

Boland v 70-80 Gibson Blvd. Owners, Inc.

2009 NY Slip Op 33004(U)

December 15, 2009

Supreme Court, Nassau County

Docket Number: 14916/07

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

**PRESENT: HON. DANIEL MARTIN,
Acting Supreme Court Justic**

**TRIAL/IAS PART 30
NASSAU COUNTY**

JOHN F. BOLAND and BARBARA BOLAND,

Plaintiffs,

- against -

**Index No.: 14916/07
Motion Seq. Nos.: 1, 2, 3**

**70-80 GIBSON BOULEVARD OWNERS, INC.,
LARRY BLUMENSTEIN, ANGELA TREZZA and
THE BOARD OF DIRECTORS OF
70-80 GIBSON BOULEVARD OWNERS, INC.,**

Defendants.

The following papers have been read on this motion:

	Papers Numbered
(#1) Defendants' Motion for Summary Judgment	1
(#2) Plaintiff's Cross-Motion for Summary Judgment	2
(#3) Defendants' Cross-Motion To Supplement Bill of Particulars	3

The Defendants, 70-80 Gibson Boulevard Owners, Inc. ("Co-op"), Larry Blumenstein, Angela Trezza and The Board of Directors of 70-80 Gibson Boulevard Owners, Inc., move (Motion #1) for an order pursuant to CPLR §3212 granting them summary judgment, dismissing the complaint in its entirety and declaring that the Co-op's increase in maintenance fees and assessments from 2006 to the present were appropriate and that the Co-op's sublet policy is valid, as well as, an award of costs and attorney's fees or, in the alternative, an order pursuant to CPLR §3212(g) granting the Defendants, Angela Trezza and Larry Blumenstein, summary judgment and dismissing the complaint against them is granted to the extent provided herein.

By separate motion the Plaintiffs cross-moved (Motion #2) for an order pursuant to CPLR §3212 granting them summary judgment. The Defendants cross-moved (Motion #3) for an order pursuant to CPLR §3042(b) permitting them to supplement their Bill of Particulars regarding their affirmative defenses of equitable estoppel and waiver. The Court notes that the attorneys have submitted material to the Court post submission date. None of those items have been considered in the rendering of this decision.

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Although not so explicitly pled, in actuality the complaint seeks declaratory relief. As and for their first cause of action, the Plaintiffs, shareholders in the Defendant Co-op, seek a Judicial declaration of their right to review the Co-op's books and records, in particular, with reference to a late tax payment in 2005. As and for their second cause of action, the Plaintiffs, in essence, seek a declaration indicating that the Co-op Board's imposition of sublet fees along with alleged exemptions was improper. As and for their third cause of action, they seek a Judicial declaration that the Co-op Board's accounting practices which resulted in an increase in maintenance fees and an assessment from 2005 to date was improper. Plaintiffs, as an incident to the declaratory relief sought, seek to recover assessment and maintenance increases and sublease fees paid since 2005. As and for their fourth cause of action, they seek to recover attorney's fees and to obtain injunctive relief enjoining the improper conduct of the Defendants. In addition, although not advanced in their pleadings, in their Supplemental Response to Interrogatories, the Plaintiffs seek declaratory relief regarding Plaintiff John Boland's entitlement to free parking when he was a member of the Co-op Board and to enjoin any attempt by the Co-op to collect any such fees in the future, as well as reimbursement of parking fees arrears allegedly paid by non-party prior Board member Melinda Sheaff.

The Co-op has served an answer denying the material assertions of the complaint. The Co-op has counterclaimed to recover their costs, expenses and attorney's fees incurred as a result of this action. The Defendants asserted several affirmative defenses, including, *inter alia*, the defense of equitable estoppel and waiver.

The Defendants seek summary judgment dismissing the complaint. In the alternative, the individual Defendant Board members, Larry Blumenstein and Angela Trezza, seek summary judgment dismissing the complaint against them.

The Plaintiffs' Notice of Motion indicates that only summary judgment relief is sought. However, in their Affirmation in Support, it appears that they seek to recover on the unpled claims set forth above and to strike the Defendants' Affirmative Defenses of equitable estoppel and waiver based on the Defendants failure to respond to their demand for a Bill of Particulars.

In the event that they are denied summary judgment, the Defendants have cross-moved for an order pursuant to CPLR §3042(b) to allow them to supplement their Bill of Particulars with respect to their Affirmative Defenses of equitable estoppel and waiver.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing

requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, *supra*, at p. 74; Alvarez v Prospect Hosp., *supra*; Winegrad v New York Univ. Med. Ctr., *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

An owner of a Co-op holds shares attendant to his or her unit and is a tenant to a Proprietary Lease of which the Co-op is the lessor. The parties' relationship is governed by their Proprietary Lease and the Co-op's Bylaws. The Co-op Board which is elected by the shareholders at their annual meetings manages the Co-op's affairs. Here, the Co-op Board is responsible for maintaining and managing the premises which includes keeping the public portions clean and properly lighted and heated and to repair those portions of the Premises which are not required to be maintained by the Shareholder-Tenant; to supply cold water, heat and such other services that are required by law or as the Board may determine; and, to provide all other services and repairs which are required of the Co-op pursuant to the Proprietary Lease and By-Laws. The Co-op Board is also responsible for paying the Co-op's monthly mortgage as well as real property taxes. These costs are financed by maintenance and other fees paid by the shareholders/tenants. The Board has sole power to set the maintenance fees each year as well as to levy special assessments if it believes that additional money is needed to pay the Co-op's expenses, including emergency repairs.

"[A] cooperative corporation's promulgation and implementation of by-laws, proprietary lease provisions and policies is governed by the 'business judgment rule,' which limits a court's inquiry to whether the challenged actions were (1) authorized, (2) taken in good faith and (3) in furtherance of the corporation's legitimate interests." 1050 Tenants Corp., Lapidus, 12 Misc3d 1196(A)(Supreme Court New York County), *aff'd*, 39 AD3d 379 (1st Dept. 2007), *lv den.* 9 NY3d 807 (2007), citing Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538 (1998). The business judgment rule applies in the absence of claims of fraud, self-dealing, unconscionability or other misconduct. Levine v Greene, 57 AD3d 627, 628 (2nd Dept. 2008), citing Gillman v Pebble Cove Home Owners Ass'n., Inc., 154 AD2d 508, 508-509 (2nd Dept. 1989). The business judgment rule protects a Board's adoption of a budget, too. Levine v Greene, *supra*, at p. 628. Board members are also protected by the business judgment rule. Levine v Greene, *supra*, at p. 627, citing Matter of Levandusky v One Fifth Av. Apt. Corp., *supra*. This "rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" Matter of Levandusky v One Fifth Ave. Apt. Corp., *supra*, at p. 537-538, quoting Auerbach v Bennett, 47 NY2d 619, 629 (1979). "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 Av. Apt.

Corp., supra, at p. 538 quoting Pollitz v Wabash R.R. Co., 207 N.Y. 113, 124 (1912). Judicial scrutiny only lies when "the Board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further corporate purposes or (3) in bad faith." 40 W. 67th St. v Pullman, 100 NY2d 147, 155 (2003).

"The relationship between the shareholder/lessees of a cooperative corporation and the corporation is determined by the certificate of incorporation, the corporation's bylaws and the proprietary lease under which a particular apartment is occupied, subject, of course, to applicable statutory and decisional law." FeBland v Two Trees Mgt. Co., 66 NY2d 556, 563 (1985); see also, Kralik v 239 East 79th Street Owners Corp., 5 NY3d 54, 59 (2005). And, the usual rules of contract interpretation apply. Kralik v 239 East 79th Street Owners Corp., supra, at p. 59 citing FeBland v Two Trees Mgt. Co., supra, at p. 563; see also, Consolidated Resources, LLC v 210-220-230 Owners' Corp., 59 AD3d 579, 581 (2nd Dept. 2009).

The Plaintiffs' complaint cannot be construed as derivative as the Plaintiffs have not alleged, let alone established, their compliance with the pre-requisites required by Business Corporation Law § 626, i.e., that a demand be made on the Board, nor have they alleged the elements necessary to excuse that demand, to wit: that (1) a majority of the directors is interested in the challenged transaction, (2) that the directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate, or (3) that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment. See, Marx v Akers, 88 NY2d 189 (1996). There are no allegations that the individual defendant Board members acted beyond their authority nor is there any evidence of personal benefit or self dealing. There are no grounds for their liability. Bernstein v Starrett City, 303 AD2d 530 (2nd Dept. 2003). The complaint against the individual Defendants is dismissed in its entirety.

The relief sought regarding parking fees is denied as such issue was never set forth as a cause of action.

The Plaintiffs' first cause of action seeking the production of records has been rendered moot. Ultimately, following the commencement of this action, the Plaintiffs were afforded access to the books and records. As to the costs incurred, the parties' Proprietary Lease provides:

REIMBURSEMENT OF LESSOR'S EXPENSES:

If the lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys fees and disbursements, shall be paid to the Lessor, on demand, as

additional rent."

Real Property Law § 234 provides that where, like here, a lease of residential property provides that the landlord may recover attorney's fees and/or expenses incurred in an action or proceeding as a result of a tenant's failure to perform any covenant or agreement contained in such lease, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorney's fees and/or expenses incurred by the tenant "as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease. . . . and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord" "[I]t is not the ultimate relief that determines whether or not a dispute arises out of a lease within the meaning of section 234 . . . it is determined by whether the litigation is based upon a breach of the terms of the lease. . . ." Jerulee Co. v Sanchez, 43 AD3d 328 (1st Dept. 2007).

While the Business Corporation Law may restrict a shareholder's right to review of the minutes of shareholders' meetings and the records of shareholders (Business Corporation Law § 624[b]) and the right to an annual balance sheet reflecting profits and losses (Business Corporation Law §624[e]), here, the parties' Proprietary Lease provides the shareholders with broader rights. The parties' Proprietary Lease provides:

The Lessor shall keep full and correct books of account at its principal office or at such other place as the Directors may from time to time determine, and the same shall be open during all reasonable hours to inspection by the Lessee or a representative of the Lessee. The Lessor shall deliver to the Lessee within a reasonable time after the end of each fiscal year an annual report of corporate financial affairs, including a balance sheet and a statement of income and expenses, certified by an independent certified public accountant.

The Co-op is required to "keep full and correct books of account . . . [which] shall be open during all reasonable hours to inspection by the Lessee or a representative of the Lessee." And, while Business Corporation Law § 624(c) may justify a Co-op's refusal to produce the records if the shareholder refuses to execute a proper affidavit, the Co-op must request one. The Plaintiffs have clearly established—without reference to Boland's unacceptable affirmation (See, LaRusso v Katz, 30 AD3d 240 [1st Dept. 2006])—that pursuant to their Proprietary Lease, they were entitled to review the Co-op's books and records and that it was necessary to bring suit in order to obtain that review. Indeed, assuming, *arguendo*, that the Co-op Board was within its rights in seeking a good faith affidavit, one was only first requested via the Co-op's Affirmative Defense to the Plaintiffs' first cause of action. Accordingly, pursuant to Section 234 of the Real Property Law, the Plaintiffs are entitled to recover the reasonable attorneys' fees and costs incurred in enforcing their contractual right in their proprietary lease to review the Co-op's books and records. See, Dinicu v Graf Studios Corp., 257 AD2d 218 (1st Dept.

1999); Meason v Greenwich and Perry Street Housing Corp., 8 Misc3d 50 (Appellate Term, 1st Dept. 2005), aff'd as mod., 42 AD3d 366 (1st Dept. 2007), lv. dismissed, 9 NY3d 946 (2007). This court will not elevate form over substance by denying this relief because it has been sought in an action as opposed to a special proceeding. The Defendants' reliance on Peck v Wolf (157 AD2d 535 [1st Dept. 1990], app. den. 75 NY2d 709 [1999]) in seeking to defeat this claim is misplaced. Real Property Law § 234 did not apply in that case because the parties' lease obligations were not at issue.

Via their second cause of action, the Plaintiffs seek reimbursement of all assessments and maintenance increases since 2005 to the present on the grounds that the Co-op Board failed to set "cash requirements before imposing them." At his examination-before-trial, Plaintiff John Boland testified that the Co-op Board's obligation to set cash requirements is synonymous with its obligation to prepare and provide budgets and that since the Board failed to do that, it lacked the authority to increase assessments or maintenance fees. Essentially, the Plaintiffs maintain that in violation of their Proprietary Lease and the By-Laws, the Defendant Co-op Board has repeatedly increased maintenance fees without determining cash requirements, i.e., adopting a budget.

The Co-op's By-Laws require the Board of Directors to "**from time to time** determine the cash requirements . . . and fix the terms and manner of payment of rent under the corporation's proprietary leases." The By-Laws also provide that "[t]he Board of Directors shall have discretionary power to prescribe the manner of maintaining and operating the Property of the Corporation and to determine the cash requirements of the Corporation to be paid as aforesaid by the shareholder-tenants under their respective proprietary leases" and that "every such determination by the Board of Directors shall be final and conclusive as to all shareholder-tenants and any expenditures made by the Corporation's officers or its agent under the direction or with the approval of the Board of Directors of the corporation shall, as against the shareholder-tenants, be deemed necessarily and properly made for such purpose." Similarly, the Proprietary Lease defines "cash requirements" as "the estimated amount in cash which the [Board of] Directors shall **from time to time** in its judgment determine to be necessary or proper for the [Co-operative]'s operation, maintenance, care, alteration and improvement of the corporate property . . . ; the creation of such reserve for contingencies as it may deem proper; the payment of, or the establishment of a reserve for, any rentals and other sums payable under any ground leases. . . ; [and,] the payment of obligations, liabilities or expenses incurred or to be incurred (emphasis added) . . ." It also allows the Co-op's Board to modify by increasing or diminishing the amount previously determined to be the cash requirement. And, again, all determinations of cash requirements are conclusive to all lessees. Furthermore, pursuant to the parties' Proprietary Lease, the Co-op Board's failure to determine new cash requirements in any year or portion thereof cannot be deemed a waiver or modification of its rights or release the lessees from their obligations. Should the Co-op Board fail to make a cash requirement determination in a new year, the Proprietary Lease provides for maintenance fees based upon the cash requirements previously

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determined to continue until such time as a new cash requirement is determined. Retroactive increases in maintenance are impliedly prohibited.

Before the Co-op Board increases the maintenance fees, all that is required by the Co-op's By-Laws and the parties' Proprietary Lease is that the Co-op Board determine cash requirements, which, via its Co-Op Board meetings' minutes and its Certified Public Accountant, the Board has established it did. While the Plaintiffs repeatedly fault the Co-op Board for not preparing and distributing a budget before increasing maintenance fees, the adoption of a budget is not a prerequisite required by the Co-op's By-Laws or the parties' Proprietary Lease for increasing maintenance or imposing assessments. While "cash requirements" and budget are analogous, they are not, as the Plaintiffs maintain, synonymous. The Plaintiffs' reliance on past practice is similarly unavailing. That hardly makes it a requirement: An amendment to the Co-op's By-Laws and/or the parties' Proprietary Lease would be required to make the adoption of a budget a *quid pro quo* to increasing maintenance and/or imposing assessments.

The Plaintiffs challenge to sublet fees in their third cause of action is similarly without merit. The cooperative's By-Laws afford the Co-op Board the authority before an assignment, sublease or reallocation of shares "to fix a reasonable fee to cover actual expenses and attorney's fees as a service fee . . . **and such other conditions as it may determine**, in connection with each proposed assignment or sublet (emphasis added)." The Proprietary Lease similarly provides that "consent to subletting may be subject to such conditions as the Directors . . . may impose, except that directors (acting as a Board) may not impose unreasonable conditions." "Other conditions" have been interpreted to include sublet fees. Rackowsky v Excelsior 57th Corp., 167 Misc2d 476 (City Civ. Ct. 1995); see also, 445/86 Owners Corp. v Haydon, 300 AD2d 87 (1st Dept. 2002); Jones v Southgate Owners Corp., 289 AD2d 73 (1st Dept. 2001); 19 NY Jur 2d Condominiums, § 155. And, sublet fees do not violate Business Corporation Law § 501(c). McCabe v Hoffman, 138 AD2d 287 (1st Dept. 1998), 19A NY Jur2d, Condominiums, § 155. The plaintiffs' reliance on DeSoignies v Cornasek House Tenants' Corp., 21 AD3d 715 (1st Dept. 2005); Zimiles v Hotel DesArtistes, 216 AD2d 45 (1st Dept. 1995) and Bailey v 800 Grand Concourse Owners, 199 AD2d 1 (1st Dept. 1993) is misplaced. While the sublet fee was found to be improper in those cases, the parties' leases in those cases did not afford the Board the power to set a sublet fee with respect to "such other conditions as it may determine," as the Proprietary Lease does here. As for the defendants' alleged failure to collect sublet fees when units are inhabited by family members, the Co-op has established that it has adopted a universal policy imposing that fee regardless of who the sublessees are.

The Co-op has established that pursuant to their Proprietary Lease, the Plaintiffs are liable for its reasonable costs, expense and attorney's fees incurred in defending the second and third causes of action. Contrary to the Plaintiffs' opposition, the Co-op is not limited to recovering attorney's fees where the lessee has been in default. It is entitled to recover attorney's fees incurred "in defending or asserting a counterclaim in any action or proceeding brought by the Lessee . . ." Nevertheless, in view of the merit to the first cause of action, and the Plaintiffs' entitlement to attorney's fees on that cause of action,

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the Co-op is not entitled to the attorney's fees incurred in defending that cause of action. The Court notes that to impose the limitation advanced by the Plaintiffs regarding the right to attorney's fees pursuant to the proprietary lease, the plaintiffs' claim for attorney's fees would fail, as well. Indeed, the Co-op acknowledges that it seeks attorney's fees only with respect to the Plaintiffs' claims which are successfully defended against and dismissed and that its entitlement to such fees is dependent upon the success or lack thereof of the Plaintiffs' claims. This court respectfully disagrees with the interpretations of identical clauses as limiting the Lesser's right to attorney's fees to where the tenant was in default. See, Mogulescu v 255 West 98th Street Owners Corp., 135 AD2d 32 (1st Dept. 1988); Dupuis v 424 East 77th Owners corp., 32 AD3d 720 (1st Dept. 2006).


In conclusion, the Court concludes as follows:

- (1) That the shareholders have the right to review the Co-op's books of account which the Directors are obliged to keep open during all reasonable hours.
- (2) That the Co-op Board's increase in maintenance fees has been and is appropriately based upon its setting cash requirements under the Co-op's By-Laws and the parties' Proprietary Lease without the adoption of a budget and that the Plaintiffs are not entitled to refunds.
- (3) That the Co-op Board's collection of a \$25.00 monthly sublet fee has been and is appropriate under the Co-op's By-Laws and the parties' Proprietary Lease.

The parties are to appear on January 29, 2010 at 9:30 a.m. or such later date as may be agreed upon by the parties with the Court's consent for a hearing to determine the costs, expenses and attorney's fees both are entitled to. Except as set forth above, the Plaintiffs are entitled to enter a declaratory judgment. The failure to settle such judgment shall be deemed an abandonment of the right to such relief.

Settle judgment containing declaration of rights.

SO ORDERED.


A.J.S.C.

Dated: December 15, 2009