

**Matter of Cohan v Board of Directors of 700 Shore
Road Waters Edge, Inc.**

2011 NY Slip Op 31857(U)

June 27, 2011

Supreme Court, Nassau County

Docket Number: 18310/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

In the matter of:

The Application of MARLA COHAN,

Index No. 18310/10

Petitioner(s),

**Motion Submitted: 3/22/11
Motion Sequence: 001, 002**

**For a Judgment under Article 78 of the Civil Practice
Law and Rules,**

-against-

**THE BOARD OF DIRECTORS OF 700 SHORE
ROAD WATERS EDGE, INC, JEFFREY S.
GOLDSTEIN a/k/a JEFF GOLDSTEIN, individually
and as President of THE BOARD OF DIRECTORS
OF 700 SHORE WATERS EDGE, INC.,**

Respondent(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....X

Petitioner moves this Court by order to show cause for an Order, pursuant to Article 78, directing respondents to rescind its determination to impose a sublet fine upon petitioner, permanently enjoining respondents from making any future determination regarding the alleged subtenant and imposing additional monthly fines, permanently enjoining respondents

from taking action against petitioner for an alleged noise nuisance, and awarding petitioner punitive damages, costs, and disbursements, including reasonable attorney's fees. Respondent cross-moves to dismiss the petition, and for an Order awarding respondents the sublet fine, and attorney's fees.

Petitioner is the owner of a certain number of shares in respondent 700 Shore Road Waters Edge, Inc. cooperative corporation ("the cooperative"), and a tenant pursuant to a proprietary lease for Apartment 5N located at the cooperative. Petitioner purchased the shares and became a tenant at the cooperative in February 2002. Respondent Goldstein is the cooperative Board's president, having been elected to that position for the past eighteen (18) years.

In or about late 2009, two issues were raised with respect to petitioner and her occupancy of the apartment. One issue concerned the fact that it was alleged by respondents that she was no longer residing in the apartment, but that another individual was residing therein as an alleged illegal subtenant. The other issue concerned noise emanating from petitioner's apartment, about which complaints were made by at least one neighbor residing in the apartment above petitioner's.

Petitioner claims that respondents acted in bad faith and "beyond the scope of [the Board's] authority" in imposing the \$3,000 sublet fine because the individual residing in her apartment with her is her sister, which is allowed by the proprietary lease. Petitioner also contends that she resides in the apartment on a full-time basis. Petitioner asserts that the sublet fine was imposed in the absence of respondents' ability to fine her for the alleged noise nuisance; thus, defendant Board's actions are alleged to be in violation of the "business judgment rule."

On the cross-motion, respondents have submitted, *inter alia*, affidavits from respondent Goldstein, Danny Foceri, vice president of respondent Board, and from the tenants above and below petitioner's apartment regarding the alleged noise nuisance. Respondents contend that they did not violate the "business judgment rule," and that the fine was a proper exercise of the Board's authority, pursuant to an enforceable house rule. In addition, respondents state that they attempted to contact petitioner for a period of approximately six months in order to investigate the occupancy and noise issues, but that petitioner did not respond until advised that the \$3,000 fine would be imposed. Respondents further state that the decision to fine petitioner was made by the Board as a group, during a Board meeting,¹ and that the Board has never met regarding the noise nuisance issue in this case.

¹ Respondents have not provided the minutes of that meeting.

It is undisputed that petitioner and her attorney met with respondent Goldstein prior to the bringing of this petition in an attempt to resolve the issues herein presented, but that such meeting was not productive because of petitioner's "reaction," which "was the result of a buildup of frustration and resentment on her part to what she regards as unfair criticism and treatment directed toward her (and her mother and sister) over a long period of time regarding the noise issue."²

At the outset, the Court finds that the facts in this case are so fully presented in the papers of the respective parties that an answer to the petition does not need to be submitted by respondents, and that no prejudice will result from the failure to require an answer (*Matter of Nassau BOCES Central Council of Teachers v. Board of Cooperative Educational Services of Nassau County*, 63 N.Y.2d 100, 102, 469 N.E.2d 511, 480 N.Y.S.2d 190 [1984]).

CPLR 7803 (3) provides that a court may review "whether a determination was . . . arbitrary and capricious or an abuse of discretion. . ." "Arbitrary action is action without sound basis in reason, and is generally taken without regard to the facts, such that the administrative action is without foundation (*Pell v. Board of Education*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974); see also *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 911 N.E.2d 813, 883 N.Y.S.2d 751 [2009]). Further, a court may not substitute its judgment for that of the board or body it reviews unless the board or body's decision is arbitrary, unreasonable, and thus constitutes an abuse of discretion (*Pell, supra* at 232).

The business judgment rule is a "common law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings" (*40 West 67th Street v. Pullman*, 100 N.Y.2d 147, 153, 790 N.E.2d 1174, 760 N.Y.S.2d 745 [2003]), and it is the proper standard of judicial review when evaluating decisions made by residential cooperative corporations (*Id.* at 149-50). If a board acts within its authority, in good faith, and for the benefit of the cooperative, a board's actions are protected from judicial review pursuant to the business judgment rule (*Romeo v. Barrella*, 82 A.D.3d 1071, 921 N.Y.S.2d 83 (2d Dept., 2011); *Pink v. Half Moon Cooperative Apartments, South, Inc.*, 68 A.D.3d 739, 891 N.Y.S.2d 107 [2d Dept., 2009]).

In this case, it is undisputed that the cooperative's proprietary lease permits an apartment to be occupied as a private dwelling by the lessee, and the lessee's brothers and sisters, among other relatives described in paragraph 14 thereof, without the lessee having to obtain written consent from the lessor (see also *Real Property Law § 235-f [2], [3]*).

²Petitioner's counsel's e-mail to respondent Goldstein dated August 21, 2010, included as Exhibit 3 in petitioner's counsel's affirmation in opposition to the cross-motion.

Respondent relies upon Article III, Section 8 of the cooperative's by-laws, which provides the Board with the right to amend and adopt the cooperative's house rules as necessary, and paragraph 13 of the cooperative's proprietary lease, which clearly states that those adopted house rules become part of the proprietary lease once furnished to the lessee.

With respect to the issue of unauthorized subletting, the proprietary lease, by itself, provides only one remedy therefor, which is termination of the lease. Respondents claim that their authority to fine petitioner \$3,000 for the alleged unauthorized subletting of her apartment is found in the cooperative's handbook (Respondent Goldstein's Affidavit in Opposition to Petition and in Support of Cross-Motion, Exhibit C).

The Court's review of that handbook reveals that it covers a multitude of topics, including a "sublet policy." In the "Welcome" section, respondent cooperative states that the handbook includes house rules and recommendations that have been adopted by the Board of Directors. It further states that all house rules "stated herein" apply to all shareholders and household members, guests and household employees. The body of the handbook contains clearly marked sections pertaining to each specific topic. Some of the sections are marked "(House Rule)" following the name of the topic, while other sections are not so marked.

The "sublet policy," appearing on page 15 of the handbook, states that the Board "does not permit shareholders to sublet their apartments. Any shareholder who sublets their apartment is subject to a \$3,000 fine. . ." This section of the handbook is not marked "(House Rule)," and nowhere in the brief statement is there any reference to this fine being a "House Rule." Thus, the fine is not a "House Rule," and is, therefore, not part of the proprietary lease to which petitioner is subject.

Based on the foregoing, this Court concludes that respondents' actions were arbitrary and capricious, and without foundation, in violation of CPLR § 7803 (3), as respondents were apparently without authority to fine petitioner \$3,000. Concomitantly, the Court also finds that respondents' actions are not protected by the business judgment rule because the Board did not act within its authority.

Accordingly, petitioner's request that the \$3,000 sublet fine be reversed, rescinded and annulled is granted, without interest.³

In any event, respondents' basis for opposing the instant petition has been rendered moot. Respondents acknowledge that petitioner has submitted proof of her residency at the cooperative, and that Sandra Jager is petitioner's sister. Respondents' counsel asserts that,

³Petitioner has not paid the fee to date.

despite having attached proof of her residency to her opposition papers, it “is simply too late.” While it may have been more efficacious for the proof to have been provided at the August 2010 meeting between petitioner, her counsel, and respondent Goldstein, the fact of the matter is that respondent acknowledges petitioner is a full-time resident of the cooperative.

As to the issue of Sandra Jager’s relationship to petitioner, it is evident from the e-mail chain submitted as petitioner’s Exhibit 3 in opposition to respondent’s cross-motion and in further support of the petition, that the other occupant of petitioner’s apartment is her sister. Respondent Goldstein actually refers to Sandra Jager in his August 17, 2010 e-mail, requesting petitioner’s counsel to “convince [petitioner] that the current issue is with her sister, not her, re the noise complaints . . . and there never seems to be an issue when [petitioner] is here. Prior to her sister it was her mother . . .” Respondent also refers to having had a “run-in” with petitioner’s sister when a telephone repair man came to the “the building.” Thus, this Court finds that Ms. Jager’s occupancy of the apartment is not an unauthorized sublet in contravention of the proprietary lease, and is indeed permitted by Real Property Law § 235-f [2], [3]), and for this reason as well, the \$3,000 sublet fine must be rescinded.

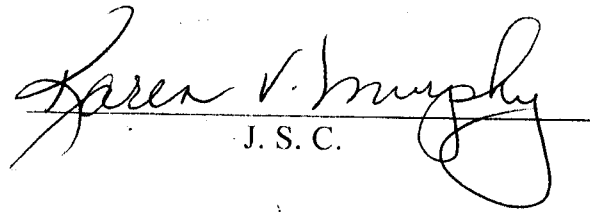
The Court declines to enjoin future actions of the Board with respect to taking action against petitioner for an alleged noise nuisance, and from making a determination in the future that Ms. Jager is a subtenant in violation of the proprietary lease. Petitioner’s requests in those regards are denied.

With respect to the award of attorney’s fees, the Court does not find petitioner’s action to be frivolous. Thus, respondents are not entitled to attorney’s fees pursuant to 22 NYCRR § 130-1.1.

Petitioner’s request that she be awarded attorney’s fees pursuant to Real Property Law § 234 is likewise denied. That statute provides for a level playing field between landlords and tenants where leases contain clauses permitting a landlord to recover attorney’s fees for a tenant’s breach of a lease. A reciprocal cause of action has been codified in Real Property Law § 234, in favor of the tenant, enabling the tenant to recover attorney’s fees for a landlord’s breach of a lease covenant. In this case, plaintiff has failed to articulate what, if any, covenant under the lease respondents are alleged to have breached (*see Matter of Duell v. Condon*, 84 N.Y.2d 773, 779-80, 647 N.E.2d 96, 622 N.Y.S.2d 891 (1995); *Salvato v. St. David’s School*, 307 A.D.2d 812, 763 N.Y.S.2d 42 (1st Dept., 2003); *Kuttas v. Condon*, 290 A.D.2d 492, 736 N.Y.S.2d 402 [2d Dept., 2002]).

The foregoing constitutes the Order of this Court.

Dated: June 27, 2011
Mineola, N.Y.


J. S. C.

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