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

PRESENT: **HON. MARYLIN G. DIAMOND** **PART 48**
Justice

KAYOKO YAEGASHI,

Plaintiff,

-against-

NELLY MARINS AGUILERA et al.,

Defendants.

INDEX NO. 114945/05

MOTION SEQ. NO. 003

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that: This dispute involves a Manhattan residential cooperative named 406 West 47 Street Housing Development Fund Corporation ("HDFC"). Plaintiff is a shareholder of HDFC and is the proprietary lessee and resident of a fourth-floor apartment. Defendant Nelly Marins Aguilera was the shareholder and proprietary lessee of the apartment directly adjacent to plaintiff's apartment.

HDFC was incorporated in 1989 by the New York City Department of Housing Preservation and Development ("HPD"), pursuant to article xi of the Private Housing Finance Law and section 402 of the Business Corporation Law, in order to provide low income cooperative housing in a building located at 406 West 47th Street in Manhattan. That same year, HPD transferred title to the building to HDFC. Simultaneous with the transfer of title, HDFC and HPD entered into a regulatory agreement which governed the use and operation of the building by HDFC, including provisions concerning the sale and occupancy of the cooperative apartments. In addition, HDFC entered into an agreement with the City of New York, referred to as the "60/40 Agreement," under which HFDC agreed that in the event of the sale of one of the building's apartments, the purchase price would be divided between the seller and the City of New York, with 40% going to the City.

Plaintiff claims that she entered into a contract with defendant Aguilera to purchase Aguilera's next door apartment as her second apartment in the building and that her attorney notified HDFC, by letter dated August 30, 2005, of this agreement. According to the complaint, HDFC refused to approve the sale and threatened Aguilera with legal action unless she transferred her shares back to HDFC, which she subsequently agreed to do. Plaintiff claims that the defendants relied on a purported resale policy in the proprietary lease which allegedly gives HDFC a right of first refusal based on a specific assigned price. The complaint alleges that, in fact, the resale policy is a sham which was never adopted by a majority of the shareholders but was nevertheless used by defendants in order to intimidate Aguilera into breaching her contract with plaintiff and transferring her apartment to HDFC.

Plaintiff has sued HDFC and Aguilera, as well as two HDFC board members, Larry Roberts and Dailo Felipe Teran. The complaint asserts four causes of action. The first cause of action alleges tortious interference with contract against HDFC, Roberts and Teran. The second cause of action seeks a declaratory judgment that the resale policy has no legal effect because it was never validly adopted by the shareholders of HDFC and that the compelled transfer of the shares of stock and the proprietary lease from Aguilera to HDFC is consequently void. It also seeks an order directing HDFC to transfer Aguilera's

former shares and proprietary lease to plaintiff. The third cause of action alleges breach of fiduciary duty against Roberts and Teran. The fourth cause of action is for breach of contract against Aguilera, who vacated the premises on or around August 6, 2005 and allegedly moved into subsidized housing.

HDFC, Roberts and Teran have now moved for summary judgment dismissing the complaint. As a threshold matter, the court notes that although the notice of motion indicates that only HDFC is moving for such relief, the papers in support make it clear that the motion is, in fact, also brought by Roberts and Teran and seeks dismissal of all of the causes of action asserted against these three defendants. Moreover, in opposing the motion, the plaintiff has fully addressed the issues raised herein with respect to all three defendants. It is well settled that, in the absence of prejudice or surprise, a court, in its discretion, may grant relief other than that specifically asked for in the notice of motion to such extent as is warranted by the facts plainly appearing on the papers on both sides. *See Matter of Delgado v. Sunderland*, 290 AD2d 440, 442 (2nd Dept 2002); *HCE Assocs. v. 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 775 (2nd Dept 1991). Since there has been no prejudice herein to the plaintiff by reason of the fact that the notice of motion refers only to HDFC as the movant, the court will treat the motion as having been brought by Roberts and Teran, as well.

As to the first cause of action, which alleges tortious interference with contract, the defendants argue that their decision to withhold consent to Aguilera's transfer of her shares to the plaintiff and to require that she sell only to the coop was proper and protected by the business judgment rule. It is well-settled that under the business judgment rule, the decisions of a cooperative board are immune from judicial review if the Board acts for the purposes of the cooperative, within the scope of its authority and in good faith. *See Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990); *Rubinstein v. 242 Apartment Corp.*, 189 AD2d 685, 686 (1st Dept. 1993); *Schoninger v. Yardham Beach Homeowners Association, Inc.*, 134 AD2d 1, 10 (2nd Dept. 1987). Absent a showing of discrimination, self-dealing or misconduct by board members, cooperatives are presumed to be acting in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of cooperative purposes. *See Jones v. Surrey Cooperative Apartments*, 263 AD2d 33, 36 (1st Dept. 1999).

Here, the defendants argue that they had the authority to deny Aguilera's attempt to sell her shares to plaintiff by demanding that Aguilera sell only to the coop. They base such authority on the resale policy, which they claim was adopted by the shareholders at a meeting on March 3, 1990. According to defendants, the HDFC was, in fact, required by the City to adopt such a policy. Indeed, the defendants have attached a copy of the resale policy, which states that it was adopted at a duly called meeting on March 3, 1990 by a vote of ⅔ of the shareholders, thereby amending the relevant sections of the proprietary lease and by-laws.

Plaintiff, however, asserts that the document which the defendants have submitted as constituting a validly-adopted resale policy is a sham and that no such policy was ever adopted by the shareholders, as defendants claim. In support of this assertion, plaintiff, who was the treasurer of the cooperative in 1994, denies that she was ever aware of the existence of such a policy and points out that there are no minutes of any shareholders meeting on March 3, 1990. However, the fact that the HDFC has not retained the minutes of a shareholder meeting held 17 years earlier is not dispositive since such a document could understandably have been lost or discarded over such a lengthy period of time. Nor is it dispositive that plaintiff may have been unaware of the policy given the fact that the policy had never been implemented until Aguilera's proposed sale to plaintiff since, according to the defendants, the Board did not previously have any reason to demand a right of first refusal. Plaintiff also claims that defendant Teran, who has been a member of the Board of Directors from the time HDFC purchased the building in 1989, testified at his

deposition that there was no discussion of a resale policy at any shareholders meeting in 1990. In fact, although Teran initially testified that he did not believe that the resale policy was discussed by the Board at its meeting in 1990, he later testified that, upon reflection, he thought that the policy was discussed at either the 1990 or 1991 annual meeting of the Board. In any event, Teran clearly stated that the Board was committed at each of its meetings to ensure that the HDFC complied with all city guidelines.

Thus, the plaintiff has not provided any persuasive evidence which rebuts the presumption of regularity that attaches to a corporate document reflecting an amendment to the corporate by-laws. *See Matter of Chapman v. 2 Kin Street Apts. Corp*, 2005 WL 1961330 * at 8 (Sup Ct NY Co 2005). Her claim that the resale policy was never validly adopted and that the document which the defendants have submitted is a sham ultimately rests on inference and speculation. She has failed to raise a triable issue of fact as to whether the resale policy was validly adopted.

The plaintiff has also suggested that even if the resale policy was properly adopted so that the defendants had the authority to exercise a right of first refusal, the business judgment rule would not insulate the defendants from liability since the courts have recognized that the rule does not prevent judicial review of decisions where "the challenger demonstrates that the board's action . . . deliberately singles out individuals for harmful treatment....." *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 NY2d at 540. *See also Louis and Anne Abrons Foundation, Inc. v. 29 East 64th Street Corp.*, 297 AD2d 258, 259 (1st Dept.2002). According to the plaintiff, if the resale policy has, in fact, been in existence since 1990, it has been unevenly applied in that other shareholders, including Roberts's wife, have been able to purchase additional apartments without being subject to the cooperative's alleged right of first refusal. This argument is without merit.

Roberts has explained that the proposed sale between plaintiff and Aguilera was rejected because the Board, concerned about rising fuel costs and the fact that as a low income cooperative, it could not charge maintenance at the fair market amount, decided that the apartment should be used as a rental so as to obtain a higher monthly revenue from the apartment. The plaintiff has not offered any evidence which even suggests that this explanation is pretextual. Indeed, plaintiff has failed to assert that the defendants have any personal animus towards her or that Board members denied her application because of self-dealing or other reasons reflecting bad faith. Nor has she has not even attempted to dispute the defendants' contention that the coop is in need of additional revenue in order to meet rising fuel costs. Under the circumstances, the plaintiff has also failed to raise a triable issue of fact on her claim that the business judgment rule should be abrogated because she has been subject to uneven and unfair treatment. The defendants' motion for summary judgment dismissing the first cause of action must therefore be granted.

As to the second cause of action, since the court has already determined that the plaintiff has failed to raise a triable issue of fact as to whether the resale policy was ever properly adopted, the defendants' motion for summary judgment dismissing the plaintiff's request for a declaratory judgment on this issue must also be granted.

The remaining claim which plaintiff has asserted against the moving defendants is for breach of fiduciary duty by Teran and Roberts. Since the plaintiff has failed to raise a triable issue of fact on her claims that the resale policy was fabricated and that the policy has, in any event, been unfairly and unevenly applied, her cause of action for breach of fiduciary duty must be dismissed.

Accordingly, the defendants' motion for summary judgment is granted and the first, second and third causes of action are hereby dismissed.

Finally, the court notes that on January 2, 2007, the plaintiff's motion for a default judgment as against Aguilera on the fourth cause of action was granted on default. Although Aguilera is thus in default, it is nevertheless incumbent upon the court to assess the merits of the complaint prior to issuing a judgment for injunctive or monetary relief since a plaintiff who fails to make a prima facie showing of a right to judgment is not entitled to such relief. *See Martocci v Bowaskie Ice House*, 31 AD3d 1021 (3rd Dept 2006). *See also Carnegie Hall Corp. v City Univ. of N.Y.*, 286 AD2d 214, 215 (1st Dept 2001); *Matter of Dyno v. Rose*, 260 AD2d 694 (3rd Dept 1999); *Joosten v Gale*, 129 AD2d 531 (1st Dept 1987).

The plaintiff shall therefore appear before the court in Room 412, 60 Centre Street, New York, New York on June 26, 2007 at 10:00 a.m. at a conference to discuss the merits of her claim against Aguilera and the relief to which she believes she is entitled .

ENTER ORDER

Dated: 6-6-07

MOD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION