

**Catsimatidis v Board of Mgrs. of Petersfield  
Condominium**

2005 NY Slip Op 30443(U)

July 21, 2005

Supreme Court, New York County

Docket Number: 601875/04

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III  
Justice

PART 56

John Catsimatidis

INDEX NO. 601875/04

MOTION DATE 3/25/05

MOTION SEQ. NO. 002

- v -

The Board of Managers of Petersfield Condominium

MOTION CAL. NO. \_\_\_\_\_

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

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

|   | 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

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**

AUG - 2005

COUNTY CLERK'S OFFICE  
NEW YORK

**RICHARD B. LOWE III**

Dated: 7/21/05

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 56

-----x  
 JOHN CATSIMATIDIS,

Plaintiff,

Index No. 601875/04

-against-

THE BOARD OF MANAGERS OF PETERSFIELD  
 CONDOMINIUM, and ELEANOR KORMAN, SUSAN  
 RYDELL, STACEY FACTER, HERVE SENEQUIER  
 and ROBERT MANDELBAUM, Individually and  
 as Members of the Board of Managers of Petersfield  
 Condominium, PETERSFIELD CONDOMINIUM,  
 and ELEANOR KORMAN, in her representative capacity as  
 President of Petersfield Condominium,

Defendants.

-----x  
**Richard B. Lowe, III, J.:**

In this action, plaintiff John Catsimatidis (Catsimatidis), the sole commercial unit owner of defendant Petersfield Condominium (Condominium), seeks a declaration that certain amendments to the Condominium's Declaration and By-Laws, enacted on May 17, 2004 (Amendments), are null and void, and seeks to recover damages caused by defendants' alleged breach of fiduciary duty, tortious interference with contract, and breach of contract.

In a decision dated March 7, 2005, this court denied plaintiff's motion, pursuant to CPLR 6301, for a preliminary injunction (motion sequence no. 001): (1) enjoining defendants Board of Managers of Petersfield Condominium (Board), Eleanor Korman (Korman), Susan Rydell, Stacey Facter, Herve Senequier, and Robert Mandelbaum (collectively, the Board Members), the Condominium, and Korman, in her capacity as president of the Condominium, from enforcing the Amendments; and (2) directing defendants to remove such Amendments from the record. Instead, the court granted a cross motion made by the Board and Board Members, pursuant to

CPLR 3211 (a) (1), and (a) (7), and severed and dismissed the amended complaint as asserted against them.

In motion sequence number 002, defendants now move, pursuant to CPLR 3212, for summary judgment, dismissing the amended complaint in its entirety. Catsimatidis cross-moves, pursuant to CPLR 3212, for summary judgment for a declaration that the Amendments are null and void. Given the March 7, 2005 decision, the court considers the motion and cross motion solely to the extent that they refer to the first claim for declaratory relief and the fifth claim for breach of contract as asserted against the Condominium, and Korman, in her capacity as president of the Condominium.

#### BACKGROUND

The underlying facts are discussed in greater detail in this court's March 7, 2005 decision. The Condominium's Declaration and By-Laws govern the operation, use, and occupancy of the Condominium.

##### The Declaration

The relevant provisions of the original Declaration include: (1) Article 7, addressing the "Use of Units"; (2) Section 7.1, allowing Catsimatidis to use his commercial unit "for any lawful purpose" so long as such use conformed and complied with the terms and conditions of the Certificate of Occupancy, and any other applicable legal requirements; (3) Article 8, addressing any changes in the Condominium; (4) Article 17, covering any amendments to the Declaration; and (5) Section 17.1, providing, in relevant part, that:

Subject to the provisions contained herein or in the By-Laws with respect to amendments . . . affecting Sponsor or its designee or any Unsold Units, except as hereinafter set forth, any provision of this Declaration may be . . . amended . . . by

the vote of at least 66 2/3% in number and in common interest of all Unit Owners taken in accordance with the provisions of the By-Laws. Subject to the provisions contained hereto or in the By-Laws with respect to amendments . . . affecting Sponsor or its designee or any Unsold Units, no amendment . . . pursuant to the preceding sentence shall be effective without the written consent . . . of the Mortgage Representatives, if any. No such amendment . . . shall be effective until recorded in the City Register's Office. . . . Subject to the rights of Sponsor or its designee under Articles 7 and 8 of this Declaration, Articles 6 and 7 of this Declaration may not be amended . . . unless (in addition to the consent, if required, of the Mortgage Representatives, if any, as set forth above) 100% in number and in common interest of all Unit Owners affected thereby approve such amendment . . . in the manner set forth above.

See Brenda Ballison Affidavit in Support (Ballison Affidavit), Ex. D, at 15-16. Section 17.4 of the Declaration prohibited any amendment to Section 17.1, in whole or in part, without the consent of the Sponsor or its designee.

#### The By-Laws

The relevant provisions of the original By-Laws include: (1) Section 6.6, requiring unit owners to pay late fees; (2) Section 6.24, providing that the Board shall pay all license fees, taxes and charges for vaults or other protrusions, and charge unit owners a "common expense"; (3) Section 8.1-5, requiring:

Any lease executed in connection with the acceptance of any Outside Offer to lease a Unit shall be consistent with these By-Laws and shall provide that it may not be modified, amended, extended or assigned without the prior consent in writing of the Board, that the tenant shall not assign his interest in such lease or sublet the demised premises or any part thereof without the prior written consent in writing of the Board . . . .

(see Ballison Affidavit, Ex. E, at 35); and (4) Section 8.10, providing that "no unit owner" may convey or lease his unit until all unpaid common charges have been paid, and all unpaid liens against his unit have been satisfied.

### The Amendments

On May 3, 2004, the Condominium's managing agent caused a Notice of Special Meeting of Unit Owners (Notice) to be delivered to all unit owners, including Catsimatidis. The Notice contained a copy of the Amendments, and a proxy, and advised the unit owners of a special meeting to be held on May 17, 2004 for the purpose of considering the Amendments.

The amendments to the Declaration include: (1) deleting the last sentence of Section 17.1, which provides that Article 7 "may not be amended, modified, added to or deleted unless . . . 100% in number and in common interest of all Unit Owners affected thereby approve such amendment, modification, addition or deletion in the manner set forth above"; and (2) amending Section 7.1 so that the commercial unit "may be used for retail sales of goods (not including food for human or animal consumption)" and for no other purpose without prior written consent of the Board; "provided, however, that, in no event, may any cooking or other activity take place within the Unit that results (or is reasonably likely to result) in any odors emanating from the Commercial Unit."

The amendments to the By-Laws include: (1) extending the right of first refusal to the commercial unit; (2) limiting outside lease terms to five years; (3) limiting commercial activity to the hours between 9:00 A.M. and 10:00 P.M.; and (4) imposing a fine of \$100 per day for any violation of the Rules and Regulations, with such fines increasing to \$200 per day if the violation remains uncured after 30 days' written notice.

On May 17, 2004, the unit owners voted on the Amendments. The unit owners holding title to 74.28% of total units, and 71.03% of common interests, approved the Amendments. At this time, the Sponsor did not own any units in the Condominium, and no mortgage

representatives were appointed.

#### Liens Against Catsimatidis

In August 2002, defendants filed a lien against Catsimatidis in the sum of \$12,327.84 for unpaid common charges. See Ballison Affidavit, Ex. J. In June or July 2004, defendants filed a second lien against Catsimatidis in the sum of \$21,353.32 for unpaid common charges, incorporating the unpaid charges in the first lien, and late fees from December 2003 through June 2004. See Ballison Affidavit, Ex. K.

#### Remaining Causes of Action

Given this court's May 7, 2005 decision, only the first cause of action and the fifth cause of action as asserted against the Condominium, and Korman, in her capacity as president of the Condominium, remain. The first cause of action seeks a declaratory judgment that: (1) the Amendments are null and void; (2) such Amendments must be removed from the record; and (3) the August 2002 lien in the amount of \$12,327.84 is null and void, and must be removed from the record. The fifth cause of action asserts breach of the Declaration's implied covenant of good faith and fair dealing. The court now considers defendants' motion, pursuant to CPLR 3212, for summary judgment, dismissing the amended complaint in its entirety, and Catsimatidis's cross motion, pursuant to CPLR 3212, for summary judgment for a declaration that the Amendments are null and void.

#### DISCUSSION

On a summary judgment motion, the moving party must establish its cause of action or defense sufficiently as a matter of law. See Star City Sportswear, Inc. v Yasuda Fire & Marine Ins. Co. of Am., 2 NY3d 789, 790 (2004); Zuckerman v City of New York, 49 NY2d 557, 562

(1980). The opposing party then needs to establish, with admissible evidence, that a triable issue of fact remains. See Silver v Silver, 17 AD3d 281, 281 (1<sup>st</sup> Dept 2005).

At the outset, the court grants defendants' summary judgment motion to the extent of dismissing the remaining claims against Korman, in her capacity as president of the Condominium. The amended complaint makes no specific allegations with regard to Korman's involvement, misconduct, or any facts pertaining directly to Korman. See P.F.G. Indus., Inc. v Tel-Glass, Inc., 49 AD2d 112, 114 (1<sup>st</sup> Dept 1975) (granting summary judgment to dismiss claims against president of defendant company because allegations of complaint were insufficient to fix liability upon him individually). The court proceeds to analyze the first and fifth causes of action as asserted against the Condominium itself.

#### First Cause of Action for Declaratory Relief

Pursuant to CPLR 3001, the grant or denial of declaratory relief lies within the discretion of the court. See Green v Glenbriar Co., 131 AD2d 363, 364 (1<sup>st</sup> Dept 1987) (finding declaratory relief available "where it will serve to quiet or stabilize a disputed jural relationship"). A declaratory judgment is usually unnecessary and inappropriate, "where a full and adequate remedy is already provided by another well-known form of action," such as breach of contract. Bellefonte Re-Ins. Co. v Volkswagenwerk AG, 102 AD2d 753, 754 (1<sup>st</sup> Dept 1984) (citation omitted); see also Town of Fishkill v Royal Dutchess Props., Inc., 231 AD2d 511 (2d Dept 1996).

#### Validity of Amendments to Declaration

Given the present facts and circumstances, the court remains unconvinced that a

declaratory judgment, regarding the validity of the amendments to the Declaration, is “useful and necessary.” James v Alderton Dock Yards, Ltd., 256 NY 298, 305 (1931). Catsimatidis generally claims that, as a condominium unit owner, he agreed to give up certain rights, but relied on the Declaration and the By-Laws and the rights they granted. He asserts that the Amendments must be rejected as accomplishing indirectly what the Declaration prevents the Condominium from doing directly. Under the facts of this case, Catsimatidis has a cause of action for breach of contract, as asserted in his fifth cause of action, and needs no declaratory judgment to establish his rights.

#### Validity of Amendments to By-Laws

Catsimatidis seeks a declaration that certain amendments to the By-Laws are null and void, which include the amendments that: (1) extend the right of first refusal to the commercial unit; (2) limit outside lease terms to five years; (3) limit commercial activity to the hours between 9:00 A.M. and 10:00 P.M.; and (4) impose a fine of \$100 per day for any violation of the Rules and Regulations, with such fines increasing to \$200 per day if the violation remains uncured after 30 days’ written notice. Catsimatidis argues that such amendments restrict his ability to use and transfer the commercial unit, and are barred by the rule against unreasonable restraints on alienation.

Real Property Law § 339-v (2) (a) specifically allows condominium bylaws to contain “provisions governing the alienation, conveyance, sale, leasing, purchase, ownership and occupancy of units” so long as those provisions do not discriminate on the basis of race, creed, color or national origin. The bylaws are also subject to the common-law rule against

unreasonable restraints on alienation. “Whether a restraint on the disposition of property is unreasonable is a question of fact depending upon its purpose, duration and, where applicable, the designated method for fixing the purchase price.” Demchick v 90 East End Ave. Condominium, 18 AD3d 383, \*2 (1<sup>st</sup> Dept 2005) (citations omitted) (granting summary judgment to defendants because restriction, and purpose of restriction, on leasing studios, failed to constitute an unreasonable restraint on alienation).

The court finds that, under the circumstances presented, Catsimatidis fails to present any issue of fact as to the reasonableness of the amendment extending the Board’s right of first refusal to the commercial unit. See Anderson v 50 East 72<sup>nd</sup> St. Condominium, 119 AD2d 73, 79 (1<sup>st</sup> Dept 1986) (finding standard right of first refusal provision in defendant condominium’s declaration and bylaws, requiring board to: (1) exercise right within 30 days after notification by unit owner; (2) close within 45 days of notice of election, and (3) purchase at the same price and terms as agreed upon by proposed third party, was “clearly reasonable”). “Although the duration of the restriction appears to be unlimited on its face, the restriction can be modified or removed at any time by a duly called meeting of the unit owners to further amend the bylaws.” Demchick, 18 AD3d at \*2. Therefore, defendants’ summary judgment motion to dismiss the first cause of action based on this restriction is granted. As to the other disputed restrictions, the court finds that the reasonableness of the restrictions as they apply to Catsimatidis’ commercial unit raises issues of fact and cannot be determined as a matter of law.

#### Validity of August 2002 Lien

Catsimatidis also seeks declaratory relief to render the August 9, 2002 lien null and void.

As stated in the March 7, 2005 decision, the Condominium argues that, pursuant to Section 8.10 of the By-Laws, New York Buffet's lease with Catsimatidis was void because Catsimatidis failed to fully pay all common charges for the commercial unit as shown by the August 2002 Lien for \$12,327.84. In response, Catsimatidis contends that the late fees, which he allegedly owes, should be rejected as arbitrary, and that, even if the August 2002 Lien were valid, it could not serve as a basis for rejecting the New York Buffet Lease because Section 8.10 of the By-Laws, providing that no unit owner may lease (or sell) his unit until all unpaid common charges have been paid, and all unpaid liens against his unit have been satisfied, applies only to residential units.

The express language of Section 8.10 of the By-Laws fails to limit its applicability to residential units only. Therefore, it is useful and necessary to determine whether the August 2002 Lien should be deemed null and void. Notwithstanding the fact that the subsequent June 2004 Lien incorporates the outstanding late fees in the August 2002 Lien, the court finds that Catsimatidis is not entitled to a judgment declaring that the August 2002 Lien in the amount of \$12,327.84 is null and void, because the four-month statute of limitations, pursuant to CPLR 217, to challenge the validity of the Board's determination to file the August 2002 lien has expired. See Brodsky v Board of Mgrs. of DAG Hammar skjold Tower Condominium, 1 Misc 3d 591, 597 (Sup Ct, NY County 2003). Defendants' summary judgment motion to dismiss the first cause of action, based on the August 2002 Lien, is granted.

#### Fifth Cause of Action for Breach of Contract

As stated in this court's March 7, 2005 decision, a condominium's by-laws and

declaration constitute a valid and binding contract with the unit owners. "In New York, all contracts imply a covenant of good faith and fair dealing," which "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002) (citation omitted).

In his fifth cause of action, Catsimatidis asserts that the Condominium breached its obligations in the Declaration by: (1) eliminating the provisions of Article 17, that require his consent to amend Article 7; and (2) amending the By-laws to circumvent his rights under Article 7 of the Declaration to use his commercial unit "for any lawful purpose." Catsimatidis argues that Article 17.1 of the Declaration, in plain and unambiguous language, prohibited amendments to Article 7, governing the use of any unit, without the consent of all affected unit owners, and must be enforced as written. Defendants respond that, when reading Article 8, Section 17.1 and Section 17.4 of the Declaration together, the only reasonable interpretation of Section 17.1 of the Declaration is that such a restriction was for the benefit of the Sponsor, and that no amendment of the use of the unit clauses in Article 7 of the Declaration could be enacted without the Sponsor's consent while the Sponsor held unsold units in the Condominium; however, once the Sponsor sold all of its units (as in the present case), a super-majority of unit owners could remove the consent requirement, and amend the use clauses in Article 7 of the Declaration. Catsimatidis argues that defendants misread Section 17.4 of the Declaration, which intended to require the Sponsor's consent "in addition to" the consent of all affected owners.

The court finds that Section 17.1 of the Declaration is ambiguous, and cannot determine whether defendant Condominium acted in bad faith by eliminating the provisions of Article 17 of

the Declaration, that allegedly require Catsimatidis's consent to amend Article 7 of the Declaration, as a matter of law. Therefore, the motion and cross motion for summary judgment, based on the fifth cause of action for breach of the Declaration's implied covenant of good faith and fair dealing as asserted against defendant Condominium, are denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212, is granted to the extent that:

- (1) the amended complaint is hereby severed and dismissed as against defendant Eleanor Korman, in her representative capacity as president of Petersfield Condominium; and
- (2) the first cause of action for declaratory relief is dismissed as asserted against defendant Petersfield Condominium, to the extent that the claim seeks
  - (a) a declaration that the amendments to the Condominium's Declaration are null and void, and must be removed from the record,
  - (b) a declaration that the amendment to the Condominium's By-Laws regarding the Board of Managers' right to first refusal as to the commercial unit is null and void,
  - (c) a declaration that the August 2002 Lien is null and void, and must be removed from the record,

and the Clerk is directed to enter judgment in favor of said defendants as stated above; and it is further

ORDERED that defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 21, 2005

ENTER:



**RICHARD B. LOWE III**  
J.S.C.

**FILED**  
AUG - 5 2005  
COUNTY CLERK'S OFFICE  
NEW YORK