

Hamill v Elmwood Park Homeowners Assn., Inc.

2011 NY Slip Op 31790(U)

June 29, 2011

Supreme Court, Richmond County

Docket Number: 102414/10

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102414/10
Motion No.: 002,003**

**ROBERT HAMILL, Individually and on behalf of
THE BOARD OF MANAGERS OF FOXWOOD
SQUARE CONDOMINIUM VI and all
Unit Owners therein,
THOMAS MOONEY, Individually and on behalf of
FOXWOOD SQUARE CONDOMINIUM I and all
Unit Owners therein, and
DAVID ZEPENICK, Individually and on behalf of
THE BOARD OF MANAGERS OF FOXWOOD
SQUARE CONDOMINIUM IV, and all
Unit Owners therein,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**ELMWOOD PARK HOMEOWNERS ASSOCIATION, INC., and
STATEN ISLAND CONDO MANAGEMENT CORP.,**

Defendants

The following items were considered in the review of the following motion and cross motion..

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Replying Affidavits	3, 4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The defendants move to have this court reconsider the decision and order of this court dated February 17, 2011 which granted the plaintiffs' motion to compel the rescheduling of an election meeting of the Elmwood Park Homeowners Association. The defendants' cross-move to compel the defendants to comply with this court's order dated April 19, 2011 requiring Island Condo Management Corp. to provide Honest Ballot Associates with the names and addresses of all owners entitled to vote at the Elmwood Park Homeowners Association election; as well as for

sanctions. The defendants' motion is denied. The plaintiffs' motion is granted to the extent that Island Condo Management Corp. shall provide the names and address of all owners entitled to vote at the Elmwood Park Homeowners Association.

Facts

On or about November 28, 1977, Elmwood Park, Inc. made a Declaration to develop a residential community. The declaration reads:

NOW, THEREFORE, the Declarant does hereby declare that the Subject Property shall be held, sold, conveyed and occupied subject to the following restrictions, covenants, obligations, easements, and agreements which are for the purpose of protecting the value and desirability of the Subject property and which shall run with such real property, binding every party having any right, title or interest in the Subject Property or any part thereof and binding all heirs, successors and assigns.

The declaration also deals with the creation of an Association to govern the property. At Article IV paragraph 1 the declaration reads:

1. Formation: The Declarant covenants to incorporate under the New York State Not-For-Profit Corporation Law an association having the purpose of exercising the duties, obligations, and functions set forth in this Declaration. The certificate of incorporation and by-laws of the association shall contain such provisions as may be required by this Declaration and such other reasonable provisions, not inconsistent with this Declaration, as may be necessary and proper for the association to carry out its duties, obligations and functions.

The declarations then addresses the subject of this litigation at paragraph 5 of the same Article:

5. Directors: The *certificate of incorporation* shall provide that the

“town house members” shall elect a director or directors and that the “apartment members” shall elect a director or directors of equal number. The *certificate of incorporation* may provide for the directors elected by the members of at least one or more directors, provided that . . . [illegible] constitute more than one-half of the board of directors. The *certificate of incorporation* shall provide that within three months of the issuance of certificate of occupancy for half the town houses and half the apartment buildings in the second stage, elections shall be conducted for a new board of directors. The *certificate of incorporation* shall have the same provisions regarding the third phase. (Emphasis added)

Finally at Article XV the declaration provides “[t]his Declaration may be amended or cancelled *only* with the approval of the City Planning Commission and the Board of Estimate or the agencies succeeding to their jurisdiction and no other approval or consent shall be required from any public body, private person, or legal entity of any kind.” (Emphasis added).

Discussion

“A parcel of real property becomes a condominium and thus is subject to the jurisdiction of the Condominium Act by the filing of a declaration.”¹ The declaration filed by Elmwood Park, Inc. created a condominium that required formation of an association incorporated under the New York State Not-For-Profit Corporation Law to govern the residential units. Contrary to the defendants’ argument the Elmwood Park Homeowners Association, Inc. is governed under the Condominium Act.

Here, the defendants argue that this court overlooked the affidavits of Anthony Cantalupo, Fred Tagliarini, and Martin Filler to the extent that each of these documents stated that there was a written change in the by-laws of the not-for-profit corporation concerning how the board of directors was to be formed. These statements must fail on their face. The clear

¹ *Schoninger v. Yardarm Beach Homeowners Ass’n, Inc.*, 134 AD2d 1, [2d Dept 1987] (citations omitted).

language of the declaration required that the certificate of incorporation for the association created under New York Not-For-Profit Corporation Law shall provide the methodology for the election of directors, not the by-laws of the association. Even assuming that the by-laws of the not-for-profit corporation were properly amended to reflect a new method of election for the board of directors, such an amendment is without any force. The terms of the declaration require that the certificate of incorporation of the not-for-profit corporation must govern the creation of the board of directors, not the by-laws. Furthermore, the certificate of incorporation along with the by-laws of the governing association cannot be inconsistent with the duly filed declaration. Therefore, an amendment to the condominium's declaration was necessary in order to change the method of selecting members of the not-for-profit corporation's board of directors pursuant to the terms of the declaration.

Accordingly, it is hereby:

ORDERED, that the defendants' motion is denied; and it is further

ORDERED, that the plaintiffs' cross-motion is granted to the extent that Island Condo Management Corp. shall provide Honest Ballot Associates with the names and addresses of all unit owners entitled to vote at the Elmwood Park Homeowners Association election by July 15, 2011; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, on **Friday, August 19, 2011 at 11:00 a.m.** for a compliance conference.

ENTER,

DATED: June 29, 2011

Joseph J. Maltese
Justice of the Supreme Court