

**Glasser Family Ltd. Partnership II v Board of Mgrs. of  
the Lido Beach Towers Condominium**

2010 NY Slip Op 31109(U)

April 22, 2010

Supreme Court, Nassau County

Docket Number: 6358/2009

Judge: R. Bruce Cozzens

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. R. BRUCE COZZENS, JR.  
Justice.

TRIAL/IAS PART 6  
NASSAU COUNTY

\_\_\_\_\_  
THE GLASSER FAMILY LIMITED PARTNERSHIP II,  
Plaintiff(s),

-against-

THE BOARD OF MANAGERS OF THE LIDO BEACH  
TOWERS CONDOMINIUM,  
Defendant(s).

MOTION #004, 005  
INDEX #6358/2009  
MOTION DATE:  
February 4, 2010

The following papers read on this motion:

|                             |   |
|-----------------------------|---|
| Notice of Motion.....       | 1 |
| Answering Affidavits.....   | 2 |
| Notice of Cross Motion..... | 1 |
| Briefs: Plaintiff.....      | 1 |
| Defendant.....              | 2 |

Motion pursuant to CPLR 3215 by plaintiff Glasser Family Limited Partnership for entry of a default judgment against defendant The Board of Managers of The Lido Beach Towers Condominium (the Board), and to withdraw the second and eleventh causes of the second amended complaint, is granted to the extent that the second and eleventh causes of action of the second amended complaint are hereby stricken.

Plaintiff's request for entry of a default judgment against defendant is denied given the parties' attempt - but failure - to agree to a briefing schedule after defendant agreed to accept the second amended complaint.

Cross motion pursuant to CPLR 3211(a)(7) by defendant Board to dismiss plaintiff's second amended complaint is determined as hereinafter provided.

Plaintiff, the owner of Unit 6R in the Lido Beach Towers Condominium located at 2 Richmond Road, Lido Beach, New York seeks, *inter alia*, to recover damages predicated on defendant Board's alleged breach of fiduciary duty and breach of the Condominium's by-laws. Generally, the amended complaint alleges that assessments have been imposed upon unit owners as and for various work on the Condominium, including replacement of the building's 184 terraces, in violation of the Condominium by-laws and in violation of the Board's fiduciary duty to unit owners. Plaintiff also alleges that, although it was not delinquent in the payment of monthly maintenance charges, defendant Board enacted rule number 46 whereby plaintiff's

parking privileges were suspended and use of the pool, beach, health club, tennis courts, etc. was restricted. That rule was enacted, according to plaintiff, in retaliation for plaintiff's challenge to the alleged unauthorized \$22,000,000 assessment against unit owners.

In opposition to plaintiff's motion for default judgment, defendant City of Long Beach has cross moved to dismiss plaintiff's second amended complaint predicated on the grounds that the action is both untimely and barred by the business judgment rule. The Court notes that a prior Article 78 proceeding commenced by The Glasser Family Limited Partnership II against The Board of Managers of The Lido Beach Towers Condominium [index number 6259/09] was dismissed by order of the Hon. Antonio I. Brandveen dated December 17, 2009. Petitioner's request to annul the February 23, 2009 vote approving an additional \$2,600,000 assessment was denied by Hon. Judge Brandveen based on the finding that "the actions taken by [the Board] were authorized, taken in good faith, and in furtherance of the legitimate interests of the respondent condominium." As such, plaintiff is precluded in this action from further litigating the issue of the 2009 assessment. *Kaufman v Eli Lily and Co.*, 65 NY2d 449, 455 [1985].

Notwithstanding defendant Board's argument to the contrary, plaintiff's claims sounding in breach of contract, and breach of fiduciary duty are not barred by the four month statute of limitations governing commencement of an Article 78 proceeding and could not have properly been asserted in such a proceeding.

The creation and administration of condominiums are governed by the provisions of Real Property Law Article 9-B (§ 339-d et seq.). A condominium's by-laws constitute a contract with the unit owners pursuant to which the affairs of the condominium are conducted. *Schoninger v Yardarm Beach Homeowners Ass'n, Inc.*, 134 AD2d 1, 6 [2<sup>nd</sup> Dept. 1987]; *Murphy v State*, 14 AD3d 127, 122 [2<sup>nd</sup> Dept. 2004]. Thus, the provisions of the by-laws control whether a condominium board has authority to act in the manner it does. A board is not at liberty to act in ways that are contrary to the provisions contained in the by-laws. *Kaung v Board of Managers of Biltmore Towers Condominium Ass'n*, 70 AD3d 1004 [2<sup>nd</sup> Dept. 2010].

Defendant Board correctly asserts that courts will apply the business judgment rule to protect a condominium board from attack by unit owners where the board is found to have acted in good faith. *Matter of Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 537-538 [1990]. *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 8 [1<sup>st</sup> Dept. 2006]. When applied to a condominium board, the rule limits judicial inquiry to whether the board acted within the scope of its authority under the by-laws and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing, unconscionability, or other misconduct, the court's inquiry is so limited and the Court will not inquire as to the wisdom or soundness of the business decision. *Perlbinder v Board of Managers of 411 East 53<sup>rd</sup> Street Condominium*, 65 AD3d 985, 989 [1<sup>st</sup> Dept. 2009]; *Helmer v Comito*, 61 AD3d 635, 636 [2<sup>nd</sup> Dept. 2009]; *Quinones v Board of Managers of Regalwalk Condominium I*, 242 AD2d 52, 54 [2<sup>nd</sup> Dept. 1998].

A Court, however, may review “improper decisions, as when the challenger demonstrates that the board’s actions had no legitimate relationship to the welfare of the cooperative [condominium], 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.” *Levandusky v One Fifth Ave. Apartment Corp.*, *supra* at p. 540; *Perlbinder v Board of Managers of 411 East 53<sup>rd</sup> Street Condominium*, *supra* at p. 989.

Pursuant to the business judgment rule, a unit owner seeking review of a board of managers’ actions has the burden of demonstrating a breach of fiduciary duty through evidence of unlawful discrimination, self dealing or other misconduct by board members, i.e., that the board acted outside the scope of its authority, in a way that did not legitimately further the corporate purpose or in bad faith. *Pelton v 77 Park Avenue Condominium*, *supra* at p. 9. Merely making an unwise, unreasonable or inexpedient decision, however, does not invite judicial review of a board’s decisions.

While defendant Board rightly avers that under the by-laws (Article V § 1) the Board is charged with maintaining, repairing and replacing the common elements of the Condominium, a question exists as to whether the challenged assessments *vis a vis* the replacement of the Condominium’s terrace system, for which plaintiff alleges owner consent was not obtained, were in fact, properly authorized in accordance with article X § 13 which provides as follows;

“Whenever in the judgment of the Board of Managers the Common Elements shall require additions, alterations or improvements costing in excess of ten thousand (\$10,000.00) dollars and the making of such additions, alterations or improvements shall have been approved by vote of more than fifty (50%) of Unit Owners, both, in number of Units and percentage of interest present in person and/or by proxy and voting at a meeting duly held in accordance with these By-Laws, and by the representative, if any, appointed pursuant to Section 5 of Article VI hereof by the holders of mortgages constituting first liens upon Units, the Board of Managers shall proceed with such additions, alterations or improvements and shall assess all Unit Owners for the cost thereof as a Common Charge. Any additions, alterations or improvements costing ten thousand (\$10,000.00) dollars or less may be made by the Board of Managers without approval of the Unit Owners, or the representative of mortgagees of Units, provided that all members of the Board of Managers concur, and the cost thereof shall constitute part of the Common Expenses.”

Accepting as true the allegations of the second amended complaint that defendant Board acted outside the scope of its authority, in bad faith, and according them the benefit of every favorable inference (*Schneider v Hand*, 296 AD2d 454 [2<sup>nd</sup> Dept. 2002]), plaintiff has

adequately pled causes of action against defendant Board for breach of contract and breach of fiduciary duty *vis a vis, inter alia*, the 2007, 2008 special assessments [first and fourteenth causes of action] and retaliatory interference with plaintiff's use of common areas including plaintiff's designated parking spaces [seventh and eighth causes of action].

The third and fourth causes of action seeking damages from an alleged unlawful recording of a lien is untenable given § 339-z of the Real Property Law which provides that:

“[t]he board of managers, on behalf of all unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon . . .”

Both the Condominium's by-laws and § 339-z make clear that owners must pay common charges and the defendant board has the right to file notices of lien for non-payment of common charges. This is not subject to dispute.

The claims asserted in the fifth, sixth and tenth causes of action regarding the threatened interference with plaintiff's parking privileges and use of certain facilities are moot given defendant Board's representation that full access to common areas, facilities and parking spaces has been fully restored.

The facts do not support a claim pursuant to Real Property Law § 234 for recovery of attorneys' fees as plaintiff purports to assert in the ninth cause of action as this is not a summary proceeding between tenant and landlord.

The twelfth and thirteenth causes of action which seek injunctive and declaratory relief with respect to the contested charges are merely duplicative of the breach of contract/breach of fiduciary claims and are, therefore, not viable.


Accordingly, the third through sixth, ninth, tenth, twelfth and thirteenth cause of action are hereby dismissed.

The second and eleventh causes of action have been withdrawn.

The first, seventh, eighth and fourteenth causes of action are continued.

To the extent that any allegations of the second amended complaint relate to actions taken by the defendant Board more than six years prior to commencement of this action, such claims are time barred.

Dated: **APR 22 2010**

  
 J.S.A.  
**ENTERED**

**APR 30 2010**

**NASSAU COUNTY  
 COUNTY CLERK'S OFFICE**