

Ryfun v 406 West 46th St. Corp.

2001 NY Slip Op 30091(U)

April 16, 2001

Sup Ct, New York County

Docket Number: 113430/99

Judge: Barbara R. Kapnick

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

PRESENT: Hon. BARBARA R. KAPNICK
Justice

PART 13

John C Ryfun

INDEX NO. 113430/99

MOTION DATE _____

- v -

MOTION SEQ. NO. 05

406 W 46th St Corp

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: _____ J.S.C.

Dated: 4/16/01

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
BARBARA R. KAPNICK
J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12**

-----X
JOHN C. RYFUN and DOROTHEE SENICH a/k/a
DOROTHEE RYFUN SENICH,

Plaintiffs,

DECISION/ORDER
Index No. 113430/99

-against-

406 WEST 46th STREET CORP. and
PNK ASSOCIATES,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

Motions Sequence Numbers 05 and 06 are consolidated for disposition.

Plaintiff John C. Ryfun moves under Motion Sequence No. 05 for an order preventing defendant from taking his oral deposition on the ground that due to his advanced age (i.e., 89 years old), poor health and frail condition, a hardship would result if he were required to travel to New York City from his home in Florida.

Defendant 406 West 46th Street Corp. cross-moves for an order granting partial summary judgment dismissing plaintiff John C. Ryfun's claim against it or, alternatively, directing said plaintiff to appear for a deposition in order to answer questions relating to the "primary" issue remaining in this action -- i.e., whether the rightful "owner" of the cooperative shares and

proprietary lease allocated to Apartment 2C at 406 West 46th Street, New York, New York is the cooperative corporation or plaintiff Ryfun.

Plaintiff Ryfun opposes the cross-motion and moves under Motion Sequence No. 06 for summary judgment on the ground that the amendment to the proprietary lease approved at a special meeting of the shareholders on January 7, 1999, which granted the cooperative corporation a first lien and security interest in the proprietary lease and accompanying shares of stock owned by lessees and permitted the cancellation of shares owned by any lessee in default of his monetary obligations, was not made in conformity with the proprietary lease and the corporation's by-laws.¹

Article 1, paragraph 6 of the proprietary lease provides, in relevant part, as follows:

The Lessor will not make or consent to any change or alteration in the terms or conditions of any proprietary lease which shall have been executed by the Lessor (as distinct from the house rules) unless such change or alteration shall be made pursuant to the affirmative

¹ This Court rejects defendant's preliminary argument that plaintiff is collaterally estopped from relitigating the issue of whether the corporation could lawfully create a security interest and retain Ryfun's cooperative shares based on the decision dated November 15, 1999 of the Hon. Lucy Billings in the related Civil Court proceeding, 406 West 46th Street Corp. v. Dorothee Senich, Index No. L&T 72722/99. Judge Billings made no factual findings but merely stayed the Civil Court action pending the resolution of the instant action pursuant to Stipulation dated November 9, 1999, which was so-ordered by this Court.

vote, taken at a meeting called for that purpose, or written consent signed, by lessees owning at least two-thirds in amount of the Lessor's capital stock then owned by all the Lessees under proprietary leases then in force.

Article V, section 1 of the by-laws provides, in relevant part, as follows:

After a proprietary lease in the form so adopted by the board has been executed and delivered by the corporation, all proprietary leases (as distinct from the house rules) subsequently executed and delivered shall be in the same form, and shall not be changed in form or substance unless such change shall be made pursuant to the affirmative vote, taken at a meeting called for that purpose, or the written consent, of lessees owning at least two-thirds in amount of the corporation's capital stock then owned by lessees under proprietary leases then in force.

It is undisputed that the amendment to the proprietary lease at issue was approved by PNK Associates, owner of 439 of the 660 shares of the corporation, and Diana Jeram, owner of 47 shares. Thus, the amendment was approved by 74% of the capital stockholders of the Corporation, i.e. more than the required two-thirds vote.

Defendant 406 West 46th Street Corp. contends that it advised plaintiff John C. Ryfun of his maintenance arrears by sending him a Notice of Intention to Retain Collateral on or about January 21, 1999, and thereafter properly exercised its rights under the terms of the amended proprietary lease by retiring plaintiff Ryfun's shares and proprietary lease and in issuing a new stock certificate and proprietary lease to the corporation.

However, Article I, sections 2 of the by-laws sets forth the requirement that a notice of a special meeting of the stockholders

stating the time, place and purpose thereof and the officer or other person or persons by whom the meeting is called, shall be served, either personally or by mail, on each stockholder of record, at least five days before such meeting. No business other than that stated in the notice shall be transacted at any special meeting unless the stockholders of record of all outstanding stock of the corporation are present thereat in person or by proxy.

Pursuant to Article I, section 3, the notice requirement set forth in section 2

is not indispensable, but any stockholders' meeting whatever shall be valid for all purposes if the stockholders of record of all outstanding stock of the corporation are present thereat in person or by proxy, or if a quorum is present as provided in [Article I, section 4] and notice of the time, place and purpose of such meeting has been duly waived in writing by all stockholders not so present. Any notice to be served upon a stockholder by mail shall be directed to the stockholder at his address as it appears on the stock book unless the stockholder shall have filed with the secretary of the corporation a written request that notices intended for him be mailed to some other address, in which case it shall be mailed to the address designated in such request.

In the instant case, there is no dispute that the stockholders of record of all outstanding stock were not present at the meeting held on January 7, 1999. In addition, defendant has made no showing that plaintiff John C. Ryfun waived his right to notice of the special meeting, as required by section 3.

Although it appears that the three members of the corporation's board of directors waived the notice requirement in writing on the date of the meeting, such a waiver is not authorized under the Corporation's by-laws. Therefore, this Court finds that the January 7, 1999 special meeting was held in violation of Article I of the Corporation's by-laws. Thus, any action taken at the meeting, including the relevant amendment to the proprietary lease, must be considered null and void even if those stockholders who were absent from the meeting, including plaintiff John C. Ryfun, were subsequently notified of the actions taken at the meeting.

Accordingly, based on all the papers submitted and the oral argument held on the record on January 10, 2001, the cross-motion by defendant 406 West 46th Street Corp. for partial summary judgment is denied and the motion by plaintiff Ryfun for summary judgment is granted to the extent of declaring that the shares and proprietary lease previously issued to plaintiff John C. Ryfun for Apartment 2C remain in full force and effect.

Since the primary issue on which defendant sought to depose plaintiff Ryfun has now been determined, plaintiff's motion for a protective order is granted. This does not, however, preclude defendant from seeking plaintiff's testimony in person or otherwise at trial.

All parties are directed to appear for a status conference in
IA Part 12, 80 Centre Street, Room 308 on May 9, 2001 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 16, 2001



BARBARA R. KAPNICK
J.S.C.
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