

**320 Owners Corp. v Harvey**

2008 NY Slip Op 32796(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 110470/07

Judge: Marcy S. Friedman

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Justice

Index Number : 110470/2007

320 OWNERS CORP.

vs

HARVEY, FRANCIS J.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

110470/2007

MOTION DATE

10/8/07

MOTION SEQ. NO.

003

MOTION CAL. NO.

s motion to/for

summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 1a, 1b, M1  
2-3, 3a, M2  
4, M3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10-6-08

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

320 OWNERS CORP.,

*Plaintiff,*

- against -

FRANCIS J. HARVEY and JEAN P. WILHELM,

*Defendants.*

\_\_\_\_\_ x

Index No.: 110470/07

DECISION/ORDER

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, plaintiff 320 Owners Corp., the Board of Directors of a cooperatively owned residential building at 320 West End Avenue in Manhattan, seeks a judgment of ejectment against defendants Francis Harvey and Jean Wilhelm, the tenant-shareholders of Apartment 6-B, on the ground of objectionable conduct. Plaintiff moves for summary judgment pursuant to CPLR 3212.

The complaint alleges that plaintiff is entitled to a judgment of ejectment based on a notice of termination terminating defendants' tenancy pursuant to a resolution approved by the Board of Directors. It is undisputed that the parties' proprietary lease authorizes the Board to terminate a tenancy on the ground of objectionable conduct by a vote of two-thirds of the directors. Paragraph 31 of the lease provides for termination:

If at any time the Lessor shall determine, upon the affirmative vote of two-thirds of its then Board of Directors, at a meeting duly called for that purpose, that because of objectionable conduct on the part of the Lessee, or of a person dwelling or visiting in the apartment, repeated after written notice from Lessor, the tenancy of the Lessee is undesirable; (it being understood, without limiting the

generality of the foregoing, that repeatedly to violate or disregard the House Rules hereto attached or hereafter established in accordance with the provisions of this Lease, or to permit or tolerate a person of dissolute, loose or immoral character to enter or remain in the building or the apartment, shall be deemed to be objectionable conduct.

The procedural history of this matter is also undisputed: By letter dated September 5, 2006, the Board gave defendants written notice of objectionable conduct by their then teenaged son Alex. By letter dated June 7, 2007, the Board's attorneys gave defendants Notice of a Special Meeting of the Board of Directors to be held on June 28, 2007. This notice informed defendants of their right to "appear at the meeting with your attorney to respond to the charges of objectionable conduct that will be presented to the Board at the meeting." (Def. Ex. C.) At defendants' request, the meeting was adjourned to July 10, 2007. Defendants appeared at the July 10 meeting with their attorney and their son. In proceedings that were transcribed, the charges were presented to the Board, and both defendants and their son then addressed the Board. After defendants left the meeting, the Board conducted deliberations and voted to terminate defendants' tenancy. The Board's deliberations were not transcribed, and the record contains no indication that the Board made a written resolution.

The Board's determination is described as follows in a five-day notice of termination, dated July 11, 2007, with which defendants were served after the meeting:

PLEASE TAKE NOTICE, that the Lessor determined, upon the affirmative vote of more than two-thirds of the Board of Directors (all seven members attended the special meeting of the Board of Directors and all seven voted unanimously in favor of the termination) at a meeting duly called and held on July 10, 2007, that pursuant to paragraph 31(f) of the Proprietary Lease between 320 Owners Corp., Lessor, and Francis J. Harvey, Jr. and Jean P. Wilhelm, Lessees, the tenancy of Francis J. Harvey, Jr. and Jean P. Wilhelm, Apartment 6-B at 320 West End Avenue, New York, New York 10023 should be terminated "because of

objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, repeated after written notice from Lessor, the tenancy is undesirable” (the “Determination”).

In Matter of Levandusky v One Fifth Ave. Apt. Corp. (75 NY2d 530 [1990]), the Court of Appeals applied the business judgment rule to decisions of cooperative corporations enforcing building policy. The Court explained that the business judgment rule “permits review of improper decisions, as when the challenger demonstrates 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.” (Id. at 540.) In 40 W. 67<sup>th</sup> Street v Pullman (100 NY2d 147 [2003]), the Court extended the business judgment rule to a residential cooperative corporation’s decision to terminate a shareholder’s tenancy based on objectionable conduct. Under this standard, a court will defer to the cooperative corporation’s decision and will not undertake review of the decision unless the aggrieved shareholder tenant “make[s] a showing 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.” (Id. at 155. See 1050 Tenants Corp. v Lapidus, 39 AD3d 379 [1<sup>st</sup> Dept 2007].)

Pullman expressly held that “[w]hen dealing, however, with termination, courts must exercise a heightened vigilance in examining whether the board’s action meets the Levandusky [business judgment] test.” (Id. at 158.) “While deferential, the Levandusky standard should not serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations. (Id. at 157.) The Pullman Court found that in the case before it, “[t]he cooperative unfailingly followed the procedures contained in the lease when acting to terminate defendant’s tenancy.” (Id. at 156.) In particular, the Court noted that the Board had called a special meeting

and given the defendant an opportunity to be heard; acted by supermajority vote; properly fashioned the issue and the question to be addressed by resolution; and enacted a resolution which “specified the basis for the action, setting forth a list of specific findings as to defendant’s objectionable behavior.” (Id.)

Here, in contrast, while the Board’s September 5, 2006 letter gave defendants a detailed list of charges, the Board has not produced a written resolution. Moreover, while the July 11, 2007 notice of termination states that the Board voted to terminate the tenancy on the basis of “objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, repeated after written notice from Lessor,” the notice of termination does not set forth any specific factual findings made by the Board in support of its conclusion that the conduct was objectionable. The Board thus wholly fails to identify the charges that it found to be sustained.

Given the deference that the court must accord to a Board decision, the Board must at a minimum state the factual basis, and not a bare conclusion, in support of its decision to terminate a tenancy based on objectionable conduct. Unless a factual basis is stated, the court will not be in a position to serve as more than a rubber stamp; nor will the shareholder have a fair opportunity to assess whether the decision was made “with good faith and the exercise of honest judgment.” (See Pullman, 100 NY2d at 157.) The court accordingly holds that this action is not maintainable based on the Board decision on which the July 11, 2007 notice of termination is predicated.


In view of this holding, the court makes no findings as to the sufficiency of the evidence presented to the Board about defendants’ son’s conduct or as to defendants’ other defenses.

Plaintiff’s complaint pleads its cause of action for ejectment based solely on the Board’s

decision. The complaint does not, in the alternative, plead a common law cause of action seeking a court determination as to whether defendants' conduct was objectionable. This action will therefore be dismissed without prejudice to further proceedings by the Board against defendants. However, in light of the importance of the competing individual and collective interests – the grave consequences an eviction would have for defendants on the one hand, and the seriousness of the charges on the other – the parties are urged to attempt to reach a negotiated or mediated settlement of their dispute.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 6, 2008

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK