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

PRESENT: JUDITH J. GISCHE PART 10

Justice

Jeffrey Rubin

- v -

Ansted Condominium et al

INDEX NO. 113077/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for § 3212 Summary J/M

	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 THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: JUN 29 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Jeffrey Rubin,

Plaintiff

-against-

The Olmsted Condominium and
The Board of Managers of the
Olmsted Condominium,

Defendants.

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DECISION/ORDER
Index No.: 113077/06
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltff n/m (3212) w/JAR affirm, exhs	1
Defs x/m (3212) w/DDM affirm, EP affid, exhs	2
JAR reply affirm and in opp, exh	3
DDM reply affirm	4

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Plaintiff, an attorney admitted to the bar, represents himself in this action against the condominium board of a building in which he owns two condominium units. The action is for a declaratory judgment challenging the board's decisions to impose: 1) a fee on any condominium unit that is rented or sublet to a third party ("sublet fee" at times "administrative fee") and 2) a late fee on late payments of common and other charges, which if not paid, results in the termination of certain privileges, discussed at greater length below.

Plaintiff now moves for partial summary judgment on his 1st, 2nd and 3rd causes of

action. Olmsted Condominium and the Board of Managers of the Olmsted Condominium (hereinafter, "the board" or "defendants"), oppose plaintiff's motion and cross move for summary judgment in their favor dismissing the entire complaint.

Although issue has been joined, the note of issue has not yet been filed and the time restrictions of CPLR § 3212 not triggered. These motions are, therefore, timely and will be decided on the merits. Brill v. City of New York, 2 NY3d 648 (2004).

Background of the Dispute and the Arguments

Plaintiff owns units 4D and 4E in the condominium which he purchased in August 2004. He lives in unit 4D, but rents 4E to a tenant ("the subleased unit"). There are three specific acts by the condominium board that he contends were undertaken in bad faith, are breaches of the board's fiduciary duty to him as a unit owner and/or are discriminatory in how they have been applied to him. These acts are the imposition of an administrative fee on the subleased unit, the imposition of fees on late paid parking fees which ultimately leads to the discontinuation of such parking privilege, and the imposition of a flat administrative fee on subleased units, without regard to the size of the unit being subleased. The following facts are claimed by the parties, some of which are undisputed.

It is undisputed that the board decided that a sublet or administrative fee on subleased units was necessary, and that they voted to impose a flat fee of $500 per annum on each unit owner who rents or leases his or her apartment to a third party. Defendants contend, and plaintiff does not dispute, that there was a board meeting on October 6, 2004 at which time an election was held adopting the sublet fee requirement.

Thereafter, on December 10, 2004, the board notified the unit owners of imposition of the sublet fee, effective February 1, 2005.

It is undisputed that thereafter, on August 16, 2006, the board met again and this time voted to impose a monthly late fee of $50 a month on any late payment of common or other charges or fees. The board also amended the by-laws to provide that any unit owner who is leasing a parking space and/or a storage locker will forfeit that space or locker if s/he is in arrears for forty-five (45) days or longer. Further, it was voted and agreed that no unit owner in arrears is eligible for (e.g. will be put on, or can remain on, the waiting list for) such a parking space or a locker, and that such arrears could be recorded as a Notice of Lien against the unit as additional charges. The unit owners were notified by the board of the implementation of these new rules on August 22, 2006.

Defendants contend that they sent out a notice dated April 27, 2006 for the upcoming Annual Meeting (May 17, 2006), at which individuals would be elected to fill board vacancies. Plaintiff does not dispute that the board sent out packages with proxies and the resumes of persons who were interested in being elected to the board. Nonetheless, plaintiff indirectly maintains that the names of the candidates running for vacancies on the board were not disclosed. In any event, he contends that even if they were disclosed, the board illegally and improperly solicited proxies by making "false and misleading information for the purpose of soliciting proxies . . ." and that the election must be invalidated and the elected members removed.

It is plaintiff's contention, that the board had no right to make any of these rules,

or impose these fees because they are not authorized under the condominium by-laws. Plaintiff indirectly contends that these fees and changes to parking and storage privileges must be voted on by the unit owners, not passed by the board. He does not, however, provide any section to support this argument, but indicates that Article II, Section 2 (discussed at greater length below, and which the defendants rely upon) is insufficient authority for the actions the board has taken. Plaintiff also argues that the "administrative fee" is really a "sublet fee," without any concession that one, but not the other is permissible. Plaintiff contends that the board did not follow the proper procedure to impose these fees, without conceding they had the right to do so in the first place. Finally, he argues that even if the board *did* have the right to impose the administrative or sublet fee, it should not have been a flat fee, but imposed pro-rata. Plaintiff argues that an article appearing in the *New York Times* is instructive on this point, and that the defendants' own lawyer agreed the fee could be imposed on a sliding scale.

In support of his claim, that the board has engaging in an unlawful "taking" of his property, plaintiff argues that a unit owner in arrears is deprived of tangible rights or property - like a parking spot or a storage locker or the right to be wait listed for either amenity - if s/he has unpaid common charges or other arrears. Thus, he argues, that these are not amenities or privileges at all, but part and parcel of his interest in the common elements.

Although plaintiff set forth five (5) distinct causes of action, they seek overlapping relief and the first three cause of action are best considered globally, particularly since

these are the claims that both sides seek summary judgment on. These causes of action seek a declaration that the fees imposed are in contravention of the by-laws, that the fees are, therefore, null and void, and that the imposition of such fees are a breach of the board's duties to plaintiff who is a unit owner.

The two remaining cause of action, upon which defendants have cross moved for summary judgment are for a declaration that the May 2006 election of board members is void because the board solicited proxies by providing unit owners with intentionally false information (4th cause of action) and injunctive relief (preliminary and permanent) enjoining defendants from charging the administrative or "sublet" fee and the late or arrears fee because the enabling amendment to the by-laws is void *ab initio* (5th cause of action).

In support of their cross motion, and in opposition to plaintiff's motion for summary judgment, defendants contend that there are no material issues of fact to be tried. They contend that they are entitled to summary judgment, as a matter of law because their actions were taken in good faith, an exercise of honest judgment, and for the lawful and legitimate furtherance of the condominium's corporate purposes. They argue further, and rely upon the affidavit of their president, Ms. Peskin, that they followed the by-laws in imposing these fees, and restricting parking and locker privileges to those who pay their common charges timely. In particular, defendants rely upon Article II, Section 2 of the by-laws. In relevant part it provides as follows:

"The Board of Managers shall have the powers and duties necessary for the administration of the affairs of the Condominium and may do all such acts and things, except as by law or by the Declaration or by these By-laws may not be delegated to the Board of Managers by the unit owners. Such powers and duties of the Board of Managers shall include, but shall not be limited to, the following:

[* * *][1]

(b) Determination of the common expenses required for the affairs of the Condominium, including, without limitation, the operation and maintenance of the Property.

(c) Collection of common charges, assessments, and expenses from the unit owners.

[* * *]

(e) Adoption and amendment of rules and regulations covering the details of the operation and use of the Property.

[* * *]

(p) Levying fines against unit owners, lessees, excluding Non-Purchasers [* * *] for violations of the rules and regulations governing the operation and use of the Property."

Defendants, relying upon the sworn affidavit of the board's president, Ms. Peskin, set forth the process by which each fee was implemented, and how the new members of the board were elected at the annual meeting. They have also provided copies of the notices that the board sent and the minutes of the board meetings in controversy. Ms. Peskin was present at those meetings. The minutes reflect that there was a quorum present at the October 6, 2004 meeting at which the sublet/ administrative fee was

[1]This indicates that there is additional printed language in document being quoted from, which is not reprinted in the court's decision because it is either not germane for the purposes of the issues the court has to decide, or for clarity's sake.

passed and at the August 16, 2006 when the board considered the late fee and other rules about parking spots and storage lockers. The notice about the annual meeting, the resumes and other information about the annual meeting has also been provided, and addressed by Ms. Peskin. Copies of the proxies are provided as well.

Although plaintiff has not moved for a preliminary injunction, his 5th cause of action seeks that relief and a permanent injunction against the board enforcing these fees. Defendants argue that they are entitled to summary judgment on this cause in its entirety, because the complaint should be dismissed. Alternatively, they argue that because plaintiff cannot demonstrate a likelihood on the merits, irreparable injury in the absence of such relief, and that the equities balance in his favor, he is not entitled to a preliminary injunction, even if they do are not granted summary judgment on any of the other claims.

Law applicable to motions for summary judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp ., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64. Since each side seeks summary judgment as to the 1st, 2nd and 3rd causes of action, each bears the

initial burden of proving its prima facie case. If it does, then the opposing party must raise triable issues of fact that require a trial. Defendant is the only moving party with respect to plaintiff's 4th and 5th causes of action.

When, however, only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

The business judgment rule prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. "So long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient' " Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 537-538 [1990]. It is well established law in the First Department that this standard of review is applicable to decisions made by the members of the board of a residential condominium. Pelton v. 77 Park Avenue Condominium, 38 A.D.3d 1 (1st Dept 2006).

The by-laws of the Olmsted Condominium are broad and reserve a wide range of matters to the discretion of the board, including the imposition of fees, as needed. Although plaintiff contends that the board acted outside the scope of its authority, in bad faith, and that it breached its duty, the facts as he alleges them to be do not support his claim that the board has breached its duty and that judicial review of its decisions is

required. Plaintiff does not allege that any of the decisions by the board to impose the fees he claims to be aggrieved by were only imposed on him or solely to impact his unit. *Compare*: Louis and Anne Abrons Foundation, Inc. v. 29 East 64th Street Corp., 297 A.D.2d 258 (1st Dept. 2002). Rather, it is conceded that these fees were imposed on any unit owner who rents out his or her unit, instead of living in it. 40 West 67th Street Corp. v. Pullman, 100 N.Y.2d 147 (2003). Plaintiff's argument is very simply that the sublet fee cannot be levied unless expressly allowed for in the by-laws. This, however, misses the point of why there is a board in the first place, which is to insure the stability of a common living arrangement. Pelton v. 77 Park Avenue Condominium, supra at 9. There is no prohibition in the by-laws for the imposition of a sublet fee, and therefore no bar to the board deciding to vote on such a fee, if it for a legitimate corporate purpose, in this case, any additional administrative expense of dealing with a subleased apartment.

Each of the fees plaintiff challenges were voted on at a meeting with a quorum present. Plaintiff has failed to prove that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. Pelton v. 77 Park Avenue Condominium, *supra* at 9; 40 West 67th Street Corp. v. Pullman, *supra* at 155. Defendants, on the other hand, have proved the decision to impose these fees were within their broad powers under the by-laws, were to pursue a legitimate corporate purpose, and were not imposed in bad faith. Since plaintiff has not raised factual disputes that have to be tried, defendants are entitled to summary judgment on the first three causes of action in the complaint.

Any argument by plaintiff, that the board has to impose the administrative or sublet fee according to the owner's proportionate share in the common elements is offered without any legal support. There is no legal precedent nor such restriction in the by-laws. *New York Times* article cited is merely one author's opinion without any legal citation. It is of no probative value on a motion for summary judgment. In any event, there is no explanation why it is a breach of fiduciary duty, or otherwise discriminatory, for the board to charge a flat fee of this kind, or why a sliding scale fee paid according to the size of the unit, is necessary. Therefore, plaintiff's claim that the fee must be pro rated is conclusory.

To the extent that plaintiff contends that the imposition of such fees and late fees are a breach of fiduciary duty, and unlawful taking, or subject to judicial review because he will lose a parking spot or storage locker or be removed from the waiting list for either one, if he has arrears, defendants' motion for summary judgment dismissing those claims must be granted. The defendants have proved that their decision to impose these fees are protected under the business judgment rule. Plaintiff has failed to set forth factual disputes that would otherwise take this dispute out of the business judgment rule.

Plaintiff has failed to prove the board is "taking" his "property." He does not individually own such amenities (the parking space or storage locker). Nor has he proved that his right to share in their use is superior to any other unit owner. These are amenities at the condominium which may be available and offered to qualified unit owners. Judicial review is not available for the board's decision to terminate an owner's

monthly parking lease or storage space. *See:* Board of Managers of Patchogue Homes Corp. Condominium No. 1 v. Islar, 176 Misc.2d 214 (N.Y. Sup. App Term 1998) (*citing* Matter of Levandusky v. One Fifth Ave. Apt. Corp., *supra*).

Defendants have also proved they notified the unit owners of the upcoming Annual Meeting in May 2006, and that they provided a package for unit owners to consider in advance of the meeting. The package contained resumes, proxies, and instructions. In opposition plaintiff has failed to present any factual dispute for trial. His statement that not all the information sent by the board to the owners was the same is entirely conclusory and insufficient to defeat defendants' motion for summary judgment. Plaintiff does not explain what his claim is or even the basis of his belief, that not all the packages the board sent were the same. In reply plaintiff now contends that the election, and how it was conducted, is further evidence of the board's discriminatory acts, without any elaboration.

Having met their burden of demonstrating the board complied with the by-laws in how the meeting and the ensuing election was conducted, defendants are entitled to summary judgment on plaintiff's 4th cause of action. Zuckerman v. City of New York, supra at 563-64. Plaintiff's bare boned allegations, which may not even be based upon personal knowledge, fail to raise factual disputes, or even that there are mixed issues of law and fact. Defendants have proved their claim, that they notified the unit owners of the election and conducted in the appropriate manner.

The fifth cause of action, which is for injunctive relief, also fails because it is an ancillary remedy to the four (4) other causes of action in the complaint which the court is

hereby dismissing. Plaintiff is not entitled to injunctive relief enjoining the board from charging the fees it has voted to impose, nor is there any basis to declare the election that took place on May 17, 2005 void. Thus, any prayer for a preliminary and permanent injunction is rendered moot.

Conclusion

Defendants have met their burden in moving for summary judgment on each cause of action asserted by the plaintiff. They have proved that their actions are protected under the business judgment rule and not subject to judicial review. In opposition, plaintiff has not met his burden of setting forth material triable issues of fact that require a trial in this case.

Other claims by plaintiff for an independent accounting, removal of board members, reimbursement of any sublet or other fees already paid, and for attorney's fees have been considered and are subsumed within the court's overarching decision, that defendants are entitled to summary judgment dismissing the complaint, without any further discussion. Therefore, the clerk shall enter judgment in favor of defendants The Olmsted Condominium and the Board of Managers of the Olmsted Condominium against plaintiff Jeffrey Rubin on each cause of action herein.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 29, 2007

So Ordered:

Hon. Judith J. Gische, JSC