.: 526106/21
Motion Date: 4-25-22
Mot. Seq. No.: 1

DECISION/ORDER

Upon the following papers, listed on NYSCEF as document numbers 1-109 were read on this petition:

The petitioner, JACQUELINE PETERS, commenced this proceeding seeking an Order pursuant to CPLR §7801, et seq. (i) vacating, annulling, setting aside, and declaring void and unenforceable several Notices of Termination of Proprietary Lease issued by Respondent CATON TOWERS OWNERS CORP ("the Cooperative") to Petitioner Jacqueline Peters, which were signed by Chris Forte as President of the Corporation and dated February 24, 2021, March 11, 2021, April 7, 2021, May 10, 2021, May 27, 2021 and June 14, 2021 respectively; (ii) vacating, annulling, setting aside and declaring void and unenforceable a Notice of Non-Judicial Sale scheduling the sale of 351 shares of stock of the Lessor appurtenant to Apartment 2R located at 135 Ocean Parkway, Brooklyn, and all the right, title and interest in and to the Proprietary Lease at a public auction ; and (iii) for such other, further and different relief as the Court deems just and equitable.

Background:

On February 11, 2021, at a virtual meeting, the Board of Directors of the respondent, CATON TOWERS OWNERS CORP. (the "Co-op"), considered the following resolution:

> Has Ms. Peters engaged in "objectionable conduct" under the Proprietary Lease such as would cause the Board to determine to

> terminate her interests in the Cooperative, including in her Lease and shares of stock?

The petitioner, JACQUELINE PETERS, had been the owner of Apartment 2R in the Co-op since October 2019. The nature of the objectionable conduct is summarized in the multiple letters and emails referenced in the Co-op's answer (see Answer ¶¶ 35, 38, 39, 41, 44-58, 62-3, Exhs. D, I, K, L, T, W, X). The resolution was approved and adopted by six (6) out of seven (7) board members present. One board member abstained from the vote. Based on the vote, the Co-op served the petitioner with a Notice of Termination dated February 24, 2021 which stated as follows:

> YOU ARE HEREBY NOTIFIED, pursuant to Paragraph 27 and Subsection (f) of Paragraph 31 of the Lease, that upon the affirmative vote of two-thirds of the members of the Board of Directors for Lessor, and because of objectionable conduct on the part of Lessee, repeated after written notice, Lessor has determined the tenancy of Lessee to be undesirable;
>
> PLEASE TAKE FURTHER NOTICE, that the term of the Lease will expire on March 15, 2021, and on said date, all of your right title and interest in and to the Lease and the Premises shall wholly cease and expire and you must quit, vacate and surrender possession of the Premises on that date, as if it were the date set forth in the Lease definitely fixed for the expiration of the Term; and Lessor will further pursue all appropriate rights and remedies pursuant to Paragraph 32 of the Lease and as otherwise provided therein

On March 11, 2021, April 7, 2021, May 10, 2021, May 27, 2021 and June 14, 2021, the Co-op thereafter served the petitioner with amended Notices of Termination extending the date upon which the petitioner's proprietary the lease would terminate. Pursuant to the Notice of Termination dated June 14, 2021, petitioner was advised that her lease would terminate on June 25, 2021.

The Co-op also served the petitioner with a Notice of Non-Judicial Sale scheduling a public auction of petitioner's 351 shares of stock in the Co-op that are appurtenant to her apartment, as well as all the right, title, and interest in and to the Proprietary Lease for 10:00 a.m. on Thursday, November 18, 2021. The Co-op subsequently withdrew the Notice of Non-Judicial Sale.

The Co-op is a residential cooperative corporation which owns a building containing 283 residential apartments located at 135 Ocean Parkway in Brooklyn, New York. The February 11, 2021 board meeting referenced above was held for the sole purpose of determining whether petitioner's tenancy and interests in the Coop should be terminated for "objectionable conduct" pursuant to paragraph 31 of the proprietary lease, entitled "Termination of Lease by Lessor", which provides:

> If upon, or at any time after, the happening of any of the events mentioned in subdivisions (a) to (j) inclusive of this Paragraph 31, the Lessor shall give to the Lessee a notice stating that the term hereof will expire on a date at least five days thereafter, the term of this lease shall expire on the date so fixed in such notice as fully and completely as if it were the date herein definitely fixed for the expiration of the term, and all right, title and interest of the Lessee hereunder shall thereupon wholly cease and expire, and the Lessee shall thereupon quit and surrender the apartment to the Lessor, it being the intention of the parties hereto to create hereby a conditional limitation, and thereupon the Lessor shall have the right to re-enter the apartment and to remove all persons and personal property therefrom, either by summary dispossess proceedings, or by any suitable action or proceeding at law or in equity, or by force or otherwise, and to repossess the apartment in its former estate as if this lease had not been made, and no liability whatsoever shall attach to the Lessor by reason of the exercise of the right of reentry, re-possession and removal herein granted and reserved.

Paragraph 31(f) of the proprietary Lease governs the termination of a proprietary lease for objectionable conduct and provides:

> If at any time the Lessor shall determine, upon the affirmative vote of two-thirds of its then Board of Directors, at a meeting duly called for that purpose, that because of objectionable conduct on the part of the Lessee, or of a person dwelling or visiting in the apartment, **repeated after written notice from Lessor**, the tenancy of the Lessee is undesirable; (it being understood, without limiting the generality of the foregoing, that repeatedly to violate or disregard the House Rules hereto attached or hereafter established in accordance with the provisions of this lease, or to permit or tolerate a person of dissolute, loose or immoral character to enter or remain in the building or the apartment, shall be deemed to be objectionable conduct);

The petitioner was given written notice of the February 11, 2021 meeting well in advance and attended the meeting with her attorney. Both the petitioner and her attorney had the opportunity to address the board at the meeting and to defend the claim that the petitioner engaged in objectionable conduct. Indeed, prior to the meeting, petitioner's counsel submitted to the board a comprehensive response to the Co-op's contentions regarding objectionable conduct.

Discussion:

Decisions of residential cooperative corporations, including the termination of a shareholder's tenancy for objectionable conduct, are assessed under the business judgment rule (*see 40 W. 67th St. v. Pullman,* 100 N.Y.2d 147, 153–154, 760 N.Y.S.2d 745, 790 N.E.2d 1174). When the business judgment rule is found to be applicable, the courts will not substitute their judgment for that of a cooperative's board of directors and shareholders, as long as the corporate action is authorized, in furtherance of the cooperative's legitimate interests, and taken in good faith (*see id.* at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174; *Levandusky v. One Fifth Ave. Apt. Corp.,* 75 N.Y.2d 530, 537–538, 554 N.Y.S.2d 807, 553 N.E.2d 1317; *1050 Tenants Corp. v. Lapidus*, 39 A.D.3d 379, 382, 835 N.Y.S.2d 68, 71–72). "If the business judgment rule applies, the court must grant summary judgment to the cooperative corporation if the cooperative moves for it, and, otherwise, must grant a final possessory judgment after trial without requiring the cooperative corporation to prove whether the shareholder-tenant is innocent or guilty of the purported objectionable conduct. It is the shareholder-tenant's burden to show that the board vote is not entitled to deference" (*Surfair Equities, Inc. v. Marin*, 66 Misc. 3d 1216(A), 120 N.Y.S.3d 718; citing *London Terrace Towers, Inc. v. Davis*, 6 Misc 3d 600, 610; *40 W. 57th Street Corp v. Pullman,* 100 NY2d at 155; *13315 Owners Corp. v. Kennedy*, 4 Misc 3d 931, 938).

"To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (*40 W. 57th Street Corp v. Pullman,* 100 NY2d 147,155; see also *Surfair Equities, Inc. v. Marin*, 66 Misc. 3d 1216(A), 120 N.Y.S.3d 718). If the shareholder satisfies its burden, only then will the Court conduct "an independent evaluation, from competent, admissible evidence, of whether the shareholder committed objectionable conduct" (*London Terrace Towers, Inc. v. Davis*, 6 Misc 3d 600, *citing*, *13315 Owners Corp. v. Kennedy*, 4 Misc 3d 931, 938).

Here, the petitioner did not demonstrate that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. Therefore, pursuant to the business judgment rule, the board's determination to terminate petitioner's lease for objectionable conduct must be affirmed. Petitioner's request for an independent evaluation by this Court of whether she committed objectionable conduct must be denied.

The record does not support petitioner's contention that the board acted outside the scope of its authority. Paragraph 31(f) of the proprietary lease authorized the Co-op to terminate petitioner's proprietary lease "upon the affirmative vote of two-thirds of its then Board of Directors, at a meeting duly called for that purpose, that because of objectionable conduct on the part of the Lessee [the petitioner] … **repeated after written notice from Lessor**, the tenancy of the Lessee [the petitioner] [was] undesirable…" As stated above, such a meeting took place on February 11, 2021. The petitioner was notified of the meeting and both she and her attorney participated in the meeting. At the conclusion of the meeting, six (6) out of seven (7) of the Board members present voted to terminate petitioner's tenancy based on objectionable conduct.

Petitioner's contention that she was not given adequate "written notice" of the nature of her objectionable conduct, as paragraph 31(f) required, is without merit. The multiple letters and emails referenced in the respondent's answer (see Answer ¶¶ 35, 38, 39, 41, 44-58, 62-3, Exhs. D, I, K, L, T, W, X) that were sent to the petitioner prior to the meeting sufficiently set forth the nature of petitioner's "objectionable conduct." Further, the proprietary lease does not set forth the requirements for such written notice and the petitioner cites no authority mandating the "specificity" and "particularity" that the petitioner claims was required.

Petitioner's claim that she had the right to a stenographer is without merit. The proprietary lease did not afford her this right, nor did the petitioner cite to any authority that recognizes this right.

Petitioner's contention that the Co-op' acceptance of maintenance after her proprietary lease was terminated vitiated the Notice of Termination or waived the lease termination is also without merit. "A housing cooperative does not waive its right to enforce its occupancy requirements and seek a resident's eviction by accepting payment of rent from the resident, where the [constituent documents] provide that acceptance of rent or carrying charges cannot be

deemed a waiver of rights" (*see* 19A N.Y. Jur. 2d Condominiums, Etc. § 147, *citing Rasic v. Roberts*, 277 A.D.2d 120, 121, 717 N.Y.S.2d 41). In this case, Paragraph 26 of the proprietary lease contains such a "no waiver" provision and provides that "[t]he failure of the Landlord to insist, in any one or more instances, upon a strict performance of any of the provisions of this Lease, or to exercise any right or option herein contained, or to serve any notice, or to institute any action or proceeding, shall not be construed as a waiver, or a relinquishment for the future, of any such provisions . . . The receipt by the Lessor of rent with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach, and no waiver by the Lessor of any provision hereof shall be deemed to have been made. . . ."

The Court rejects petitioner's contention that the Co-op lacked authority to serve amended Notices of Termination and that in so doing, the final Notice of Termination is a nullity. There are no provisions in the proprietary lease prohibiting service of amended Notices of Termination. Indeed, the only lease provision governing a Notice of Termination is that "at least five-days-notice" must be given to a lessee before the termination date and the petitioner was afforded such notice.

All the amended Notices of Termination, including the one served on June 14, 2021, were based on the same resolution that the board voted on at the February 11, 2021 meeting and served only to extend that date on which petitioner's lease would terminate. It cannot be said that the amended Notices of Termination prejudiced the petitioner in any way. The petitioner had written notice of the alleged objectionable conduct that would be the subject of the February 11, 2021 meeting and had a full opportunity to be beard at the meeting. Finally, in the Court's view, under the business judgment rule, the Co-op was within its rights to serve the amended Notices of Termination.

The Court also rejects petitioner's contention that the final Notice of Termination must be vacated because it lacked specificity. The Notice of Termination advised the petitioner that her lease was being terminated "pursuant to Paragraph 27 and Subsection (f) of Paragraph 31 of the Lease, that upon the affirmative vote of two-thirds of the members of the Board of Directors for Lessor, and because of objectionable conduct on the part of Lessee, repeated after written notice, … , Lessor has determined the tenancy of Lessee to be undesirable." In the Court view, to the extent specificity was required, the Notice of Termination was sufficient, especially since the

proprietary lease did not require further specificity. It cannot be said that the petitioner lacked notice of the reasons her lease was being terminated or lacked an opportunity to defend against the accusations of objectionable conduct.

Petitioner contends that the Co-op's Notice of Nonjudicial Sale must be set aside because foreclosure (whether judicial or nonjudicial) is not an available remedy to enforce a nonmonetary default. Notably, the Co-op has withdrawn the Notice of Nonjudicial Sale. For this reason, it would be improper for the Court to render an advisory opinion on whether Co-op was within its right to serve the Notice. The courts of New York do not issue advisory opinions for the fundamental reason that in this State "[t]he giving of such opinions is not the exercise of the judicial function" (*Matter of State Indus. Commn.,* 224 N.Y. 13, 16, 119 N.E. 1027 [Cardozo, J.]).

The Co-op is not entitled to awards for the reasonable attorney's fees and expenses it incurred in defending this proceeding. A litigant is generally presumed responsible for his or her own counsel fees, unless an award is authorized by an agreement or a statute (*see Matter of Kaczor v. Kaczor,* 101 A.D.3d 1403, 1404, 956 N.Y.S.2d 650; *Dupuis v. 424 E. 77th Owners Corp.,* 32 A.D.3d 720, 722, 821 N.Y.S.2d 173). Proprietary lease agreements containing a provision for counsel fees are generally enforceable where a cooperative board or landlord has prevailed in an action or proceeding (*see Matter of Cohan v. Board of Directors of 700 Shore Rd. Waters Edge, Inc.,* 108 A.D.3d 697, 700, 969 N.Y.S.2d 547). The provision in the proprietary lease governing attorney's fees and expenses is contained in paragraph 28, which provides: "If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, **or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in**, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent." The language of this paragraph specifically limits its application to actions commenced as a result of plaintiff's default under the terms of the lease. This proceeding was not commenced as a result of a default by the petitioner under the lease. Accordingly, Paragraph 28 of the lease does not require plaintiff to pay the co-op board's legal fees or expenses (see *Dupuis v. 424 E. 77th Owners Corp.*, 32 A.D.3d 720, 722, 821 N.Y.S.2d

173, 174–75, citing *George Tower & Grill Owners Corp. v. Honig,* 232 A.D.2d 475, 648 N.Y.S.2d 172; *Mogulescu v. 255 W. 98th St. Owners Corp.,* 135 A.D.2d 32, 40–41, 523 N.Y.S.2d 801, *lv. dismissed in part and denied in part,* 73 N.Y.2d 868, 537 N.Y.S.2d 487, 534 N.E.2d 325).

The Court has considered petitioner's remaining arguments in support of the petitioner and find them to be without merit.

Accordingly, it is hereby

ORDRED and **ADJUDGED** that the petition is **DENIED**.

This constitutes the decision and order of the Court.

Dated: January 11, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

2023 JAN 13 AM 9:15
KINGS COUNTY CLERK
FILED