

Giordano v East 92nd St. Owner's Corp.

2007 NY Slip Op 30266(U)

March 8, 2007

Supreme Court, New York County

Docket Number: 0113787

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE
Justice

PART _____

Index Number : 113787/2006

GIORDANO, PAOLO

vs
EAST 92ND STREET OWNER'S CORP.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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 the cross motion*
is decided in accordance
with the annexed Decision and Order.

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

FILED

MAR 21 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7 March 07

Lewis Bart Stone
HON. LEWIS BART STONE 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: PART 59

----- X
PAOLO GIORDANO, :
 : DECISION AND
 Petitioner, : ORDER
 :
 For an Order Pursuant to Article 78 of :
 the Civil Practice Law and Rules : INDEX NUMBER
 : 113787/06
 :
 - against- :
 :
 EAST 92nd STREET OWNER'S CORP. :
 Donald Fagen, Arnie Lizan, Uli Armbrust, :
 John Ryan, as Directors of the Respondent :
 Corporation, :
 :
 Respondents :
----- X

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Lewis Bart Stone:

This proceeding was commenced by Petitioner, Paolo Giordano ("Giordano") by Notice of Motion, dated September 24, 2005, pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") against East 92nd Street Owner's Corp., ("Coop Corp") and Donald Fagen, Arnie Lizan, Uli Ambrust and John Ryan, four¹ of the Directors of Coop Corp (the "Directors"), to review a decision rejecting Giordano's application for the approval of an alteration to be made to Apartment 5, the top floor apartment at 8 East 92nd Street in Manhattan (the "Apartment"). The grounds for such review are that the action of the Coop Corp was arbitrary and capricious and in

¹ There are five directors, including Giordano, one for each apartment.

violation of the proprietary lease. Giordano is the owner of the shares and proprietary lease relating to the Apartment. By Notice of Motion dated November 27, 2006, the Coop Corp and the Directors cross moved to dismiss Giordano's petition on the grounds that the action complained about was protected by the "business judgment rule."

This dispute between Giordano and the other four unit owners arises from Giordano's desire to make substantial renovations to his Apartment and the failure of Coop Corp to grant him the consent necessary to permit him to proceed. Unlike most larger cooperative buildings which are managed through a professional managing agent, Coop Corp is self managed by its directors and officers.

This dispute has a history. Before he purchased his Apartment, when Giordano was interviewed by the board of directors of Coop Corp (the "Board"), he was informed that the building opposed significant construction projects. Giordano then stated he was only interested in making renovations to the Apartment's kitchen and bathroom, and planned no other projects. Finding such acceptable, the Board approved Giordano's purchase of the Apartment and approved his renovation of the kitchen and bath. Such renovation, done in 2004, resulted in damage to the common areas by Giordano's contractors, most of which damage was eventually repaired and restored at Giordano's expense, which damage and process significantly left the other

unit owners with a bad taste.

In spring 2006, Giordano advised the Board, (of which he was a member) that he wished to construct a greenhouse on the roof and that he was exploring whether repairs were warranted. Giordano was advised that Board approval would be required and on August 14, 2006, Giordano submitted documentation to the Board and requested approval of his project. The president of Coop Corp (the "President") advised Giordano on August 16, 2006 that the Board would review the request and that no construction was to be done before its decision. While the Coop Corp has submitted minutes of various Board meetings, including one where the Board sought the supporting documents, no minutes show that there was any meeting of the Board where the Board reviewed the documents and found them wanting.

On September 12, 2006, Giordano was subsequently advised by the President that "the majority of shareholders does not approve" of Giordano's proposed renovations, and that "the directors are available...to meet with you to discuss the reasons behind this decision." Although Giordano was scheduled to meet with the Board on October 2, 2006 to discuss the rejection, the Board cancelled the meeting because this proceeding had been commenced. Thus, no Board meeting had considered Giordano's application by the time this proceeding was commenced.

The cooperative form of apartment ownership arose in New York in the late 19th century as a “lawyer created” relationship, relying on concepts originally developed for other purposes. Thus, usual rules relating to corporations apply to the corporate entity and the usual rules relating to leases apply to the proprietary lease. Courts regularly navigate through this complexity, and professional managing agents understand the issues and work to assure compliance with applicable rules.

The courts are reluctant to intervene in the inevitable disputes which arise in these buildings and resolve them by substantial reliance on the “business judgment rule” which broadly supports corporate decisions of a board of a cooperative corporation reached through proper corporate practices, even when the result may be to severely restrict what an apartment owner must do with his own apartment. The rationale is that by “buying in” to the cooperative agreement, an apartment owner consents that the board, in exercising its business judgment, may impair some of his freedom to do what he wishes with his property. See, e.g., Levandusky v. One Fifth Avenue, 75 NY2d 530 (1990).

Here, the Coop Corp, is a do-it-yourself cooperative. While under law, the directors of a corporation (including a cooperative) have broad discretion to manage their corporation, they must act as such. Although the majority of the directors constituting the Board may not eventually approve Giordano’s project, he was only

informed that a majority of the shareholders opposed his project. Under general principles of the New York corporation law, review of Giordano's application is a matter for the Board, not the shareholders. Although New York Business Corporation Law ("BCL") §701 authorizes this rule to be modified in the corporation's certificate of incorporation to give shareholders the powers of directors to take certain acts in a "close corporation," here, neither party included the Certificate of Incorporation of the Coop Corp in the record to indicate in any way that the general rule requiring the management of Coop Corp by its Board had been modified.² Accordingly, the Court may not convert the decision of "a majority of the shareholders" to the decision of a Board so as to invoke the business judgment rule. Giordano, as a director of Coop Corp has a right to be informed of and attend all meetings of its Board.³ Without such notice, a directors' meeting cannot be duly constituted under the usual principles of corporate law, so as to conduct corporate business.

² Although the record is similarly not clear that Coop Corp had been organized under New York law, this Court will assume that it was, applying the presumption, absent evidence to the contrary that New York law applies to this controversy.

³ While without a review of Coop Corp's By-laws (which was also not included in the record) it is not clear whether Giordano could have voted on his own application, he was certainly entitled to be given notice and be present at the meeting, unless he waived such right. The rules relating to possible conflict of interests of a director are set forth in BCL §713. BCL §713(d) authorizes the certificate of incorporation or by-laws of a corporation to set stricter rules. Under the general rules, however, it is clear that a director with a conflict has the right to be present at a meeting. See BCL §713(c).

Thus, this Court must first decide whether indeed there was a proper rejection of Giordano's application. If the corporate procedure required to effectuate a rejection that was not followed, this matter would be moot as the petition herein was commenced under CPLR Art 78 to review the action of a body, i.e. the Coop Corp. As the Coop Corp had not duly acted, there is no action of a "body" to review, and there was no action taken to which the "business judgment rule" would apply.

Giordano's proprietary lease forbids the renovations Giordano wishes to make without the prior written consent of Coop Corp. However, the lease further provides that such "consent shall not be unreasonably withheld." Thus, Giordano is under his proprietary lease both entitled to apply for and receive an answer from the Board as to his application for such consent within a reasonable time.

Recognizing that the disapproving shareholders (or their spouses) are all Board members, the outcome may be the same when the Board considers Giordano's application. However, Board members, acting as fiduciaries of the Coop Corp, might also resolve this dispute differently in light of the proprietary lease provision that consent may not be unreasonably withheld, or perhaps approve a lesser scope of the renovation which might be acceptable to Giordano and/or require an appropriate

alteration agreement⁴ or posting of security to address proper concerns of the Board. The Board may also, when the act as a body, carry out the possibility that after joint consideration and consultation, they may reach a different result than they might have individually thought or had as shareholders when they first entered the Board meeting.

As Giordano has in his papers sought in the alternative “such other and further relief as this Court may deem just and proper,” the Court will invoke its CPLR Article 78 powers to consider Giordano’s petition also as one of mandamus and require that the Board consider, as a Board, Giordano’s application for approval of his alterations, at a duly constituted meeting of the Board, and that the Board accord Giordano a reasonably prompt decision on such application. Here, this Court finds that under Giordano’s proprietary lease, the Board is required to address and consider Giordano’s application and not unreasonably withhold consent thereto.

While this conclusion of the Court may appear to be a quibble as between the individual decisions of the majority of the shareholders of Coop Corp to withhold consent and the collective decision of the Board, where each Director owns an apartment, it is not. Shareholders, under the BCL as such, have no fiduciary

⁴ Alteration agreements are in general use to regulate the conduct of alterations in New York cooperatives. There are several common standard forms in use. As shown by the Court of Appeals discussions in Levandusky, their use is assumed and hardly the basis of comment.

obligations to their corporation, while directors do. Directors must further concern themselves as to obligations of their corporation, including contractual obligations under a proprietary lease.⁵ While a board of a cooperative corporation when it acts, has the protection of the business judgment rule to support its decision, such rule requires a board to act and exercise business judgment to receive such protection.


Accordingly, it is ordered that the Directors of the Coop Corp meet within thirty days of the date of the entry this order to consider and act upon the application of petitioner for permission to perform the renovations he seeks, in a manner consistent with this Decision and Order. Nothing in this decision or order shall by itself require the Board to reach any particular result or foreclose either party from the review of any such decision of the Board by proper legal procedure. The Directors' cross motion is dismissed as no Board decision as to which the business judgment rule applies, has been made.

⁵ The Court notes that in Levandusky, supra, which also involved a dispute over a renovation, the relevant proprietary lease provisions was materially different from that here in that the cooperative corporation in Levandusky had not agreed with Levandusky in his proprietary lease not to unreasonably withhold its consent.

This is the Decision and Order of the Court.

DATED: MARCH 8, 2007
NEW YORK, NEW YORK

ENTER:



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE