

**Green v Board of Mgrs. of Diamond on Duane
Condominium**

2020 NY Slip Op 32819(U)

August 28, 2020

Supreme Court, New York County

Docket Number: 159465/2019

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

-----X

NOTOYA GREEN, AS TRUSTEE OF THE GROWING
FAMILY REVOCABLE TRUST

Plaintiff,

INDEX NO. 159465/2019

MOTION DATE 5/8/2020

MOTION SEQ. NO. 001

- v -

BOARD OF MANAGERS OF DIAMOND ON DUANE
CONDOMINIUM,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 27, 28, 29, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Notoya Green, as Trustee of the Growing Family Revocable Trust (Motion Seq. 001) is denied in its entirety and the petition is dismissed; and it is further

ORDERED that the counterclaims of Respondent Board of Managers of Diamond on Duane Condominium are dismissed with prejudice; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Respondent shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

MEMORANDUM DECISION

In this Article 78 proceeding, Petitioner Notoya Green, as Trustee of the Growing Family Revocable Trust, seeks an order: (i) annulling and setting aside Respondent Board of Managers of Diamond on Duane Condominium's rejection of Petitioner's alteration application with respect to the renovation of two units owned by Petitioner as arbitrary and capricious and an abuse of discretion, (ii) compelling Respondent to consent to the requested alterations or deeming that no consent is required under the building's governing documents, and (iii) directing an award of reasonable legal fees (Motion Seq. 001).

Respondent opposes the petition in its entirety and has asserted counterclaims for breach of fiduciary duty and for an award of legal fees, which are both opposed by Petitioner.

BACKGROUND FACTS

Petitioner resides with her family in a condominium building located at 137 Duane Street in Manhattan (the "Condominium"). Respondent is the Board of Managers of the Condominium (the "Board"). Petitioner has owned Residential Unit 2C (the "Residential Unit") in the Condominium since 2010 (NYSCEF doc No. 10, ¶ 1). After residing in the building for several years and starting a family, Petitioner became interested in expanding her living space and expressed an interest in purchasing the space next to the Residential Unit, a separate room designated in the Condominium's Offering Plan as Commercial Unit 5 (the "Commercial Unit") (*id.* at ¶ 7). The Commercial Unit at the time was a "Sponsor Unit" not owned by a separate entity (*id.*). Petitioner contacted the Sponsor with an offer and the offer was accepted.

Petitioner alleges that Respondent engaged in numerous acts of obstruction to thwart the sale of the Commercial Unit. According to Petitioner, Respondent was opposed to the sale because the Commercial Unit had been used for several years as an office for the Condominium's superintendent, for which Respondent paid no rent (*id.* at ¶ 8). Respondent first objected to the sale by arguing that Petitioner did not obtain a right of first refusal but withdrew that argument after Petitioner pointed out that the Condominium Declaration does not provide for a right of first refusal for the sale of a Sponsor Unit (*id.* at ¶ 9).

According to Petitioner, Respondent then attempted to impede the sale a second time by informing Petitioner that there were outstanding common charges in the amount of \$61,309.98 for the Commercial Unit (*id.* at ¶ 10). Petitioner claims that this sum was grossly inflated by Respondent given that the monthly common charges for the unit are \$60.76, meaning that it would have taken over 85 years for such an amount to accrue (*id.*). However, Petitioner agreed to indemnify the Commercial Unit's seller for the claim of common charges owed and closed on the sale of the Commercial Unit in September 2018 (*id.*)

Petitioner then submitted an alteration application to Respondent in April 2019, detailing her plans to combine her Residential Unit with the Commercial Unit by tearing down the wall between the two spaces. On May 28, 2019, Respondent rejected Petitioner's application and informed Petitioner that "the Condominium's Declaration and By-Laws ('Governing Documents') prohibit you from combining said units. The Governing Documents do not permit the combination of a residential and commercial unit" (NYSCEF doc No. 15).

Petitioner alleges that her husband then attempted to negotiate with Leo Pustilnkov, a Board member, regarding how the alteration application might be approved. Petitioner alleges that Mr. Pustilnkov offered to approve the alteration only on the condition that Petitioner find another

suitable space for the superintendent to work in the building (NYSCEF doc No. 10, ¶ 13). Petitioner also alleges that Mr. Pustilnkov attempted to coerce Petitioner to purchase a different adjoining unit in the building, ostensibly so the superintendent could still use the Commercial Unit (*id.* at ¶ 14). Petitioner then commenced a proceeding in landlord/tenant court to evict the superintendent from the space, which resulted in a stipulation wherein Respondent agreed to turn over possession of the Commercial Unit to Petitioner on August 21, 2019 (NYSCEF doc No. 9).

Petitioner then commenced this present Article 78 action seeking to annul Respondent's rejection of Petitioner's alteration plan, on the grounds that the rejection was made in bad faith and was arbitrary and capricious as the Condominium's Governing Documents do not expressly prohibit the alteration sought. Petitioner also claims to be entitled to an award of legal fees pursuant to the By-Laws, which provide that legal fees may be recovered by an aggrieved unit owner in a legal proceeding related to the Board's breach of the By-Laws, rules, or other regulations (*id.* at ¶ 35).

Respondent opposes the petition and argues that its decision to reject the combination of a residential and commercial unit in the Condominium was a legitimate business decision protected by the Business Judgment Rule. Respondent also has asserted a counterclaim for breach of fiduciary duty against Petitioner's husband, a board member, arguing that he engaged in improper self-dealing by utilizing information gleaned from Board meetings to negotiate the purchase of the Commercial Unit. Respondent further counterclaims for an award of legal fees, which it contends it is owed pursuant to the same provision in the By-Laws cited by Petitioner.

Petitioner seeks dismissal of both counterclaims. Petitioner argues that Respondent has not sufficiently pled its counterclaim for breach of fiduciary duty as it has not demonstrated any

misconduct by Petitioner's husband nor demonstrated any damages. Petitioner also contends that she, not Respondent, is the entity owed legal fees pursuant to the By-Laws.

DISCUSSION

Petitioner's Article 78 Application

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [Ct App 1974]; *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 [1st Dept 1996]). A determination is only deemed arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts" (See *Century Operating Corp. v Popolizio*, 60 NY2d 483 [Ct App 1983], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231). However, if there is a rational basis for the administrative determination, there can be no judicial interference (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232). It is also well settled that "[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational" (*Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251 [1st Dept 1994], citing *Matter of Salvati v Eimicke*, 72 NY2d 784 [Ct App 1988]).

While challenges to administrative agency decisions always take the form of Article 78 proceedings, challenges to the propriety of corporate board action have been lodged as derivative suits, injunction actions, and all manner of civil suits, including Article 78 proceedings. In the

seminal case of *Levandusy v One Fifth Ave. Apt. Corp*, the Court of Appeals opined that regardless of what type of proceeding has been initiated, the applicable standard under which to evaluate Condominium and Co-operative Building Board decisions is the business judgment rule, which differs from the typical Article 78 arbitrary and capricious standard:

“[W]e reiterate that “business judgment” appears to strike the best balance. It establishes that board action undertaken in furtherance of a legitimate corporate purpose will generally not be pronounced “arbitrary and capricious or an abuse of discretion” (CPLR 7803 [3]) in article 78 proceedings, or otherwise unlawful in other types of litigation. It is preferable to a standard that requires Judges, rather than directors, to decide what action is “reasonable” for the cooperative. It avoids drawing sometimes elusive semantical distinctions between what is “reasonable” and what is “rational” (the concurrence rejects the former but embraces the latter as the appropriate test). And it better protects tenant-shareholders against bad faith and self-dealing than a test that insulates board decisions “if there is a rational basis to explain them” or if “an articulable and rational basis for the board's decision exists.” (Concurring opn, at 548.)” (75 NY2d 530, 542 [1990]).

In light of the instructive *Levandusy* holding, this Court must accordingly evaluate the Board’s decision here not under the arbitrary and capricious standard, but rather under the business judgment rule. It is well settled law that

“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 ... 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”

(*Id.* at 539).

Under the business judgment rule, Board decisions are generally upheld unless the actions are taken in bad faith or in furtherance of a purpose that does not sever the goals of the condominium corporation (*Id.* at 537-38). Absent such circumstances, the Court will defer to the Board’s judgment as long as it acted consistently with its by-laws.

Here, as a preliminary matter, the Court notes that the sole question at issue in the Article 78 petition is whether the Board’s denial of Petitioner’s application to combine her residential

and commercial units is protected by the business judgement rule. Petitioner's allegations that the Board attempted to "thwart" her purchase of the Commercial Unit are moot as she did eventually purchase the Commercial Unit, and thus there is no decision rendered by the Board pertaining to the purchase of the Unit itself that the Court can evaluate under this Article 78 proceeding.

In support of her argument that the Board's denial of her alteration application was improper and not protected by the business judgment rule, Petitioner relies on the following two provisions of the Condominium's Declaration that pertain to Commercial Unit alterations:

"Except to the extent prohibited by law, a Commercial Unit Owner shall have the right, without the requirement of consent of the Board of Managers, the other Unit Owners or anyone else, (a) to make alterations, additions and improvements, whether structural or nonstructural, interior or exterior, ordinary or extraordinary in, to and upon its Unit or any Limited Common Elements appurtenant thereto and (b) to install any ducts, stacks, chutes, or chases reasonably required in connection with the renovation of the Unit or any limited Common Element appurtenant thereto provided (i) that the nature and location of such installation does not interfere materially with the use then being made of any other Commercial or Residential Unit or any Limited Common Element and (ii) that the then owner of the Unit complies with zoning requirements and all other laws, ordinances and regulations of all governmental authorities having jurisdiction."

(NYSCEF doc No. 5 at 36, Art. 9.2).

"Commercial Unit Owner (including the Sponsor or its designee with respect to Units owned by it or such designee) shall have the right (i) to change the layout of the Commercial Unit, and (ii) to change the size and/or number of the Commercial Unit including subdividing a Commercial Unit into additional Commercial Units or combine two or more Commercial Units into one such Unit, including, without limitation incorporating into such Unit a wall..."

(*Id.*, Article 9.3).

There is also a similar provision in the By-Laws of the Condominium that holds:

"The Commercial Unit Owners will have the right to make any structural addition, alteration or improvement in or to the Commercial Unit or any Limited Common Element appurtenant thereto with the requirement of consent of the Board of Managers or any other Unit Owner, if it does not affect the portion of the Building utilized by any other Unit Owner."

(NYSCEF doc No. 6, Article VI, Section 12).

Petitioner argues that as these provisions provide that Commercial Unit owners may make alterations without Board approval as long as the alterations do not affect another unit owner or a common area of the building, Respondent erred in denying their application. Petitioner concludes that as the proposed alteration merely involved knocking down a wall between her adjoining units, Respondent's denial of the application was undertaken in bad faith "retaliation" against Petitioner because her purchase of the Commercial Unit took office space away from the Condominium's superintendent.

However, as noted by Respondent, while the Governing Documents afford commercial unit owners wide discretion in alterations they wish to make within their units, the Governing Documents are completely silent regarding the combination of Residential and Commercial Units. The provisions cited by Petitioner convey no entitlement to engage in such combinations without Board approval. Respondent's determination that such combinations are thus barred is in and of itself a decision that is subject to the protection afforded by the Business Judgment Rule. Notwithstanding Petitioner's correct assertion that such combinations are not explicitly precluded in the Governing Documents, the Court has no grounds to challenge Respondent's judgment to not allow unit owners to undertake alterations not expressly provided for in the Governing Documents. Therefore, Respondent acted within the scope of its authority when it issued its denial of Petitioner's alteration application.

Petitioner contends that even *assuming arguendo*, Respondent was within its authority to deny the alteration, the decision should nevertheless not be protected under the Business Judgment Rule as it was made in bad faith. However, Petitioner's claims that the denial was

issued in retaliation are all completely unsupported by the evidentiary record. In her papers, Petitioner claims that she and her family believe they were treated differently as they are the only African American family in the building (NYSCER doc No. 10 at ¶ 30). The only support Petitioner provides for this charged assertion is a list of non-African American building residents who were permitted to perform major alterations in their units. However, none of the examples cited involve a combination of residential and commercial units (*Id*). Therefore, Petitioner has not introduced any factual link between the race of her family and the circumstances surrounding the Board's denial of the alteration application, and this claim of disparate treatment must be disregarded as thoroughly unsubstantiated.

Petitioner also does not provide any documentary evidence to corroborate her assertions that Respondent attempted to bribe her family into purchasing a different Commercial Unit on the condition that the alteration application would then be approved. The only communication provided is a series of emails between Petitioner's husband, Fred Mwanngaguhunga ("Fred") and Mr. Pustilnikov discussing the additional space for sale in the building (NYSCEF doc No. 16). The email chain concludes with Fred informing Mr. Pustilnikov that they are not interested in purchasing; nothing in the chain reflects an express or implied threat from Mr. Pustilnikov to withhold approval of the alteration. The only other documentary evidence submitted is the rejection letter sent by Respondent (NYCEF doc No. 15), which merely states the reasons for the rejection of the alteration and does not convey any bad faith intent.

Therefore, Petitioner simply has not shown that Respondent 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" (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 8-9 [2006] [citations omitted]). Respondent's denial of Petitioner's alteration application is thus a decision made within its

authority and protected by the Business Judgment Rule; the decision is thus not subject to judicial interference. Petitioner's Article 78 application is therefore denied.

Petitioner's Application for Legal Fees

As the petition for relief pursuant to Article 78 is denied, Petitioner's application for reasonable attorney's fees must also be denied. Section 19 of the By-Laws provides as follows:

(c) The violation or breach of any of the provisions of these By-Laws, the Rules and Regulations or the Declaration with respect to any rights, easements, privileges or licenses granted to any Unit Owner will give to the aggrieved Unit Owner a right of action for damages or the right to enjoin, abate or remedy by appropriate legal proceedings, either in law or in equity, the continuance of any such violation or breach. (Emphasis added)

(d) The expenses of any proceeding brought under this Section 19 and all other costs and expenses, including reasonable attorneys' fees, incurred hereunder by the Board, the Sponsor or a Unit Owner, as the case may be, together with interest thereon at the highest legal rate from the date of expenditure, will immediately be payable by the defaulting Unit Owner to (i) the Board, in the event set forth, in (a) above, (ii) the Sponsor in the event set forth in (b) above and (iii) the aggrieved Unit Owner in the event set forth hi [sic] (c) above, All sums payable under this Section 19 will constitute common charges payable by the Unit Owner,

(e) Unit Owners will have similar rights of action against the Board of Managers for failure to comply with the terms of the Condominium Documents, subject to the limitations on liability of Board Members contained in these By-Laws."

(NYSCEF Doc No. 6, Article VI, Section 19).

Petitioner's claim that she is entitled to legal fees is predicated on subsection (e), which affords unit owners the right to reasonable attorney's fees upon a showing of a breach of the Governing Documents by the Board. However, as discussed *supra*, there has been no finding in this proceeding that the Board failed to comply with the terms of the Governing Documents. Therefore, Petitioner's application for legal fees is also denied.

Respondent's Counterclaims

In its Answer to the petition, Respondent asserts counterclaims for breach of fiduciary duty and an award of reasonable legal fees. Respondent does not provide any support for these counterclaims within its subsequent papers. The Court writes separately to note that these counterclaims must be dismissed.

Breach of Fiduciary Duty and Self-Dealing

Respondent argues that Petitioner's husband Fred, who is a member of the Board, breached his duty to Respondent and is culpable of self-dealing. Respondent alleges that Fred utilized information he learned from confidential discussions at Board meetings to contact the Sponsor directly in order to negotiate the purchase of the Commercial Unit (NYSCEF doc No. 30, ¶ 47). Respondent contends that Fred acted in bad faith, engaged in self-dealing and breached his fiduciary duty as a member of the Board.

To establish a claim for breach of fiduciary duty, Respondent must have sufficiently pled that Fred owed Respondent a fiduciary duty, that he committed misconduct, and that Respondent suffered damages as a result of the misconduct (*Onetti v The Gatsby Condominium*, 2012 NY Slip Op 33584[U] [Sup Ct, NY County 2012]).

Here, Respondent has failed to allege with specificity any fact to demonstrate that Fred breached his fiduciary duty or engaged in self-dealing as required by CPLR § 3016(b). As noted above, Respondent raised this counterclaim in its Answer but provides no legal argument in its memoranda of law to support its assertions. Respondent has not provided any facts to demonstrate any misconduct committed by Fred, or that it suffered any damages as a result of the alleged misconduct. Respondent does not state what confidential information was purportedly acquired by Fred, nor has it provided any documentary showing that a purchase of the

Commercial Unit was ever even contemplated at a Board meeting or that Fred ever was made aware that Respondent was interested in purchasing the unit itself. The background of this proceeding as documented in the affidavits supplied by both parties reflect that Respondent was aware of Petitioner's family's desire to purchase the Commercial Unit for several years, as far back as 2015 (NYSCEF doc No. 46 at 9). In addition to failure to allege specific facts underlying the claim of breach of fiduciary duty, Respondent fails to specify what damages, if any, resulted from the alleged actions.

Therefore, Respondent's counterclaim for breach of fiduciary duty and self-dealing is dismissed.

Legal Fees

Respondent relies on Article VI, Section 19, as cited *supra*, in its counterclaim for legal fees against Petitioner. However, the provision entitling Respondent to legal fees is conditioned on a claim that a unit owner violated the Governing Documents. As discussed above, the Board has failed to allege any wrongdoing or violation of the Governing Documents by Petitioner. The counterclaim for breach of fiduciary duty and self-dealing has been dismissed and is also not a claim for breach of the Governing Documents. It should also be noted that the aforementioned counterclaim is not alleged against Petitioner but rather her husband, who is not individually a party to this proceeding (NYSCEF doc No. 46 at 13). Furthermore, Section 19 of the By-Laws also does not expressly permit Respondent to recover legal fees in defense of an action by a unit owner; a plain reading of the section indicates that it pertains to proceedings commenced by Respondent against unit owners for a breach of the By-Laws or other misconduct. Therefore, Respondent has not demonstrated entitlement to legal fees and its counterclaim for an award of legal fees is dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Notoya Green, as Trustee of the Growing Family Revocable Trust (Motion Seq. 001) is denied in its entirety and the petition is dismissed; and it is further

ORDERED that the counterclaims of Respondent Board of Managers of Diamond on Duane Condominium are dismissed with prejudice; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Respondent shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

8/28/2020
DATE


HON. CAROL R. EDMEAD, J.S.C.
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE