Oriogun v Board of Mgrs. of Hamptonhouse Condominium
2015 NY Slip Op 31407(U)
February 24, 2015
Supreme Court, New York County
Docket Number: 157650/12
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JOHN ORIOGUN,

Plaintiff,

INDEX NO. 157650/12

-against-

MOTION SEQ. NO. 001

THE BOARD OF MANAGERS OF HAMPTON HOUSE CONDOMINIUM, HAMPTON HOUSE CONDOMINIUM,

Defendants.

The following papers were read on this motion by defendants and cross-motion by plaintiff.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

In this action for declaratory judgment, John Oriogun (plaintiff) alleges in his complaint that the amendment made by the defendant The Board of Managers Of Hampton House Condominium (the Board) to the Hampton House Health Club's Membership Agreement and Liability Release violates both the General Obligations Law § 5-326 (GOL) and Article 9-B of the Condominium Act (the Act). At all times relevant to the complaint, plaintiff was a resident unit owner of defendant Hampton House Condominium located at 404 East 79th Street, New York, New York (the condominium).

Defendants moved pursuant to CPLR 3042(c) for an Order of preclusion for plaintiff's failure to serve a bill of particulars, and/or for an Order striking plaintiff's complaint pursuant to CPLR 3126 for failure to comply with defendants' discovery demands. Plaintiff submitted a cross-motion for declaratory judgement. The Court notes that at Oral Argument on October 23,

2013 the defendants' motion for preclusion was resolved. As such, only plaintiff's cross-motion for declaratory judgment remains before the Court.

BACKGROUND

Plaintiff purchased his unit within the subject condominium in 2006, and avers that he had been using the Hampton Health Club facility (Health Club), a common element of the condominium that is shared by all residents, without any impediment from the date of purchase until January of 2012 (Plaintiff Affidavit in Support of Cross-Motion at par. 12). The Health Club has its own membership agreement (Membership Agreement) that the Board regularly reviews. In 2009, the Board reviewed and amended the Membership Agreement to include the following liability release:

> "The use of the Hampton House Health Club is governed by this Agreement, the by-laws of Hampton House Condominium, the Hampton House Rules and Regulations, and any rules and notices that may be posted from time-to-time in the Hampton House Health Club. While presently there are no additional fees or charges for the use of the Hampton House Health Club, I have entered into this Agreement in consideration for the right to use the Hampton House Health Club and for such other consideration, the receipt and sufficiency of which I acknowledge. I hereby assume full responsibility for any consequences and damages of any kind (including but not limited to, personal injuries; loss theft and damage to personal property; and injuries caused by third parties) relating to or deriving from the presence in or use of the Hampton House Club by myself and any minor that I am the parents or legal guardian of. This paragraph shall survive termination of this agreement. I understand that my presence in the Hampton House Health Club and use of the facilities is at my own and sole risk. I realize that accidents, equipment malfunctions, disfigurement, injuries, including serious disabling injuries, death and drowning may occur. I further realize that it is not possible to specifically list each and every risk of injury or loss. However, after full consideration, I knowingly fully assume all of the risks, losses, liabilities and damages, including serious and permanent injuries and death that could or may occur from my use of the Hampton House Health Club (Plaintiff's Cross Motion, Exhibit F, ¶ 3-5).

In September 2011, as a result of renovations, the Board had an elevator company

install a key fob system on the elevator that goes to the Health Club. The key fob activates the Health Club button so that when pressed the elevator goes to the Health Club. After installation, key fobs were made available only to unit owners in good standing. To be in good standing, unit owners had to sign the liability release. The control and authority for the release of the key fobs lied solely with the Board. On or about January 26, 2012, plaintiff states that he sought access to the Health Club by requesting a key fob from the Board (Plaintiff Affidavit in Support of Cross-Motion at par. 7). The Board notified plaintiff that he would not receive a key fob until he agreed and signed the liability release in the Membership Agreement. Plaintiff refused to sign the liability release and was denied access to the Health Club. Plaintiff then requested that he be excused from the requirements of the liability release. The Board again determined that plaintiff would be denied entry into the Health Club until he agreed to sign the liability release.

As a result, on or about October 29, 2012, plaintiff filed a summons and verified complaint against the defendants for declaratory relief. Issue was joined on or about January 9, 2013 when defendants interposed their verified answer.

DISCUSSION

In his cross-motion, plaintiff seeks declaratory judgment stating the following: (a) that an imposition of the execution of defendants' "Health Club Membership Use Agreement liability Release and Hours, Rules and Regulations" upon plaintiff prior to the release of a key fob to plaintiff which is needed to gain entry into the Health Club, constitutes a violation of plaintiff's rights as a unit owner of the defendant condominium; (b) that the Board's conduct with respect to the unilateral modification of an existing contractual relationship between the plaintiff and the condominium, and the creation of (or attempt thereof) a new or modified contractual relationship between the condominium and plaintiff, together with the imposition of the execution of the amended membership agreement upon plaintiff prior to the release of a key

fob to plaintiff which is needed to gain entry into the Health Club, are outside of the scope of the Board's authority, null and void; (c) that the terms and conditions set forth in the amended membership agreement excluding third-parties' liability for their tortious acts resulting in injury to plaintiff constitute a violation of the provisions of Article 9-B of the Condominium Act and is thus null and void; (d) that the terms and conditions set forth in the amended membership agreement excluding defendants' liability for tortious acts, including gross negligence and/or willful misconduct resulting in injury or death to plaintiff, plaintiffs guests, invitees, legal representatives, heirs, executors, administrators, agents, representatives, successors and assigns, constitute a violation of New York State public policy, and are thus null and void; (e) a mandatory injunction compelling the Board to release a key fob required to gain entry into the Health Club to plaintiff, and allowing plaintiff unhindered access to the use and enjoyment of the Health Club facility, forthwith, except as restricted by statute or declaration; (f) a perpetual injunction restraining the defendants, their workers, agents, privies, successors-in-title, or howsoever described, from denying or restricting plaintiff's right of access to the health club, except as may be restricted by statute or Declaration; (g) stay of discovery pending the determination of the within motion and (h) awarding plaintiff reasonable attorney's fees and costs.

The Court will first address plaintiff's contention that amending the Membership Agreement is a unilateral modification of an existing contractual relationship between plaintiff and the condominium and is thus outside the scope of the Boards authority. Plaintiff mistakenly avers that the amended Membership Agreement is a contract directly between himself and the Board. In essence,"having chosen the cooperative form of ownership, the plaintiff is bound to abide by the rules and regulations governing its operation" (*Hoffmann v 345 E. 73rd St. Owners Corp.*, 186 AD2d 507, 509 [1st Dept 1992]). The By-Laws, in compliance with §339(v)(1)(h)(i) of the Act, allow the Board to adopt administrative rules and regulations pertaining to the

Common Elements. Furthermore, according to Article III, Section 6 (b)(9) of the By-Laws, the Board has the power to amend these rules at any time. Such rules and amendments are binding upon all unit owners. Plaintiff cannot now argue that he somehow acquired a personal, vested right in the use of the Health Club facility that creates a basis for contractual negotiation (*Cannon Point North v Abeles*, (160 Misc 2d 30,32 [Sup Ct App Term 1st Dept 1993]). Plaintiff knowingly moved into a condominium which, pursuant to its by-laws, allows its Board to make amendments. As such, Plaintiff is bound by said amendments.

Plaintiff next avers that the liability release within the Membership Agreement is a violation of Article 9-B of the Act and is thus null and void. Section 339(i)(4) of the Act states as follows:

> "Each unit owner may use the common elements in accordance with the purpose for which they were intended, without hindering the exercise of or encroaching upon the rights of the other unit owners, but this subsection shall not be deemed to prevent some unit or units from enjoying substantially exclusive advantages in a part or parts of the common elements as expressed in the declaration or by-laws."

The Court finds that the liability release does not conflict with Article 9-B. The intention behind Section 339(i)(4) is to ensure that the common elements are used for their intended purpose. As stated earlier, the Board has the authority to revise and amend the residents' use of the common elements. Nowhere in Section 339(i)(4) does it imply that a unit owner must have absolute access to all common elements. On the contrary, Section 339(i)(4) states that some unit owners are allowed to enjoy substantially exclusive advantages in a part of the common elements. Here, unit owners that agree to sign the liability release are being granted with one such exclusive advantage; they are able to use the health club while non-signors cannot.

The Court then turns to the question of whether the liability release constitutes a violation of plaintiff's rights as a unit owner. The Board contends that it acted within the scope

of its authority and that its decisions are shielded by the business judgment rule.

The business judgement rule is defined as follows:

> "Where a unit owner challenges an action by a condominium Board of Managers, courts apply the business judgment rule" (*Helmer v Comito*, 61 AD3d 635, 636 [2009]; see also *Yusin v Saddle Lakes Home Owners Assn., Inc.* 73 AD3d 1168, 1170 [2d Dept 2010]). "Under the business judgment rule, the court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing, or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" (*Schoninger v Yardharm Beach Homeowners' Assn.*, 134 AD2d 1, 9 [2d Dept 1987]).

In the instant case, we have a situation where the Board did act within the scope of its authority. The Board, acting pursuant to the by-laws of the condominium, had the power to make amendments to the Membership Agreement. Normally, the fact that the board acted within the scope of its authority would bar judicial intervention of any kind, but an exception must be made in this particular case. As stated in the case of *Auerbach v Bennett* (47 NY2d 619, 629 [1979]), the "doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." The liability release is not a lawful furtherance of corporate purposes because it is a clear violation of GOL § 5-326. As such, the Board can not hide behind the shield of the business judgment rule, and judicial inquiry is necessary. The Court of Appeals has stated in *Matter of Levandusky v One Fifth Ave. Apt. Corp.*,(75 NY2d 530, 537 [1990]) that, in regard to a Board of Managers, "some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary to protect individual residents from abusive exercises, notwithstanding that the residents have, to an extent, consented to be regulated and even selected representatives."

GOL § 5-326 states in pertinent part that:

> "Every covenant, agreement, or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the use of such facilities pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner or operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable."

The Board cites to *Ciafolo v Vic Tanney Gyms* (10 NY2d 294, 297 [1961]), wherein the Court of Appeals held enforceable an exculpatory clause in a membership contract of a gymnasium, which "completely insulated the defendant [gymnasium] from liability for injuries sustained by plaintiff by reason of defendant's own negligence." However, this case has been abrogated by the GOL as it was decided fifteen years prior to the statute's enactment. Since the GOL's enactment, courts have reiterated that hold harmless releases clearly contradict the GOL and are to be considered void (see *Leftlow v Kutsher's Country Clib Corp.*, 270 AD2d 233 [2d Dept 2000]; *Green v Holmes Protection of N.Y.*, 216 AD2d 178 [1st Dept 1995]; *Gross v Sweet*, 49 NY2D 102, 106 [1979]). Furthermore, it is important to note that such hold harmless releases are in violation of the GOL § 5-326 whether utilized by public or private facilities (*Blanc v Windham Mtn. Club*, 115 Misc2d 404, 410 [Sup Ct NY County 1982]). The hold harmless portion of the amended membership agreement is in violation of GOL § 5-326 and is thus void.

Plaintiff next seeks a declaratory judgment for a mandatory injunction compelling the Board to release a key fob to plaintiff and allowing plaintiff unhindered access to the use and enjoyment of the health club facility. A mandatory injunction is used to compel the performance of an act (*see Matos v City of New York,* 21 AD3d 936, 937 [2d Dept 2005]). "[T]he issuance of a mandatory injunction is appropriate only when such extraordinary relief is essential to maintaining the status quo" (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011]; see also *St. Paul Fire & Mar. Ins. Co. v York Claims Serv. Co.*, 308 AD2d 347, 349 [1st Dept 2003]). In

order to obtain a permanent injunction, the party seeking such relief must show irreparable injury and the absence of an adequate legal remedy (see *Town of Liberty Volunteer Ambulance Corp. v Catskill Regional Med. Ctr.*, 30 AD3d 739, 740 [3d Dept 2006]). A movant cannot establish irreparable injury if there is an adequate remedy at law, such as money damages (see *Schleissner v 325 W. 45 Equities Group*, 210 AD2d 13, 14 [1st Dept 1994]). In determining whether to grant a mandatory injunction, "'the court must weigh the conflicting considerations of benefit to the [plaintiff] and harm to the [defendant] which would follow the granting of such a drastic remedy'" (*Nat Holding Corp. v Banks*, 22 AD3d 471, 474 [2d Dept 2005], lv denied 6 NY3d 715 [2006] [citation omitted]).

"[A] co-op [is] a voluntary association of individuals who agree to compromise their rights to obtain the benefits of living in a cooperative type of community" (*40 West 67th St. v Pullman*, 296 AD2d 120, 126 [1st Dept 2002]). Furthermore, the By-Laws of the Hampton House, which are in compliance with §339(v)(1)(h)(i) of the Act, allow the Board to adopt administrative rules and regulations pertaining to the Common Elements. As addressed above, the Board must remove the hold harmless provision of the agreement because it violates GOL § 5-326. However, the Court declines to void the remaining non-offensive portions of the amended membership agreement. In the event plaintiff signs a new membership agreement absent the hold harmless provision, the Board shall then release a key fob to plaintiff.

Plaintiff next seeks a declaratory judgment for a perpetual injunction restraining the Board, their workers, agents, privies, successors-in-title, or howsoever described, from denying or restricting plaintiff's right of access to the condominium's Health Club facility. This portion of plaintiff's motion is hereby denied.

Lastly, in his cross-motion plaintiff seeks a declaratory judgment for stay of discovery pending the determination of the within motion and (h) reasonable attorney's fees and costs. As plaintiff's request for a stay of discovery pending the determination of the within motion was not requested as a form of preliminary relief, that portion of his motion is denied. Regarding

plaintiff's request for his reasonable attorney's fees, attorney's fees are considered incidents of litigation and are not generally available as damages in the absence of statutory or contractual authority (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In this case, there is no evidence of the aforesaid authority, and plaintiff is not entitled to such fees.

CONCLUSION

Upon the foregoing, it is

ORDERED that motion by the defendants, pursuant to CPLR 3042(c), for an Order of preclusion for plaintiff's failure to serve a bill of particulars, and/or for an Order striking plaintiff's complaint pursuant to CPLR 3126 for failure to comply with defendants' discovery demands is denied as moot; and it is further,

ORDERED that the cross-motion by plaintiff for declaratory judgment is decided as follows:

(a) It is hereby ADJUDGED that an imposition of the execution of the amended membership agreement upon plaintiff prior to the release of a key fob to plaintiff which is needed to gain entry into the Health Club, constitutes a violation of plaintiff's rights as a unit owner of the defendant condominium;

(b) It is hereby ADJUDGED that the Board's conduct with respect to the unilateral modification of an existing contractual relationship between the plaintiff and the condominium, and the creation of (or attempt thereof) a new or modified contractual relationship between the condominium and plaintiff, together with the imposition of the execution of the amended membership agreement upon plaintiff prior to the release of a key fob to plaintiff which is needed to gain entry into the Health Club, are outside of the scope of the Board's authority, rendering it null and void;

(c) It is hereby ADJUDGED that specifically only the terms and conditions set forth in the amended membership agreement excluding third-parties' liability for their tortious acts resulting in injury to plaintiff constitute a violation of the provisions of Article 9-B of the Condominium Act

and is thus null and void;

(d) It is hereby ADJUDGED that the terms and conditions set forth in the amended membership agreement excluding defendants' liability for tortious acts, including gross negligence and/or willful misconduct resulting in injury or death to plaintiff, plaintiffs guests, invitees, legal representatives, heirs, executors, administrators, agents, representatives, successors and assigns, constitute a violation of New York State public policy, and are thus null and void;

(e) It is hereby ORDERED that plaintiff's request for a mandatory injunction compelling the Board to release a key fob required to gain entry into the Health Club to plaintiff, and allowing plaintiff unhindered access to the use and enjoyment of the Health Club facility, forthwith, except as restricted by statute or declaration, absent signing a agreement is denied;

(f) It is hereby ORDERED that plaintiff's request for a perpetual injunction restraining the defendants, their workers, agents, privies, successors-in-title, or howsoever described, from denying or restricting plaintiff's right of access to the health club, except as may be restricted by statute or Declaration is denied;

(g) It is hereby ORDERED that plaintiff's request for a stay of discovery pending the determination of the within motion is denied; and

(h) It is hereby ORDERED that plaintiff's request for an awarding of reasonable attorney's fees and costs is denied; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED

JUN 25 2015

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/24/15

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

Clerk