

Clark v Ise Holding Group, LLC
2004 NY Slip Op 30380(U)
July 7, 2004
Supreme Court, New York County
Docket Number: 101233/04
Judge: Louis B. York
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. LOUIS B. YORK
Justice

PART 2

Index No.: 101233/04

-----x
MICHAEL CLARK, PANSY HAMES, PAM BRANCH,
BARBARA KNISPEN, WINSTON DZOSE, ALEXANDRA
HODGES, AMES HODGES, NITSAN CHOREV, GARRETT
JOHNSON, CHARMAINE JOHNSON, GEMMA CAMPBELL,
CORELLI E. GEIFER, DETRA BUSH, MATTHEW
GRACE, and JILL MACOMBER, individually, and
on behalf of HAMILTON HEIGHTS CONDOMINIUM,

DECISION/ORDER

Plaintiffs,

- against -

ISE HOLDING GROUP, LLC, AGA MANAGEMENT
CORP., EIAL GIRTZ, JACOB AGARWAL, and JACOB
AZOULAY,

Defendants.

-----x
REQUEST FOR INJUNCTION

In this dispute regarding the management of the Hamilton Heights Condominium (the "Condominium"), plaintiffs currently move for preliminary and permanent injunctions against ISE Holding Group, LLC ("ISE"), AGA Management Corp. ("AGA"), Eial Girtz ("Girtz"), Jacob Agarwal ("Agarwal"), and Jacob Azoulay ("Azoulay"), to prevent defendants from participating in the management of the Condominium, controlling the Condominium's Board of Managers (the "Board"), and for a full accounting of all monies spent and received by the defendants during their management of the

001

Condominium. For the reasons below, the Court grants permanent injunctive relief.

BACKGROUND

Pursuant to an Offering Plan that took effect in April 1988, 441 West 151st Street Associates, Inc. (the "Sponsor") offered to sell apartments (the "Units") in the Condominium, which is comprised of 441 and 443 West 151st Street. Each building contains 19 Units for a total of 38 Units. According to plaintiff Jill Macomber's affidavit, Paragraph 8, the Offering Plan contained an express provision that the Sponsor would relinquish control of the Board by "the earlier of five years after the first closing... or the sale of seventy-five... percent of the Units." In violation of the Offering Plan, the Sponsor continued to hold a controlling three of five seats on the Board until the sale of its interest in the Condominium to defendant ISE at the end of 2001.

ISE thereafter "hired" defendant AGA to manage the property. Plaintiffs assert and defendants do not contest that defendant Girtz, defendant Agarwal, and defendant Azoulay are the sole principals of both ISE and AGA.

ISE and/or AGA called for an annual meeting of the Unit owners in January, 2002, and ISE elected three of the five members of a new Board. Neither ISE nor AGA called for an annual meeting in January, 2003, and after requests by plaintiffs, a meeting was held on November 18, 2003. Plaintiffs presented a slate of candidates

for the Board at this meeting, but plaintiffs assert that Board member Girtz prevented a vote to appoint new Board members.

ISE and/or AGA failed to present annual certified financial statements for fiscal years 2001 and 2002. Dennis C. Fedechko, CPA ("Fedechko") presented a combined statement for these years to Unit owners in September, 2003. Fedechko's cover letter, as shown in Exhibit A of the Order to Show Cause, contained the line, "Management has elected to omit substantially all of the disclosures and the statements of cash flows required by generally accepted accounting principles." Fedechko also stated that his report was "presenting in the form of financial statements information that is the representation of management," and that he could not "express an opinion or any other form of assurance on them." Plaintiffs assert that the Condominium by-laws require a certified financial statement, and that the statement submitted by Fedechko does not qualify as such. Fedechko agrees that it is not certified, but claims in the Affirmation in Opposition that a certified financial statement is impractical as its cost would exceed \$15,000.

DISCUSSION

Contrary to defendants' claim, ISE is a "sponsor." The rule in New York is clear: "Sponsor shall be deemed to include owners of at least 10 units or 20 percent of the total number of units in the condominium, whichever is less, which are not purchased for

occupancy by the owner of one or more members of his or [sic] immediate family..." 13 NYCRR §23.1. ISE and/or AGA own 19 units in (50 percent of) the Condominium, and are therefore sponsors as a matter of law. It is irrelevant what documentation ISE filed with the New York State Department of Law, or what privity ISE or AGA have with the prior Sponsor.

Defendants claim that they are "purchasers for investment or resale." The only place this court has located such a classification is in 13 NYCRR §18.3 [x], a section of the code pertaining to *cooperatives*, not condominiums. Furthermore, defendants assert that they have failed to register as broker-dealers as necessitated by sponsor status, and cite to 13 NYCRR §23.3[w]. There is nothing in this section pertaining to registration as a broker-dealer. Defendants broadly sketch a host of requirements they have not undertaken that are necessary in their view to be classified as sponsors, but lacking citations for these claims, this court decides the present action based on the statutory language in 13 NYCRR §23.1, above.

Furthermore, there will be irreparable injury to the plaintiffs should a preliminary injunction be denied. Defendants do not rebut plaintiffs' assertion that ISE and AGA de facto control the Condominium Board. If defendants continue to exert such control as sponsors and in violation of the Condominium's by-laws, the Condominium residents in 443 151st Street will be perpetually locked

out of the decision-making processes that a condominium board of managers structure is intended to support.

Plaintiffs cannot determine where their payments are going unless an itemized accounting following general accounting principles is done. It is unfair to ask Unit owners to blindly trust the management of the building in which they live (and part of which they own) to defendants. To require defendants to produce a certified accounting of the Condominium's income and expenses is simply to request that ISE and AGA conform to the Condominium by-laws. While Fedechko's affidavit claims that a full certified accounting statement will cost upwards of \$15,000, in light of the dispute between the parties and the Condominium's uncertain financial condition, the court requires that defendants produce an independent certified statement from a certified public accountant.

Defendants claim that the business judgment rule as applied in Levandusky precludes judicial review of the Condominium Board's governance in this case. Levandusky v. One Fifth Avenue Apt. Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807 (1990). Levandusky is distinguishable from the present case, because the condominium board in Levandusky had been elected by unit owners. In the present case, this does not hold true for the majority of the Board. Additionally, Levandusky stands for the proposition that a court cannot review board decisions "unless a resident is able to demonstrate a breach of [the board's fiduciary] duty." Id. at 538,

812. A board of managers, the court noted, "must act for the benefit of the residents collectively" as part of its duty. Id. Plaintiff's Order to Show Cause and affidavits include a litany of grievances, such as the Board's failure to consult with residents regarding repairs, building alterations, elections, and preferential treatment for residents of ISE-controlled Units. These complaints, taken as a whole, point to a probable breach of the ISE/AGA-controlled Board's fiduciary duty.

Furthermore, "the business judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members of the board chosen by it to make the corporate decision on its behalf... Indeed the rule shields the deliberations and conclusions of the chosen representatives of the board only if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment." Auerbach v. Bennett, 47 N.Y.2d 619, 631, 419 N.Y.S.2d 920, 927 (1979). See also Van Camp v. Sherman, 132 A.D.2d 453; 517 N.Y.S.2d 152 (1987). In the present case, ISE and/or AGA Board representatives do stand in a dual relation: ISE/AGA corporate interests are in conflict with the interests of the Condominium as a whole. Such conflict prevents an unprejudiced exercise of defendants' Board duties and responsibilities. As such, the business judgment rule elucidated in Levandusky does not prevent this court from reviewing the actions of the Condominium's Board.

Defendants also claim that Girtz, Agarwal and Azoulay cannot be individually named as defendants in this case, because the corporate veil prevents individual corporation members from suit. However, "absent an effective rebuttal from defendants... plaintiff's claims that the individual defendant[s] control both of the corporate defendants... suffice to state a claim for piercing the... corporate veil." Clark Construction Corp. v. BLF Realty Holding Corp., 300 A.D.2d 49, 49, 751 N.Y.S.2d 19, 20 (1st Dept. 2002). Here, there has been no defense rebuttal to counter plaintiffs' assertions that defendant corporations are wholly controlled by the individually named defendants.

It offends the judicial conscience to allow a corporation the ability to usurp control of a condominium and eliminate any recourse by individual unit owners based solely on that corporation's failure to comply with filing regulations. Defendants assertion that such are the realities of corporate governance illuminates their failure to grasp the concept of a condominium and the bevy of New York regulations that ensure unit owners' control of their own destinies as property holders.

For the reasons stated above, it is

ORDERED and **ADJUDGED** that a permanent injunction be issued as follows:

- 1) that AGA be removed as the managing agent for the

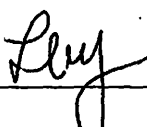
Condominium in favor of Onix Sosa's Magaw Management, LLC;

2) that two ISE-appointed Board members, be they defendants, their agents or representatives, be removed from the Condominium's Board, and that plaintiffs Barbara Knispel and Alexandra Hodges be appointed to the Board until the next Board election cycle as required by the Condominium's by-laws; and

3) that defendants produce a certified accounting statement within 45 days of service of a copy of this order with notice of entry, to be completed by an accountant other than Mr. Fedechko, for fiscal years 2001, 2002 and 2003, and present the statement to the newly reconstituted Board.

Dated: 7/7/04

Enter:



Louis B. York, J.S.C.

FILED
JUL 23 2004
NEW YORK
COUNTY CLERK'S OFFICE