

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

2005 NY Slip Op 30454(U)

March 7, 2005

Sup Ct, NY 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: Lowy  
**RICHARD B. LOWE III**  
*Justice*

PART 56m

John Catsonaridis

INDEX NO. 65187S 104

MOTION DATE 7/30/04

MOTION SEQ. NO. 001

- v -

The Board of Managers of Tetersfield

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

**FILED**  
MAR - 9 2005  
NEW YORK  
CLERK'S OFFICE

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

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 3/7/05

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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.:**

Plaintiff John Catsimatidis (Catsimatidis), an owner of a commercial condominium unit, brings this action against defendants for: (1) a declaratory judgment that (a) certain amendments to the condominium's Declaration and By-Laws, enacted on May 17, 2004, are null and void, (b) such amendments must be removed from the record with the City Register, and (c) certain liens against Catsimatidis, for unpaid common charges and late fees, are null and void, and must be removed from the record; (2) breach of fiduciary duty; (3) tortious interference of a lease with New York Buffet and Catering Co. (NY Buffet); (4) tortious interference of a lease with Gristedes Foods, Inc. (Gristedes); and (5) breach of an implied covenant of good faith and fair dealing contained in the condominium's Declaration.

Catsimatidis moves for a preliminary injunction, pursuant to CPLR 6301, enjoining defendants from enforcing the amendments, and directing them to remove the amendments from the record. Defendants Board of Managers (Board), and its individual board members, cross-

move, pursuant to CPLR 3211 (a) (1), and (a) (7), for dismissal of the Amended Complaint as asserted against them.

### BACKGROUND

Defendant Petersfield Condominium (Condominium), located at 115 Fourth Avenue, New York, New York, consists of one commercial ground-floor unit, which plaintiff Catsimatidis owns, and 70 residential units. Defendant Board operates and maintains the Condominium. Defendant Board consists of five members: Eleanor Korman, President of the Condominium, Susan Rydell, Stacey Facter, Herve Senequier, and Robert Mandelbaum (Individual Defendants).

#### The Declaration and By-Laws

The Condominium's Declaration and By-Laws govern the operation, use, and occupancy of the Condominium. See Andreas E. Theodosiou Affidavit in Support (Theodosiou Affidavit), Ex. CC, Ex. A, Exs. 1 & 2.

#### Relevant Provisions of Declaration

Article 7 of the original Declaration addressed the "Use of Units." Section 7.1 originally provided that the commercial unit could be used "for any lawful purpose," so long as such use conformed and complied with the terms and conditions of the Certificate of Occupancy for the commercial unit, and any other applicable legal requirements.

Article 17 of the original Declaration covered "Amendments of Declaration." Section 17.1 provided that the 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." The last sentence of section 17.1 originally provided that, "[s]ubject to the rights of

Sponsor or its designee under Articles 7 and 8 of this Declaration,” Article 7 could not be amended unless “100% in number and in common interest of all Unit Owners affected thereby approve such amendment . . . .”

#### Relevant Provisions of By-Laws

Section 2.13 of the By-Laws provides that board members are not liable to unit owners “for errors of judgment, negligence or otherwise, except that a Board member shall be liable for his own bad faith or willful misconduct.” Section 2.19 states that “the Board shall act as, and shall be, the agent of the Unit Owners,” in accordance with the Declaration and these By-Laws. Sections 3.3 and 3.4 authorize the Board to call special meetings of the unit owners, and explain how notice of the meetings shall be provided. Sections 6.5 and 6.6 authorize the Board to assess common charges and late fees against unit owners. Section 13.1, addressing “Amendments by Unit Owners,” provides that the By-Laws may be amended by

the vote of at least 66 2/3% in number and in Common Interest of all Unit Owners, provided, however, that the Common Interest appurtenant to each Unit as expressed in the Declaration shall not be altered without the written consent of all Unit Owners affected thereby.

No provision in the governing documents authorizes the Board itself to vote on any amendments to the Declaration or the By-Laws.

#### The Gristedes Lease

In March 2003, Catsimatidis allegedly leased the commercial unit for a five-year term, with three five-year options, to Gristedes, which currently operates a supermarket on the premises. The record does not contain a copy of such lease.

#### The NY Buffet Lease

As of May 20, 2004, Catsimatidis allegedly leased the same commercial unit, for a 20-year term, to NY Buffet, which plans to open a first-class restaurant/bar/catering facility on the premises. The record does not contain a copy of such lease.

#### Relevant Correspondence Between Parties

On May 25, 2004, Catsimatidis's attorney wrote to the Board, advising them of the NY Buffet lease, and requesting their input on NY Buffet's proposal to install a venting system for the commercial unit. On June 3, 2004, the Condominium's attorney responded that: (1) pursuant to section 8.10 of the By-Laws, the NY Buffet lease was void because Catsimatidis failed to fully pay all common charges for the commercial unit, and enclosed a copy of an August 2002 lien for \$12,327.84; and (2) the proposed venting system could require Board consent, and needed to comply with the Condominium's governing documents. See Louis P. Palermo Affidavit in Support (Palermo Affidavit), Ex. 4; Theodosiou Affidavit, Ex. CC, Ex. A, Ex. 3. Enclosed with the June 3, 2004 letter were copies of recently adopted amendments to the Declaration and the By-Laws, approved by a super majority of all unit owners at a May 17, 2004 special meeting.

See Theodosiou Affidavit, Ex. CC, Ex. A, Ex. 4.

#### The Amendments

Catsimatidis maintains that he did not receive notice of such special meeting until June 1, 2004. Defendants provide an affidavit of mailing that, on or about May 3, 2004, proper notice of the May 17, 2004 special meeting was given to all unit owners. See Theodosiou Affidavit, Ex. BB. Catsimatidis claims that only 66% of all unit owners approved the subject amendments, rather than the 66 and 2/3% required by the Declaration and the By-Laws. Defendants offer evidence that the amendments were approved by 74.28% of the total units and 71.03% of the

common interests of the Condominium at the May 17, 2004 special meeting. See id., Ex. CC, ¶ 4. Catsimatidis also alleges that the timing of the amendments raises suspicions of the Board's bad faith conduct since the voting on the amendments took place on May 17, 2004 (recorded with the New York City Register on July 5, 2004) near the execution of NY Buffet's lease on May 20, 2004.

The amendments to the Declaration include: (1) deleting the last sentence of Article 17, which prevented any amendment to Article 7 unless 100% of all unit owners affected thereby approved such amendment; 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 the prior written consent of the Board of Managers (which consent may be subject to such conditions and requirements as the Board may deem appropriate); 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.

See Palermo Affidavit, Ex. 6.

The amendments to the By-Laws include: (1) extending the right of first refusal to the commercial unit; (2) extending the requirement that unit owners may not convey, mortgage, or lease their unit if any common charges are outstanding on the commercial unit; (3) limiting lease terms to five years; (4) limiting commercial activity between 9:00 A.M. to 10:00 P.M.; and (5) 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.

Catsimatidis argues that the amendments improperly prohibit his lease to NY Buffet, eliminate the need for his consent, and prevent using the commercial unit as a restaurant.

The 2002 and 2004 Liens Against Catsimatidis

In August 2002, defendants filed a lien against Catsimatidis in the sum of \$12,327.84 for unpaid common charges. See Palermo Affidavit, Ex. 5. In June or July 2004, defendants filed a second lien against Catsimatidis in the sum of \$21,353.32 for unpaid common charges, and late fees covering December 2003 through June 2004. See Eleanore Z. Korman Affidavit in Support (Korman Affidavit), ¶ 14; Stephen L. Weinstein Supplemental Affirmation, Ex. 1.

Catsimatidis asserts that the two liens are unfounded, and should be removed from the record because common charges from December 2003 through June 2004 were paid, and defendants fail to explain the late fees requested. See Louis P. Palermo Supplemental Affidavit, ¶ 2 & Ex. 1. Defendants provide evidence of the alleged arrears, and the incurment of late fees. See Brenda Ballison Affidavit in Further Support, ¶¶ 4-12 & Ex. A.

#### Present Action

On June 17, 2004, Catsimatidis filed a complaint, and moved for the subject preliminary injunction. On June 29, 2004, defendants cross-moved to dismiss the complaint, but withdrew such cross motion upon receipt of a supplemental complaint (Amended Complaint), filed on July 6, 2004. The Amended Complaint adds the Condominium, and Eleanor Korman, in her representative capacity as the Condominium's president, as defendants. As mentioned above, the Amended Complaint asserts: (1) a request for declaratory relief; (2) breach of fiduciary duty; (3) intentional interference with the NY Buffet lease; (4) intentional interference with the Gristedes lease; and (5) breach of the implied covenant of good faith and fair dealing. On the second, third, and fourth causes of action, Catsimatidis seeks compensatory and punitive damages. On the fifth cause of action, he seeks only compensatory damages. On or about July 13, 2004, defendants filed the subject cross motion for partial dismissal of the Amended Complaint pursuant to CPLR

3211 (a) (1), and (a) (7).

Catsimatidis alleges that shortly after receiving a copy of the amendments, NY Buffet expressed its reluctance to proceed under its lease until the issues raised in the Amended Complaint were resolved. He claims that, without injunctive relief, he will lose NY Buffet's rental income, which "exceeds the current lease by more than \$200,000 per year." Theodosiou Affidavit, Ex. AA, ¶ 24. In opposition, defendants argue that neither the NY Buffet lease nor the Gristedes lease has been provided, and that the Board's president submits two affidavits stating that the Board will not interfere with Gristedes's present use of the premises during the pendency of the litigation (see Korman Affidavit, ¶ 7; Eleanore Z. Korman Reply Affidavit in Opposition, ¶ 6).

#### DISCUSSION

##### Motion for Preliminary Injunction

In its discretion, the court may deny a motion for preliminary injunction if the plaintiff fails to clearly show: "[1] a likelihood of success on the merits, [2] irreparable harm if the injunction was not granted, and [3] a balance of the equities in its favor." Sterling Fifth Assoc. v Carpentille Corp., Inc., 5 AD3d 328, 329 (1<sup>st</sup> Dept 2004). Unless the movant demonstrates a clear right to injunctive relief, such a remedy is inappropriate. See Mosseri v Fried, 289 AD2d 545, 546 (2d Dept 2001).

Here, injunctive relief is inappropriate because Catsimatidis fails to provide evidence of any irreparable injury. First, the record fails to show any threat by Gristedes to withhold payment. Second, as stated above, the Board's president provides sworn testimony that the Board will not interfere with Gristedes's present use of the premises during the pendency of the

litigation. Third, Catsimatidis fails to show that his potential damages, regarding the NY Buffet lease, “are not compensable in money.” Credit Index, L.L.C. v RiskWise Intl. L.L.C., 282 AD2d 246, 247 (1<sup>st</sup> Dept 2001). The proper remedy for plaintiff’s alleged damages is an action for money damages for the lost rental income of \$200,000 per year, or to recover any decreased value of the commercial unit, if any. This is not one of those cases where “[a]bsent a preliminary injunction, there is no assurance that the plaintiff will be able to stay in business pending trial” for which monetary damages will be inadequate. Mr. Natural, Inc. v Unadulterated Food Prods. Inc., 152 AD2d 729, 730 (2d Dept 1989). The application for a preliminary injunction is denied.

Cross Motion for Partial Dismissal of Amended Complaint

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court accepts the allegations in the complaint and any submissions in opposition to the dismissal motion as true, resolves all reasonable inferences in favor of the plaintiff, and determines whether the pleadings state a cause of action. See Sterling Fifth Assoc., 9 AD3d 261, 261-62 (1<sup>st</sup> Dept 2004). “However, on a motion to dismiss pursuant to CPLR 3211 (a) (1), where allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference.” Id.

Tort Claims (Second, Third, and Fourth Causes of Action)

Under the business judgment rule, so long as the Board, which is vested with the responsibility of the day-to-day operation and maintenance of the Condominium, “act[s] in good faith, in the exercise of honest judgment and without breaching their fiduciary obligation to the common and general interest of the corporation, judicial review to examine [the Board’s] determinations is not available.” Allen v Murray House Owners Corp., 174 AD2d 400 (1<sup>st</sup> Dept

1991). Section 2.13 of the Declaration also expressly provides that “Board members shall have no liability to Unit Owners for errors of judgment, negligence or otherwise, except that a Board member shall be liable for his own bad faith or willful misconduct.”

At the outset, judicial review of the Board’s actions for Catsimatidis’s tort claims is not appropriate under the business judgment rule. Catsimatidis fails to assert, with requisite particularity, that “the board’s action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board’s authority.” Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 540 (1990); see also Lewis v Akers, 227 AD2d 595, 596 (2d Dept 1996) (dismissing complaint for failure to state a cause of action because plaintiff failed to allege “with the requisite particularity, that the [disputed] transfers . . . lacked a legitimate business purpose or were the products of fraud, bad faith, or a conflict of interest”).

Catsimatidis only alleges that the Board improperly “caused” the Amendments to be enacted, and did so in bad faith against the express terms of the Declaration and By-Laws. However, the record shows that the Board: (1) did not vote on any of the amendments; (2) was authorized to call a special meeting of unit owners pursuant to sections 3.3 and 3.2 of the By-Laws; and (3) properly notified all unit owners of the special meeting in accordance with the By-Laws. See Theodosiou Affidavit, Ex. BB, Ex. CC, Ex. A at 10 & Ex. CC, Ex. D. Catsimatidis’s assertions that the timing of the amendments evidence the Board’s bad faith are conclusory and unsupported. The record shows that the amendments were voted upon before the NY Buffet lease was executed.

In addition, the tort claims against all Individual Defendants are deficient as a matter of law because Catsimatidis fails to allege that the Individual Defendants committed tortious acts independent of their official capacities as Board members. See Konrad v 136 East 64<sup>th</sup> St. Corp., 246 AD2d 324, 326 (1<sup>st</sup> Dept 1998). In these circumstances, a conceptual separation of the Board and its individual members for legal purposes is not appropriate. See Hunt v Sharp, 85 NY2d 883, 885-86 (1995); Dinicu v Groff Studios Corp., 257 AD2d 218, 223 (1<sup>st</sup> Dept 1999) (finding that cooperative board could not be personally liable for tortiously inducing breach of contract).

Moreover, the second cause of action for breach of fiduciary duty, as asserted against the subject defendants, “fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties,” and should be dismissed as duplicative of the breach of contract claim. Kaminsky v FSP Incorporated, 5 AD3d 251, 252 (1<sup>st</sup> Dept 2004); see also Fesscha v TD Waterhouse Inv. Servs., Inc., 305 AD2d 268 (1<sup>st</sup> Dept 2003).

Furthermore, for the third and fourth causes of action for tortious interference with a contract, Catsimatidis must show: (1) the existence of a valid contract; (2) defendants’ knowledge of that contract; (3) defendants’ intentional procuring of the breach; (4) actual breach of the contract, and (5) damages. See 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314 (1<sup>st</sup> Dept 2002). Here, Catsimatidis fails to sufficiently allege that any lease, to which he was a party, was breached as a result of the Board’s conduct. See J.C. Klein, Inc. v Forzley, 289 AD2d 79, 80 (1<sup>st</sup> Dept 2001); Fluhr v Goldscheider, 264 AD2d 570, 571 (1<sup>st</sup> Dept 1999). He also fails to sufficiently claim how the Board knew about the NY Buffet lease, which was signed on May 20, 2004, and did not exist when the amendments were adopted on May 17,

2004.

### Punitive Damages

The request for punitive damages for the second, third, and fourth causes of action is also denied. “To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another.” Don Buchwald & Assoc., Inc. v Rich, 281 AD2d 329, 330 (1<sup>st</sup> Dept 2001). The alleged conduct by the Board, even if proved, does not rise to this level of culpable wrongdoing. Catsimatidis alleges that the defendants willfully and maliciously engaged in a scheme to advance their own interests at the expense of plaintiff by improperly causing the Declaration and By-Laws to be amended; however, plaintiff fails to explain and allege what “own interests” refers to, separate from the interests of the other unit owners.

### Breach of Contract Claim (Fifth Cause of Action)

For his fifth cause of action, Catsimatidis seeks damages for breach of contract, claiming that: (1) the Declaration is a valid and binding contract between him and the Condominium, acting through the Board and the Individual Defendants; (2) implicit in the Declaration is a covenant of good faith and fair dealing; (3) defendants breached the implied covenant by amending Articles 7 and 17 without his consent, and by circumventing his rights under Article 7 to use the commercial unit for any lawful purpose; and (4) the Individual Defendants’ conduct was outside the scope of their authority.

Although Catsimatidis may bring a breach of contract claim with respect to the

Declaration and/or the By-Laws (see Collins v Hayden on Hudson Condominium, 223 AD2d 434, 436 [1<sup>st</sup> Dept 1996]; Board of Mgrs. of Madison Med. Bldg. Condominium v Rama, 249 AD2d 140 [1<sup>st</sup> Dept 1998]; Mishkin v 155 Condominium, 2 Misc 3d 1001A [Sup Ct, NY County 2004] [unpublished opinion]), and review of this claim is not prohibited by the business judgment rule (see Dinicu, 257 AD2d at 222-23), Catsimatidis fails to sufficiently allege how the Board and the Individual Defendants breached their implied covenant of good faith and fair dealing.

“This covenant 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’ [citation omitted].” 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002). Here, as stated above, Catsimatidis fails to sufficiently allege any bad faith conduct. As stated above, the Board did not vote to enact the amendments, nor were they authorized to vote under the Declaration and By-Laws. Pursuant to the authority granted to them, defendants properly called a special meeting, and notified all unit owners. This implied covenant cannot be used to create independent obligations beyond those agreed upon or inconsistent with the express terms of the contract. See id. at 153; Fesseha, 305 AD2d at 268. The claim for breach of implied covenant of good faith and fair dealing, as asserted against these defendants, is dismissed.

#### Declaratory Relief (First Cause of Action)

Given the above, the court also grants the defendants’ motion to dismiss the first cause of action as asserted against the Board and the Individual Defendants. As stated above, Catsimatidis seeks a declaratory judgment that: (a) the amendments to the Condominium’s Declaration and By-Laws, enacted on May 17, 2004, are null and void; (b) defendants must

remove such amendments from the record with the City Register; and (c) certain liens filed against Catsimatidis are null and void, and must be removed from the record. Regarding the amendments, the business judgment rule applies, and judicial review of the reasonableness of the Board's actions is foreclosed, since Catsimatidis fails to sufficiently allege any "bad faith, fraud, self-dealing, or misconduct by the Board." Martino v Board of Mgrs. of Hieron Pointe on Beach Condominium, 6 AD3d 505, 506 (2d Dept 2004). Regarding the 2002 and 2004 liens, a declaratory judgment cannot be awarded in favor of Catsimatidis to remove such liens from the record. Pursuant to sections 6.5 and 6.6 of the By-Laws, the Board is authorized to assess such common charges and late fees, and defendants provide documentary evidence regarding the alleged amounts of unpaid common charges and late fees set forth in the 2002 and 2004 liens. The claim for declaratory relief, as asserted against these defendants, is dismissed.

Accordingly, it is

ORDERED that plaintiff's preliminary injunction motion, pursuant to CPLR 6301, is denied; and it is further

ORDERED that defendants' cross motion to dismiss the Amended Complaint as against them, pursuant to CPLR 3211 (a) (1) and (a) (7), is granted, and the complaint is hereby severed and dismissed as against defendants Board of Managers, Eleanor Korman, Susan Rydell, Stacey Factor, Herve Senequier, and Robert Mandelbaum, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 7, 2005

ENTER:



HON. RICHARD B. LOWE, III  
J.S.C.

**FILED**

MAR - 9 2005

NEW YORK  
COUNTY CLERK'S OFFICE