

Vidov v Morton Sq. Condominium
2018 NY Slip Op 30532(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 155237/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

OLGA VIDOV

INDEX NO. 155237/2015

Plaintiff,

- v -

MORTON SQUARE CONDOMINIUM A/K/A BOARD OF MANAGERS OF MORTON SQUARE CONDOMINIUM,

MOTION SEQ. NO. 002

Defendants.

DECISION, ORDER & JUDGMENT

The following e-filed documents, listed by NYSCEF document number 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

This action concerns the imposition of fines by a condominium board against a unit owner for alleged violations of its bylaws, namely renting the unit on a transient basis on airbnb.com. Plaintiff Olga Vidov, the owner of condominium unit 4AE of 1 Morton Square, New York, NY, seeks a declaration that the fine is void, damages for harassment and emotional distress, and attorney's fees. Plaintiff now moves for partial summary judgment in her favor on the declaratory judgment and attorney's fees causes of action. Defendant Morton Square Condominium cross-moves under CPLR 3211 to dismiss the causes of action for damages and for attorney's fees.

Where a condominium's bylaws authorize its governing board to impose fines upon a unit owner for violations of the bylaws, the board's determination to do so generally falls within its inherent power, and will be protected from judicial scrutiny by the business judgment rule, so long as the determination is made in good faith and the amount of the fine is not unreasonable

and confiscatory. (See *Minkin v Board of Directors of the Cortland Ridge Homeowners Assn., Inc.*, 149 AD3d 723, 726 [2d Dept 2017]; *Gabriel v Board of Mgrs. of the Gallery House Condominium*, 130 AD3d 482, 482 [1st Dept 2015]; *Board of Managers of Downtown Club Condominium v Sun*, Index No. 157963/2014, NYSCEF Doc. No. 70, 2018 WL 1172599 [Sup Ct, NY County Mar. 6, 2018, Bannon, J.]; *Board of Mgrs. of the Park Ave. Court Condominium v Sandler*, 48 Misc 3d 1230[A], 2015 NY Slip Op 51316[U], *2 [Sup Ct, NY County 2015]; see generally Adam Leitman Bailey and John M. Desiderio, *When Can Condo and Co-op Boards Fine the Owners and Residents?*, NYLJ, Jan. 31, 2018 at 5, col. 2.) For example, in *Gabriel v Board of Mgrs. of the Gallery House Condominium* (130 AD3d 482), the Appellate Division, First Department declared invalid a condominium board's imposition of \$500 per day for violations of its guest policy, finding the fine to be confiscatory. On the other hand, this Court (Bannon, J.) recently upheld the imposition of two \$1,000 fines for the illegal transient use of a condominium unit over a period of more than one year. (See *Board of Managers of Downtown Club Condominium v Sun*, Index No. 157963/2014, NYSCEF Doc. No. 70, 2018 WL 1172599.)

Here, defendant has imposed a fine of \$119,000, representing \$1,000 for each alleged night that plaintiff's unit was used illegally as a transient hotel. According to defendant, the \$1,000 per night was intended as a deterrent, and was based on the \$700 per night that plaintiff was charging to stay in the unit plus an additional \$300. Defendant has alerted this Court of no authority standing for the proposition that it is entitled to impose such a large fine on the basis that a smaller fine would not adequately deter the improper conduct. Indeed, basing a fine on the amount that the unit owner earned is the very definition of a confiscation. Therefore, this fine must be annulled as unreasonable and confiscatory.

Turning to the claim for damages for emotional distress, plaintiff fails to state a cause of action. The mere imposition of a fine, albeit a large fine, by a condominium board does not constitute the sort of extreme and outrageous conduct that can form the predicate of a cause of action for intentional infliction of emotional distress. (*See generally Matthauss v Hadjedj*, 148 AD3d 425, 425-426 [1st Dept 2017]; *Trapp-White Fountain*, 147 AD3d 466, 466 [1st Dept 2017]; *Corsini v Morgan*, 123 AD3d 525, 526 [1st Dept 2014], *lv dismissed* 25 NY3d 1084 [2015].)

Finally, with respect to plaintiff's demand for attorney's fees, even assuming that she is entitled to request them under a reciprocity theory, relying on the provision in the bylaws permitting the board to collect attorney's fees (*see generally* Real Property Law § 234; *but see Bd. of Mgrs. of the J Condominium v Tornabene*, NYLJ, Jun. 7, 2017 at 38, L&T 70733/2014 [Civ Ct, Kings County 2017]) – and she has alerted this Court of no authority permitting recovery of attorney's fees in this context – this Court is unconvinced that she has substantially prevailed (*see Walentas v Johanes*, 257 AD2d 352, 354 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]). Although plaintiff has succeeded in setting aside the fees assessed, her other cause of action was dismissed, and her conduct was likely both a violation of the bylaws and of the laws of this State. In this regard, while plaintiff claims that the condominium did not have proof of 119 individual nights of transient occupancy, her Airbnb listing leaves little doubt that she engaged in at least some degree of improper use of the apartment. (Doc. No. 43.)

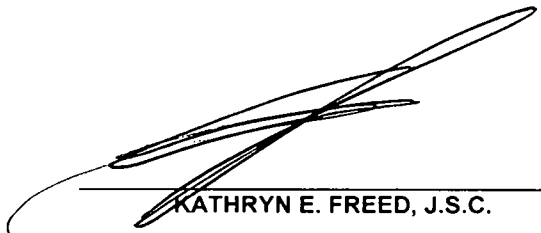
Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment in her favor is granted as to the first cause of action for a declaratory judgment, and is otherwise denied; and it is further

ORDERED that defendant's cross motion to dismiss the second and third causes of action is granted, and the second cause of action for emotional distress and the third cause of action for attorney's fees are both dismissed; and it is further

ADJUDGED and DECLARED that the \$119,000 fine imposed by defendant Morton Square Condominium against plaintiff Olga Vidov on or about March 3, 2015 is null and void.

3/282018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE