

**Silver v Murray Hill Owners Corp.**

2015 NY Slip Op 30462(U)

March 30, 2015

Supreme Court, New York County

Docket Number: 150338/12

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X  
RICHARD SILVER,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.: 150338/12

MURRAY HILL OWNERS CORP.,

Defendant.

-----X  
ANIL C. SINGH, J.

Defendant Murray House Owners Corp. moves again for summary judgment to dismiss plaintiff Richard Silver’s complaint. Silver opposes the motion.

This dispute between plaintiff, a tenant/shareholder of the defendant cooperative (the Co-op) ensued after the Co-op thwarted Silver’s attempt to replace three air-conditioning and heating units on the roof/common space of the Co-op that he installed in 1982.

By order dated December 10, 2013, this court denied Silver’s motion for injunctive relief compelling the Co-op to permit him to install the equipment. The court further denied a motion by defendant for summary judgment and plaintiff’s cross-motion for summary judgment.

Defendant argues that in the prior order, the Court determined that the

replacement of the air-conditioning units was an alteration that required Board approval which was not obtained. The Co-op contends that the Court found that it did not breach the parties' proprietary lease and that the only issue that remains is whether plaintiff can establish that the Co-op selectively enforced its rules to the detriment of Silver. It argues that the business judgment rule shields the Board's actions in this case.

This court has addressed these issues already in defendant's first motion for summary judgment. As to selective enforcement, the court stated as follows:

Plaintiff contends that the replacement of previously approved equipment does not constitute an alteration, or require Board approval, an issue which already has been determined in defendant's favor. Plaintiff argues that defendant is not entitled to summary judgment because it has singled out plaintiff as a shareholder, as other tenants that have installed air-conditioning or HVAC units, including on the roof, without Board approval or the execution of an alteration agreement. For example, plaintiff provides pictures of what he states is an HVAC system that his neighbors installed on common space. Plaintiff states that these shareholders necessarily ran electrical wiring to the system, and, therefore, cut at least one hole in the building's roof, but the Co-op did not require Board approval, or the execution of an alteration agreement, and has stated that it will work around the unit. Plaintiff asserts that defendant's document production demonstrates that, within the last thirty years, no other shareholder has been required to submit an alteration agreement or to obtain Board consent for installing, removing or replacing an air conditioner. As previously noted, defendant denied plaintiff's request to install the equipment. [ December 10, 2013 opinion at p. 13]

Regarding the Co-op's contention that the business judgment rule insulated

the Board's conduct, the court held that

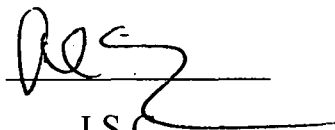
Lease § 21 provides that consent for alterations “shall not be unreasonably withheld or delayed.” Therefore, defendant's denial of plaintiff's application is not shielded by the business judgment rule (*Seven Park Ave. Corp. v Green*, 277 AD2d 123, 123 [1st Dept 2000]; *Rosenthal v One Hudson Park*, 269 AD2d 144, 145 [1st Dept 2000] [board preconditions imposed had to be reasonable and “were not sheltered from review by the business judgment rule”]), and must be reviewed by the court under a reasonableness standard. Plaintiff raises a fact issue as to whether or not the board is treating plaintiff in a manner different from other shareholders who are similarly situated, and, on this record, whether or not other shareholders are similarly situated presents a fact issue. Plaintiff also raises a fact issue as to whether or not the Board's conduct or decision was based on animus (*see e.g.* *Garbuz aff.*, exhs. R, T, Y, Z), which is not indicative of either good faith or reasonableness (*cf. Fletcher v Dakota, Inc.*, 99 AD3d 43, 48 [1st Dept 2012] [evidence of arbitrary and malicious decision-making destroys business judgment rule shield]). As plaintiff has raised these fact issues, defendant's motion must be denied (*see Seven Park Ave. Corp.*, 277 AD2d at 123).

Defendant argues that it is entitled to summary judgment because plaintiff is barred from an award of equitable relief based on the doctrine of unclean hands, but that doctrine “is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct” (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966] [citations and internal quotation marks omitted]; *Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984] [same]). Defendant has not made this showing by arguing that plaintiff violated the Lease by attempting to install the units, or other air-conditioning equipment, especially as defendant essentially acknowledges that it has no objection to the concept of plaintiff having some type of system, and plaintiff has raised a fact issue as to defendant's conduct concerning other tenants who may have installed such equipment on the Co-op's common space without approval. [*Id.*, pp. 13-15]

Although in the guise of summary judgment, the Co-op in essence moves to again reargue this Court's December 10, 2013. Nor did the Court grant leave to the defendant to bring a subsequent motion for summary judgment. "Successive summary judgment motions should only be entertained where there is a showing of newly discovered evidence or other justification such as an intervening appellate decision in the same case that clarifies or changes the controlling law" (Amill v Lawrence Ruben Co., Inc., 117 AD3d 433, 433-34 [1st Dept 2014]): Defendants have not shown justification for this court to entertain this subsequent motion (id.). Defendant moved for summary judgment before conducting discovery. That motion was denied. The Co-op is not entitled to a second bite of the apple where the first bite proves fruitless. Defendant's successive motion for summary judgment is denied.

This decision constitutes the order of the Court.

Date 3/30/15

  
J.S.C.  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**