

**Fernandez v Akam Assoc., Inc.**

2012 NY Slip Op 32104(U)

August 6, 2012

Sup Ct, NY County

Docket Number: 110446/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C. *listing*

PART 8

Index Number : 110446/2010  
FERNANDEZ, MIGUEL  
vs  
AKAM ASSOCIATES, INC.  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. 110446/10  
MOTION DATE 5/31/12  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 35, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1-32  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 33-34  
Replying Affidavits MEMO OF LAW \_\_\_\_\_ No(s). 35

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

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

**FILED**

AUG 09 2012

NEW YORK  
COUNTY CLERK'S OFFICE  
*Joan M. Kenney*  
JOAN M. KENNEY, J.S.C.  
J.S.C.

Dated: August 6, 2012

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

[\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----x  
MIGUEL FERNANDEZ and CLARINDA FERNANDEZ,  
Plaintiffs,

**DECISION & ORDER**  
Index No.: 110446/10

-against-

AKAM ASSOCIATES, INC. and THE BOARD OF  
MANAGERS OF 425 FIFTH AVENUE CONDOMINIUM,  
Defendants.

**FILED**

-----x  
JOAN M. KENNEY, J.:

AUG 09 2012

Defendants move, pursuant to CPLR 3212, for summary judgment  
dismissing the complaint.

NEW YORK  
COUNTY CLERK'S OFFICE

**FACTUAL BACKGROUND**

Plaintiffs are out-of-possession owners of a condominium unit in a building managed by defendant Board of Managers of 425 Fifth Avenue Condominium (Board) and Akam Associates, Inc. (Akam), property managers for the Board. Plaintiff asserts the following causes of actions: (1) that imposition of a moving-in fee, late fees and fees imposed in connection with leasing are arbitrary and unreasonable; and (2) the repayment options for common charges offered to plaintiffs are different than the ones offered to other unit owners owing similar charges, and therefore plaintiffs have been discriminated against. Plaintiffs purchased their unit on or about December 7, 2007.

John Czajkowski (Czajkowski), the management executive for Akam, states in his affidavit that the Board adopted a move-in, move-out fee of \$1500 for the use of the building's freight elevator by Board resolution in 2006 (Aff., Ex. N), and that fee was reaffirmed by the Board at meetings held on September 8, 2009, November 11, 2009, and

May 11, 2010. *Id.*, Ex. M. In addition, the condominium's fee schedule appears in the building's House Rules (*id.*, Ex. A), which were adopted by the Board, pursuant to the authority granted the Board under the condominium's bylaws applicable to all unit owners. *Id.*, Ex. B.

With respect to the fees charged when a unit owner wishes to lease the unit, Czajkowski avers that changes to the rules needed to be adopted so as to limit the ability of an absentee owner to lease the unit to third parties because of: (1) issues with unauthorized late-night pool parties hosted by the teenage daughter of an absentee-owner; (2) the large number of owners who leased their units which infringed upon the residents' abilities to use the condominium's amenities; and (3) the fact that the absentee-owners specifically leased their rights to use the condominium's amenities as part of the lease agreement (the lease agreement states that the owner-tenant is leasing the common elements from the condominium). *Aff.*, Exs. P & S.

In addition, Czajkowski states that there were several problems with the lease package submitted by plaintiffs, in that plaintiffs initially failed to comply with the requirement that a signed lease be submitted with the package (*id.*, Ex. B), and subsequently plaintiffs submitted a lease signed not by plaintiffs, the unit owners, but by a limited partnership that was associated with plaintiffs (*id.*, Ex. P), which is in contravention of the bylaws. According to the minutes of several Board meetings, the Board

discussed the problems associated with the persons actually residing in plaintiffs' unit on multiple occasions. *Id.*, Ex. Q.

Lastly, with respect to late fee charges, this claim refers to charges for electricity for four units in the building, one of which is owned by plaintiffs.

Apparently, because of a construction error, these four units did not have individual electric meters, and so the owners were not charged for any electrical use until 2009, when the construction error was discovered. In September, 2009, meters were installed in these four units, and the four unit owners were sent bills for electric usage for their units for the period prior to the installation of the meters, because those electric charges had been paid by the condominium.

Since there was no actual meter reading for these units, the Board decided to charge a pro rata apportionment for the usage, based on each unit's square footage, as detailed in the offering plan. *Id.*, Ex. C. The electric company from whom the condominium purchased its electricity prepared a review of electrical charges for the period, approximately 22 months, of comparable-sized units in the building (*id.*, Ex. D), and each of the four units was billed accordingly. Plaintiffs' back-charges for this electrical use was the smallest of the four units.

The Board offered the four unit owners a choice of making either a single, lump-sum payment based on the calculations indicated above, or to pay double the actual electrical charges for the coming year

5] for the unit. These options were discussed and decided at a Board meeting on November 11, 2009. *Id.*, Ex. E.

On or about December 24, 2009, Akam sent letters to each of the four unit owners setting forth these repayment options, including the chart prepared by the electricity provider, so that the owners could see how the charges were determined. *Id.*, Ex. F. All of the unit owners except for plaintiffs chose to pay double their actual electrical usage for the coming 12-month period. *Id.*, Ex. G. Plaintiffs refused to pay any charges for the electricity for this period, allegedly because the period included the two-week period prior to their purchase of their unit. According to Czajkowski, this difference would only amount to \$32.08 of the \$1,606.24 estimated charge, but plaintiffs still refused to pay the estimated charge less the \$32.08.

On February 11, 2010, defendants' counsel wrote to plaintiffs, stating that, absent an agreement to reimburse the condominium for these back electrical charges, the Board would add \$1,606.24 to their next invoice. *Id.*, Ex. I. When plaintiffs continued to refuse to pay this charge, the Board instructed its counsel to add plaintiffs' names to the condominium's arrears list (*id.*, Ex. G), which is the beginning of the condominium's lien/foreclosure process, as detailed in the House Rules.

When plaintiffs continued to refuse payment, Akam sent a letter to them on March 26, 2010, warning them that the condominium would be proceeding with filing a lien against their unit. *Id.*, Ex. K. A

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lien was eventually filed for these unpaid common charges. *Id.*, Ex. L.

Defendants contend that all of the fees charged are authorized by the condominium's bylaws and House Rules, which have been equally applied to all unit owners. It is defendants' position that the Board's actions are not subject to judicial scrutiny, pursuant to the business judgment rule, and that, since all of the unit owners have been treated exactly the same, plaintiffs' claim of discrimination asserted as against Akam is meritless.

In opposition to this motion, plaintiffs have submitted the affidavit of their son, Robert Fernandez (Fernandez), who avers that he is responsible for the management of the subject unit, since his parents reside in Europe. Fernandez commences his affidavit by asserting that, in July of 2008, plaintiffs were sent an invoice indicating an amount of overdue common charges of \$85,653.67, which, he asserts, was obviously incorrect and outrageous, since they had only purchased the unit a few months before. However, this error was corrected by defendants in February of 2009, and therefore is not relevant to the issue at hand, even though plaintiffs claim that this was the precipitating factor in the problem between the parties. The court notes that, according to the lien filed by defendants against plaintiffs' unit, the total arrearage asserted is \$3,805.96, reflecting the charge for the electrical use plus late fees for not paying this common charge. Motion, Ex. L.

In sum and substance, plaintiffs maintain that the Board lacked

[\* 7]

the authority to impose the charges against them, that defendants discriminated against them with regard to leasing the unit, going so far as to disable their key to the common-area amenities, and that Akam discriminated against them with respect to the imposition of the electric charge and late fees for the nonpayment of those charges, when another owner similarly charged was not so treated when he did not pay. The court notes that defendants, in their motion papers, provided evidence that the other three unit owners charged for electrical usage did pay those charges by accepting the alternate proposal of paying double their actual usage for the coming year. *Czajkowski Aff.*, Ex. H.

In reply, defendants state that plaintiffs never contest the factual assertions appearing in the motion and fail to set forth any facts to indicate how defendants discriminated against them. Defendants point out that the thrust of plaintiffs' opposition lies with a single clerical error that was corrected months before the factual disputes of the instant matter arose. Moreover, defendants point out that plaintiff fail to provide a any legal authority to support their opposition.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden

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then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in their lawful and legitimate furtherance of corporate purposes." *Auerbach v Bennett*, 47 NY2d 619, 629 (1979). The business judgment rule has been found applicable to the decisions of the boards of residential cooperatives and condominiums, and "[t]o trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." *40 West 67<sup>th</sup> Street v Pullman*, 100 NY2d 147, 155 (2003).

Plaintiffs have failed to provide any factual evidence that the Board acted outside the scope of its authority or in any way not in furtherance of legitimate corporate purposes. All of the Board's actions were taken pursuant to the authority granted it under the condominium's bylaws and House Rules, and nowhere do plaintiffs challenge that authority. Moreover, the only argument posited by plaintiffs that could relate to bad faith involves a clerical error

[\* 9]

that was corrected months before the occurrences giving rise to the instant action, which the court finds to be nothing more than a red herring and irrelevant to the issues at hand. The fact remains that the fees imposed by the Board were all legitimately authorized and determined in the best interests of the condominium.

Similarly, the court can find no evidence to support plaintiffs' allegation that they were discriminated against, either by the Board or by Akam. All of the evidence presented demonstrates that plaintiffs were treated exactly the same as all other unit owners similarly situated. As stated by the Court in *Pelton v 77 Park Avenue Condominium* (38 AD3d 1, 9 [1<sup>st</sup> Dept 2006]), "[c]onclusory or speculative allegations of discrimination are insufficient to deprive corporate directors of the protection of the rule precluding judicial scrutiny of board decisions."

Based on the foregoing, it is hereby

ORDERED that defendants' motion is granted and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

Dated: August 6, 2012

ENTER:

*JMK*

**FILED**

Joan M. Kenney, J.S.C.

AUG 09 2012

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