Matter of Giaccio v Brancati
2015 NY Slip Op 30769(U)
May 11, 2015
Supreme Court, Westchester County
Docket Number: 1286-15
Judge: Anne E. Minihan
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

Richard J. Giaccio,

Petitioner,

-against-

Edward Brancati, Jr., Domenic Simone, Nicholas Dipaolo, individually and as directors of CEDAR WOODS TENANTS CORP., a New York Corporation, and Nicholas Dipaolo, as Secretary of CEDAR WOODS TENANTS CORP.

Respondents.

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Decision and Order
Index No. 1286-15

MINIHAN, J.

The following papers numbered 1 to 24 were read on this petition seeking an order compelling Respondents to allow Petitioner to inspect and copy corporate documents, to hold a special shareholder meeting and to refrain from taking any further action to sell Petitioner's shares for cooperative apartment Unit 203.

OTSC/Verified Petition ("Pet.")/Exhibits	1-7
Verified Answer	8
Affidavit of Tom Bundarin/Exhibits A-C	9-12
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Upon the foregoing papers, for the reasons articulated hereinafter, the petition is granted insofar as the determination made by Respondents to impose the penalty of termination of the lease is vacated; permission to inspect corporate documents is granted and is otherwise denied;

It is ORDERED that a special shareholders meeting shall be scheduled within 20 days of this order or on May 28, 2015.

Factual and Procedural Background

Petitioner, Richard J. Giaccio, owns 3 residential units in the cooperative building complex located at 10 Wild Oaks Road, Goldens Bridge, New York, operated by the Cedar Wood Housing Corp. a/k/a the Cedar Woods Tenant Corp. (hereinafter "the Corporation"), a cooperative housing corporation (the "premises").

On July 14, 2014, a contract of sale was signed by Petitioner for the purchase of Unit 203 at the premises and an admission purchase package was signed and submitted by Petitioner as well (*see* Exhibit "A" to Brancati Aff.). The purchase package contains "Guidelines to Purchase a Cooperative Unit" and explicitly states that before a tenant sublets a unit the "**Purchaser must occupy the unit purchased for at least one year**"(*see* page "ii" to Exhibit "A" to Brancati Aff.). The purchase package also has House Rules[1] which state, in relevant part, that

> "In the event of non-compliance with any of the House Rules, The Board of Directors has the right to impose fines, at its sole discretion. Non-payment of the imposed fines may become a lien on the shares of the shareholder. If the imposition of a fine requires the services of the Cedar Woods Tenant Corporation's attorney, the shareholder in violation of the House Rules will be responsible for the attorney's fees in addition to the fine imposed. ***Repeated offenses and refusal to pay on time will incur increased fines***. The Board of Directors may amend this fine schedule from time to time at its discretion (emphasis added)(House Rules ¶ 24).

> "All prospective shareholders (owners) must meet with the interview committee of Cedar Woods before the purchase of a unit (as indicated in the proprietary lease). In addition, if the unit is to be rented, the renter/s must meet with the interview committee, AND BE APPROVED... ***A $250.00 fine will be imposed on any shareholder who has an unapproved tenant residing in their unit. Additionally, a $50.00 fine per day thereafter will also be imposed*** (emphasis added)(House Rules ¶ 25).

On September 17, 2014, a day after the closing on Unit 203, Quantum Property Management, the managing agent, submitted Petitioner's sublease application via e-mail to the Board of Directors for review and to schedule an interview[2] and two checks were cashed in

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[1] The House Rules submitted herein were adopted August 18, 2008. The parties have not submitted a copy of the executed purchase package for Unit 203.

[2] In response to the e-mail, Respondent Dipaolo inquired about the one-year sublet rule who responded "we asked LaGumina and he advised us that there was no such rule in the

connection with his purchase package.

On September 19, 2014, an e-mail from Respondent Simone was forwarded to Petitioner (*see* Exhibit "2" to the Pet.) indicating Petitioner's failure to abide by the one-year sublet rule. Respondent Simone noted that the one-year rule was waived for Simone's unit in 2013 after a Board vote. Respondent Simone also noted that Petitioner made some unapproved alterations in his other units that the Board would scrutinize more closely and wrote "if you want to make things personal go right ahead and I will make it personal."

By letter to Petitioner dated October 30, 2015, the Respondents outlined the sublet policy and also advised that his unauthorized alterations to his other units were made without consent and could be additional grounds for termination of the lease. On the same day, October 30, 2014, Respondents issued a Notice of Default and Notice to Cure to Petitioner concerning Unit 203 for violating § 31(c) of the lease by subletting Unit 203 without full compliance with the requirements of ¶ 15 of the lease.

The relevant sections of the lease[3] state the following:

SUBLETTING

> "(15) ...the Lessee shall not sublet the whole or any part of the apartment or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by a resolution of the Directors, or given in writing by a majority of the Directors or, if the Directors shall have failed or refused to give such consent, then by lessees owning at least 65% of then issued shares of the Lessor. Consent by lessees, as provided for herein, shall be evidenced by

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offering plan. If you have proof otherwise, please send it to me and I can forward to the attorney"(*see* Exhibit I to Pet. Reply Aff.).

[3] The lease submitted by Petitioner is not specific to Unit 203 and the attached copy appears to be a lease for an unidentified unit that expired in 2004. Petitioner claims that Respondents are trying to enforce a lease that has been expired. Neither party has submitted a document amending or superceding the relevant terms of the lease at issue herein and both parties rely on the language of the relevant terms of the annexed lease to support their respective arguments. As such, the Court will rely on the attached lease for purposes of this action and since Petitioner signed the contract subject to and in satisfaction of "the lease"(*see* ¶ 5 to the contract at Exhibit "A" to the Brancati Aff). Moreover, "the ownership interest of a tenant-shareholder in a co-operative apartment is *sui generis*," and "[t]he leasehold and shareholding are inseparable"(*Matter of State Tax Com. v. Shor,* 43 NY2d 151, 154 [1977]). Thus, it is disingenuous for Petitioner to claim that the lease is expired or that there is no enforceable lease whatsoever in this action.

written consent or by affirmative vote taken at a meeting called for such purpose. Any consent to subletting may be subject to such reasonable conditions as the Directors or lessees, as the case may be, may impose. No consent to a subletting shall operate to release the Lessee from any obligations hereunder. Directors' consent to subletting shall not be unreasonably withheld, but shall take into consideration the welfare of the property as a whole..."(lease ¶ 15).

TERMINATION OF LEASE BY LESSOR

"(31) If upon, or at any time after, the happening of any of the events mentioned in subdivision (c)..., the Lessor shall give to Lessee a notice stating that the term hereof will expire on a date at least five days thereafter,...(31)(c) Assignment, Subletting or Unauthorized Occupancy: If there be an assignment of this lease, or any subletting hereunder, without full compliance with the requirements of paragraphs (15) ..., and the Lessee shall fail to cause such unauthorized person to vacate the apartment within ten days after written notice from the Lessor..."(lease ¶ 31).

On December 11, 2014, a Notice of Termination was served on Petitioner on the ground that he failed to cure the default with an effective termination date of December 16, 2014.

On December 15, 2014, Petitioner, through his counsel, requested that he be permitted to review corporate documents including resolutions, by-laws, House Rules and written consents from 2003 through present. Respondents have agreed during this proceeding to allow inspection limited to two years.

On December 23, 2014, Petitioner requested that the Secretary of the Corporation notify the shareholders that a special meeting would be held on January 15, 2015 as requested by tenants collectively owning more than twenty-five (25%) of the outstanding shares of the corporation (a requirement to call a special meeting pursuant to the by-laws Article II, § 2)(*see* Exhibit 7 to the Pet. and by-laws, p. 96, Exhibit "4" to the Pet.). In fact, the shareholders calling for the meeting held a total of 4,224 shares (which exceeds 25% of 12,979).[4] The basis for the meeting was to review inconsistent policies on subtenancies and to remove the directors from the Corporation.

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[4] The parties agree that the total amount of outstanding shares is 12,979. Therefore, 3,244.75 shares would be necessary to meet the 25% threshold. The parties disagree about the number of shares that called for the meeting; however the Court counts a total of 4,224 shares for 17 different units (including Unit 203) as set forth in Exhibit "7" to the Pet.

Shortly thereafter, 3 shareholders withdrew their calls for a special meeting[5] (*see* Bundarin Aff. Exhibits "A-C"). On January 28, 2015, the Board issued a memorandum to its shareholders where it publicized the dispute over the sublet policy between Petitioner and Respondents (*see* Exhibit "E" to Brancati Aff.).

On February 10, 2015, the instant Article 78 proceeding was commenced.

Petitioner contends that Respondents are without authority to cancel his shares for Unit 203 at the premises. In support of his contention, Petitioner argues that the one-year rule, was never promulgated by the Board or the shareholders. Secondly, the House Rules, he urges, indicate that the penalty for an unauthorized sublease is a fine and not seizure of a unit. As such, Petitioner contends that the one-year rule, to the extent it exists, has been selectively enforced as applied to Petitioner in a punitive manner. Petitioner also claims that Respondents cannot simultaneously refuse to acknowledge his sublease application (in violation of the lease) and then penalize him for failing to obtain consent from the Board. Petitioner also claims that the lease for which Respondents rely upon has been expired since December 2004.

Petitioner also argues that Respondents are required to call a special meeting since shareholders owning at least 25% of the outstanding shares of the Corporation properly called for a special meeting. Petitioner claims that the alleged revocations by some shareholders are ineffective and resulted only after Respondents solicited the revocations.

Lastly, Petitioner claims that as a shareholder of several units, he is entitled to inspect the Corporations's books and records from 2003 to the present.

Respondents counter that the termination of Petitioner's lease for Unit 203 is proper and as such, the Petition must be dismissed. Respondents maintain that Petitioner's tenant moved into Unit 203 in violation of the one-year sublet policy without the approval of the Board of Directors in violation of the lease. As such, a notice of default and notice to cure within 10 days were served on Petitioner and, since he failed to cure the default, a notice of termination was properly served. Therefore, Respondents claim that the lease expired on December 16, 2014 and that they intend to sell Unit 203 with the net proceeds of the sale (after deduction of expenses incurred) to be remitted to Petitioner.

Respondents contend that Petitioner was fully aware of the one-year rule when he

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[5] Shareholder Chernick, "removed [her] signature from the proxy" in an effort to revoke her call for a shareholder meeting as she was "under duress" and she "[disagrees] with [petitioner's] actions...thank you for your phone call today"(*see* Exhibit "A" to Bundarin Aff.). Shareholder Starke's withdrawal is not dated and states "please be advised that I signed this proxy under false pretenses and was misled by [petitioner]"(*see* Exhibit "B" to Bundarin Aff.). The last withdrawal was conveyed verbally to Lundarin by shareholder Curran on an unspecified date as contained in his Aff. at ¶ 3.

purchased the unit, completed the purchase package which explicitly states the one-year sublet rule in the guidelines to purchase a cooperative apartment. Moreover, Petitioner was on notice of the one-year sublet rule as a result of his service as Director of the Corporation from 2010 through 2014 where he voted with the Board to make an exception to the one-year rule in 2013.

Respondents affirm that they had declined to hold a special meeting as certain shareholders revoked their request for a special meeting. Respondents state that such revocations together with the subtraction of shares allocated to Unit 203 (Petitioner's terminated unit) fails to meet the 25% threshold necessary to call for a special shareholder meeting.

Standard of Review and Legal Analysis

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*40 W 67th St v Pullman*, 100 NY2d 147, 153 [2003] [internal quotation marks omitted]). In the context of a CPLR Article 78 proceeding, the business judgment rule has been applied as a concurrent form of "rationality" and "reasonableness" to determine whether a decision was "arbitrary and capricious" pursuant to CPLR 7803(3)(*see Levundusky v One Fifth Ave Apt Corp*, 75 NY2d 530, 541[1990]). The business judgment rule does not apply when a cooperative board acts outside the scope of its authority or violates its own governing documents (*see Cohan v Board of Directors of 700 Shore Road Waters Edge, Inc,* 108 AD3d 697 [2d Dept, 2013](Board was without authority under its own governing documents to assess a fee against a shareholder for alleged illegal subletting since the sublet policy, recited in the shareholder handbook, was not an enforceable house rule incorporated or made binding on the shareholder under the proprietary lease thus, business judgment rule does not apply and the penalty was arbitrary and capricious).

Here, Respondents have failed to demonstrate a valid exercise of their authority by imposing the unduly harsh, unauthorized and unprecedented penalty of terminating Petitioner's lease. Conspicuously absent is a resolution or a vote or minutes from a meeting or some other corporate document showing the reasons why such a strict penalty was imposed, which is not authorized by its own House Rules. So too, Respondents have failed to explain what aggravating factors caused the Board not to apply the prescribed penalty for violating the sublet policy as set forth in the House Rules (a $250.00 fine and a $50.00 daily continuing violation)(*see* Exhibit "2" to Pet. Aff., ¶ 25, p. 4 and Respondents' Memo of Law, p. 6-7). Even more egregious is that Respondents admit that only fines have been imposed in the past for such a violation and that the one-year sublet policy[6] was waived in 2013 for another shareholder after

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[6] Respondents argue that the one-year sublet policy contained in the purchase package is enforceable (*see* page "ii" to Exhibit "A" to Brancati Aff.). On the other hand, Petitioner claims that the one-year is unenforceable as it is not contained in the House Rules or the lease but rather a purchase package that has not been formally adopted. Since the termination of lease is shocking to the conscience, the Court declines to rule on enforceability of the one-year sublet

a meeting by the Board to vote on such waiver (which included the vote of Petitioner, a former Director)(*see* Brancati Aff., ¶ 8 and Respondents' Memo of Law, p. 7). Additionally, the e-mails demonstrate a personal animosity between Petitioner and Respondent Simone that beg the question as to whether the departure from the uniform treatment of shareholders was taken in good faith or in furtherance of a justifiable and bona fide business purpose which precludes Respondents' dismissal claim; yet the question of a fiduciary breach cannot appropriately be decided in the instant Article 78 action *(see Schwartz v Marien*, 37 NY2d 487 [1975]).

As such, since Respondents have failed to justify inconsistent imposition of this apparently novel penalty, the business judgement rule does not apply. The penalty of termination of the lease is punitive on its face, is disproportionate to the offense and is shocking to the conscience (*see Cohan v Board of Directors of 700 Shore Road Waters Edge, Inc.*, 108 AD3d 697 [2d Dept, 2013][internal citations omitted]).

So too, Respondents have also failed to demonstrate that the Board took collective action on behalf of the Corporation to make a determination on Petitioner's application in accordance with the by-laws Article V, § 4 and the lease ¶ 15 which requires the Board to take action in within a reasonable time after receipt of a sublet application. Respondents have not demonstrated a resolution or some other corporate document denying the Board's consent or evidencing any decision made by the Board in this regard. Notably, if the Board had properly convened at a meeting and refused consent to sublease then Petitioner had the right under the lease to obtain consent from shareholders holding 65% of the outstanding shares (*see* lease ¶ 15).

In fact, the notices sent to Petitioner advising of the violation do not state a violation of the one-year rule but rather a violation of ¶ 15 of the lease (which states in part "consent to sublet shall not be reasonably withheld"). Respondents have failed to demonstrate that they considered Petitioner's sublease application "within a reasonable time after receipt of said application" pursuant to the by-laws, Article 5, § 4 (*see* Exhibit "4" to Pet., p. 106) before they served the notice of termination. Under the circumstances, the Court finds that Respondents' actions were inconsistent with the plain and unambiguous terms of the lease, which prohibited the Board from unreasonably withholding its consent to any sublease pursuant to ¶ 15 of the lease (Exhibit "3" to Pet., p. 69), and inconsistent with the By-Laws, Article 5, § 4 (Exhibit "4" to Pet., p. 102) which required Respondents to act within a reasonable time to consider Plaintiff's application (*see Ludwig v 25 Plaza Tenants Corp*, 184 AD2d 623 [2d Dept, 1992])(the business judgement rule does not apply when cooperative board's actions were inconsistent with the plain language of the lease which prohibited it from unreasonably withholding consent to sublease after 2 applications for sublease were summarily denied).

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rule. However, the penalty of a fine for a such violation that has been traditionally applied is set forth in the House Rules (which have been adopted in 2008; incorporated by reference in the lease at ¶ 13, p.68; and referenced in the by-laws, Article III, § 8).

Shareholder Meeting

Mandamus is available to compel corporate management ... to comply with the corporation's by-laws regarding corporate governance (*see Auer v. Dressel*, 306 NY 427 [1984]) (convening of special meeting upon demand of majority of shareholders meeting). The by-laws herein require the Secretary to call a special meeting "whenever requested in writing to do so by the shareholders owning at least twenty-five percent of the outstanding shares of the Corporation"(*see* by-laws, Article II, § 2); *see also* Business Corporation Law § 602(c)(special meetings of shareholders may be called as directed by the corporation's by-laws for the purpose set forth in the notice required by section 605).

On December 23, 2014, Petitioner together with other shareholders collectively holding more than 25% of the outstanding shares of the Corporation properly submitted notices in writing for a special meeting for a specified purpose in accordance with the by-laws, Article II, § 2. Petitioner proffered 4,224 shares calling for a special meeting well in excess of 25% of 12,979 outstanding shares. Respondents contend that Petitioner has failed to meet the threshold since some shareholders revoked their requests and excluded Petitioner's shares for Unit 203 on the basis that the lease had been terminated. On this record, Respondents have failed to demonstrate the authority to permit the cancellation of a properly called special meeting. The revocations were neither clear nor unequivocal. One revocation was allegedly verbal and cannot rebut the documentary evidence (*see Briedis v Tuxedo Park*, 156 AD2d 744 [2d Dept, 1989]); another was undated and was mischaracterized as a "proxy." The Starke revocation is illegible and fails to clearly revoke her call (*see Brenner v Hart Systems*, 114 AD2d 363 [2d Dept, 1985])(director was not properly removed as a matter of law by virtue of a shareholder letter that was contradictory and ambiguous). As such, Respondents have failed to overcome the showing that Petitioner met the threshold pursuant to the by-laws on December 23, 2015 and that a special meeting should have been called.

Mandamus to Compel Inspection of Records

With respect to the Petitioner's entitlement to inspect corporate documents, the Business Corporation Law § 624 gives a shareholder the statutory right to inspect books and records of a corporation. Moreover, "a shareholder has a common-law right to inspect a corporation's books and records if the inspection is sought in good faith and for a valid purpose"(*see Goldstein v Acropolis Realty Corp,* 116 AD3d 776, 777 [2d Dept, 2014]). The by-laws herein state in pertinent part,"a book containing the names of the shareholders...the number of shares held...shall be open for inspection as provided by law"(*see* Article IV, § 4). Similarly, the lease herein states "the Lessor shall keep full and correct books of account at its principal office or at such other place as the Directors may, from time to time, determine, and the same shall be open during all reasonable hours to inspection by the Lessee..."(*see* lease at ¶ 5).

Petitioner has demonstrated his entitlement to inspect the records of the Corporation from 2003 through the present (as he requested in his December 2014 letter). Respondents have failed to justify limiting the review to the past two years since they have failed to demonstrate

any bad faith or an improper purpose (*see Crane Co v Anaconda Co*, 39 NY2d 14, 20 [1976]). In light of the disputes presented herein, no question of fact concerning Petitioner's good faith exists to limit his request to inspect records.

Accordingly, it is ORDERED and ADJUDGED that the petition is granted insofar as the determination made by Respondents to impose the penalty of termination is vacated; permission to inspect corporate documents is granted; a special shareholders meeting shall be scheduled within 20 days of this order or on May 28, 2015; and the Petition is denied for all other claims including attorney's fees and Respondents' motion to dismiss is denied.

Dated: White Plains, New York
May 11, 2015

ANNE E. MINIHAN
ACTING JUSTICE OF THE SUPREME COURT

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