

**Banker v 14 Horatio St. Apts. Corp.**

2009 NY Slip Op 30423(U)

February 20, 2009

Supreme Court, New York County

Docket Number: 604271/2005

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 604271/2005  
**BANKER, BROOKS**  
 VS.  
**14 HORATIO STREET APARTMENTS**  
 SEQUENCE NUMBER : 005  
 SUMMARY JUDGMENT

INDEX NO. 604271/2005  
 MOTION DATE 1-7-09  
 MOTION SEQ. NO. 005  
 MOTION CAL. NO. 2

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
pl attached

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

FACTORS TO BE TAKEN IN CONSIDERATION WITH THE ABOVE DECISION AND ORDER.

**FILED**  
 FEB 26 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 2/20/09 \_\_\_\_\_ SAF \_\_\_\_\_  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

AT BENCH TRIAL, PT. 12 4/20/09 6:30 AM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
BROOKS BANKER,

Plaintiff,

-against-

14 HORATIO STREET APARTMENTS CORP.,

Defendant.  
-----X

Index Number 604271/2005

Submission Date 1/7/09

Mot. Seq. Nos. 005 & 006

**DECISION & ORDER**

**Appearances:**    **For Plaintiff :**  
Lawlor & Rella LLP  
By: Todd Lawlor, Esq.  
      Anthony Rella, Esq.  
551 Fifth Avenue, 28<sup>th</sup> Floor  
New York, New York 10176  
212-875-7921

**For Defendants:**  
Toback, Bernstein, & Reiss LLP  
By: Brian K. Bernstein, Esq.  
      Connie Milligan, Esq.  
15 West 44<sup>th</sup> Street, 12<sup>th</sup> Floor  
New York, New York 10036  
212-869-2300

Papers considered in review of this motion and cross-motion for summary judgment:

<u>Seq. 005</u>	<b>Papers</b>	<b>Numbered</b>
	Affid. in Supp. of Motion for Summary Judgment	1
	Memorandum in Support	2
	Memorandum in Opposition	3
	Affidavit in Opposition	4
	Reply Affid. in Support	5
<u>Seq. 006</u>	Affirm. in Supp. of Motion for Summary Judgment	1
	Affid. in Opposit. to Partial Motion for Summ. Judgment	2
	Reply Affirmation	3

**FILED**  
FEB 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**PAUL G. FEINMAN, J.:**

In motion sequence number 005, defendant 14 Horatio Street Apartments Corporation ("the co-op") moves pursuant to CPLR 3212 for : (1) summary judgment declaring that plaintiff Banker's alterations and installation of a washer and dryer violate the co-op's prohibition on washers and dryers, the Offering Plan and Proprietary Lease; (2) an injunction preventing plaintiff and his subtenants in apartment 15H from operating the washer and dryer and directing plaintiff to remove such equipment; and (3) an award of attorney's fees. Plaintiff Banker opposes the motion, and in motion sequence number 006, cross-moves for partial summary judgment on

the issue of the legality of the installation of the clothes dryer alone. The two motions are joined for purposes of decision.

Plaintiff Banker received the co-op shares allocated to apartment 15H at 14 Horatio Street, New York, New York in a divorce property settlement finalized in late 1994. The apartment was occupied by subtenants eligible for rent stabilization. In March of 2005, plaintiff sub-leased the apartment to a new tenant. As part of up-scaling the apartment, plaintiff installed a washer and a dryer and performed some alteration work to fit the appliances into the plumbing system. Defendant co-op and its managing agent, Key Real Estate Associates, strenuously objected in writing, by e-mail, and orally to plaintiff's new sublease and the installation of the washer and dryer in the apartment. The co-op complained that plaintiff did not secure the co-op's consent to the sublease, failed to sign and comply with the Alteration Agreement, and violated the co-op's allegedly long-established prohibition against individual washers and dryers. Plaintiff maintained that he was a holder of "unsold shares" and, as such, was freed by the Offering Plan, dated November 24, 1982, and the Primary Lease, dated January 5, 1984, from complying with the co-op's demands, which were applicable only to shareholders. The co-op refused to recognize plaintiff as a holder of unsold shares. Plaintiff brought the present suit in December of 2005, which, in part, seeks a judgment declaring his status as a holder of unsold shares, with attendant rights to sublet and renovate the apartment without the co-op's consent. The co-op counterclaimed for breach of the lease. By Decision and Order of the previously assigned justice, dated February 22, 2007, plaintiff was declared to be a holder of unsold shares allocated to apartment 15H; the court indicated that this declaration was without prejudice to the parties' rights to litigate the remainder of the issues in the case, including the issue of the installation of

the washer and dryer (Banker's Aff. Ex. A).

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. (*Daliendo v Johnson*, 147 AD2d 312, 317 [2<sup>nd</sup> Dept 1989]). Defendant argues that summary judgment is appropriate because the business judgment rule makes the co-op's decision impervious to judicial second-guessing. Plaintiff counters that the business judgment rule is inapplicable and that he is entitled to partial summary judgment under the applicable reasonableness test.

The business judgment rule precludes judicial review of the co-op board's decisions so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith (*Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). The business judgment rule is not applicable when documents setting out the relationship between shareholders and the co-op expressly require the co-op's actions not be unreasonable (*Ludwig et al. v 25 Plaza Tenants Corp.*, 184 AD2d 623 [2<sup>nd</sup> Dept 1992]; see also *Rosenthal et al. v One Hudson Park, Inc.*, 269 AD2d 144, 145 [1<sup>st</sup> Dept 2000]). In the present case, the co-op is subject to such an express requirement. Paragraphs 38[m] and 21[a] of the Proprietary Lease and Section N[3] of the Offering Plan allow the holder of unsold shares to make any alteration, enclosure, or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, if any, electrical conduits, wiring or outlets, plumbing fixtures, equipment, or any other installation or facility without the co-op's written consent, "subject only to the consent of [the co-op's] then

managing agent, which shall not be unreasonably withheld or delayed.” Installing and connecting a washer and dryer to the plumbing and electrical systems thus fall within the type of action that requires the co-op to either agree or proffer a reasonable withholding of consent. Therefore, defendant’s decision to prohibit plaintiff’s installation of the washing and drying machines is not shielded by the business judgment rule and must be scrutinized by the Court utilizing a reasonableness standard.<sup>1</sup>

According to *Levandusky*, the reasonableness test is twofold. First, unlike the business judgment rule, which places on the shareholder the burden to demonstrate the breach of the board’s fiduciary duty, reasonableness review requires the board to demonstrate that its decision was reasonable (*Levandusky*, 75 NY2d at 539). Second, although a certain amount of deference may be accorded to board decisions, the court itself must evaluate the merits or wisdom of the board’s decision (*Id.*). To establish that its decision was reasonable in this instance, defendant’s affirmation alleges a long-standing policy against use of washing machines by residents. Defendant also proffers a list of reasons for such policy, including the potential for flooding, noise, the overloading of the building’s plumbing system, the creation of suds zones and the co-

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<sup>1</sup>Defendant argues that since Paragraph 18[c] of the Proprietary Lease reserves with the co-op the sole judgment to disallow residents the use of any appliances it deems damaging to the building or the quality of living, the business judgment rule is the appropriate standard. Defendant overlooks the fact that the Offering Plan and the Proprietary Lease provide greater rights and more decisionmaking independence to holders of unsold shares than to shareholders. Paragraph 38 of the Proprietary Lease delineates this divergence. Paragraph 38[b] allows the holder of unsold shares to sublet without consent of the co-op, while shareholders may be denied consent for no reason. Paragraph 38[c] reserves with the holder of unsold shares the right to block any changes in terms and conditions of the Primary Lease that affects the holder’s rights, while the rights of the shareholders can be modified by approval of 75% of the co-op’s shares. Paragraph 38[h][i] relieves the holder of the duty owed by shareholders to compensate the co-op for the legal fees related to subletting. Paragraph 38[l] allows the holder to subdivide and combine apartments without the co-op’s consent, while shareholders may do so only upon the co-op’s written permission. In addition, pursuant to Paragraphs 21[a] and 38[m], unlike shareholders, the holder is not required to sign the Alteration Agreement, which outlines conditions and requirements for doing any work or adding fixtures in apartments.

op's ability to obtain contracts for washing machine service in the basement. Defendant further maintains that plaintiff failed to comply with state and local construction laws by failing to obtain requisite work permits. However, upon a careful review of the record, the Court finds the co-op's arguments unpersuasive.

First, there is no evidence of a long-standing written prohibition against individual washers and dryers. There is no such prohibition expressed in either the Offering Plan, the Proprietary Lease or the House Rules. On the contrary, the Proprietary Lease impliedly allows their use, because Paragraphs 18[a] and 21[c] mention a washing machine in a long list of items which the residents have the responsibility to maintain and which become fixtures if they cannot be removed without making structural alteration inside their apartments. In addition, the co-op's Alteration Agreement was amended by the co-op to include an express prohibition against washing machines only after the present dispute arose, which underscores its prior absence.<sup>2</sup>

Second, the record is also devoid of any support for or credible explanation of all the listed reasons for the prohibition. Defendant failed to proffer an expert's affidavit supporting or explaining the need for the blanket prohibition. An unsworn letter from Fred Smith Plumbing and Heating Company, dated May 25, 2005, which defendant offers in its submissions does not satisfy defendant's burden on the summary judgment motion (Def. Reply Aff. Ex. A). In addition, the parties' e-mail letters raise an issue as to the reasonableness of defendant's action, evidenced by defendant's summary refusal to take into account plaintiff's description of the

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<sup>2</sup> The co-op offered a 1998 version of the Alteration Agreement, the print of which was almost unintelligible. Paragraph 24 of that version allows use of washers and dryers upon written consent of the co-op. (Def. Reply Aff. Ex. B) As noted in footnote 1, under the Proprietary Lease, plaintiff as a holder of unsold shares is not required to enter into the Alteration Agreement and is not bound by its terms.

efficiency of the imported washer selected by him (Kob's Aff. Ex. L). Defendant also fails to show that it has considered the number and ratio of apartments in the co-op held by the holders of unsold shares. Since the co-op may, without reason, deny common shareholders use of individual washers and dryers, there is an unknown aggregate effect of the use of washing machines by the holders of unsold shares. This leads the Court to conclude that summary judgment is not appropriate here, because there remains an issue of fact as to whether the co-op acted reasonably in prohibiting installation of plaintiff's washer and dryer and the attendant structural alterations in the apartment 15H.

Third, as to the issue of plaintiff's compliance with state and local laws, the Court finds the record to be woefully incomplete. Presently the record contains only the project invoices indicating that all contractors were properly licensed (Kob's Aff. Ex. G, H). Defendant does not offer an analysis of the relevant state and city regulations alleged to have been violated. Defendant's conclusory allegations that no permits were secured prior to the commencement of the work and that no project plans were filed with NYC Department of Buildings, raised for the first time in its reply papers although alleged in its answer, do raise a triable issue, but are alone insufficient to entitle defendant to the judgment as a matter of law. Therefore, defendant's motion for summary judgment is denied. Inasmuch as a trial is required on these points, the Court also cannot summarily grant defendant's remaining requests for an injunction and attorney's fees.

Turning to the cross-motion, plaintiff argues that because a dryer does not use water and is not connected to the plumbing system, the co-op may not reasonably withhold consent to its installation. Defendant contends that the substantial amount of alteration work done to

accommodate both the washer and dryer, as evidenced by the project invoices, raises a triable issue as to the dryer's effect on the building's overall facilities. Given that the washer and dryer were installed as a set, the determination of reasonableness of the co-op's refusal should apply equally to the installation of both the washer and the dryer. Therefore, plaintiff's cross-motion for partial summary judgment is denied. Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED that the parties shall appear for a bench trial in Part 12, Room 212, 60 Centre Street, New York NY 10007 on April 20, 2009 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: February 20, 2009  
New York, New York

  
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J.S.C.

**FILED**  
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