

**72 Poplar Townhouse LLC v Board of Mgrs. of the
72 Poplar St. Condominium**

2021 NY Slip Op 30638(U)

March 1, 2021

Supreme Court, Kings County

Docket Number: 501530/20

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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72 POPLAR TOWNHOUSE LLC,
Plaintiffs, Decision and order

- against - Index No. 501530/20

BOARD OF MANAGERS OF THE 72 POPLAR
STREET CONDOMINIUM, RON SION, AMY LEE,
MICHAEL ROSNER, RAKESH MANGAT AND
TORA FISHER BUCKWORTH,
Defendants, March 1, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds they cannot be sued in their individual capacities. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Property located at 72 Poplar Street in Kings County is a cooperative that consists of thirteen residential units and a separate townhouse. Two sets of by-laws were adopted which materially differed in the way common charges were assessed against the unit owners. The by-laws presented by the offering plan stated that common expenses would be assessed based upon the percentage of ownership of the common interest. However, the by-laws that were recorded changed the percentage owed by the owner of the townhouse. Upon review of the discrepancy the board

refunded the owner of the townhouse \$2,867.76 it calculated were overcharges based upon the plan by-laws. To resolve the discrepancy between the two versions of the by-laws the board called a special meeting to resolve the discrepancy. All of the unit owners participated and a vote to reconcile the discrepancy was approved by 82% of the unit owners. The plaintiff was unhappy with the vote and instituted the within lawsuit. The complaint asserts causes of action for a declaratory judgement the vote and subsequent amendment is void, breach of contract, breach of fiduciary duty, fraud and estoppel. Further, the complaint lists causes of action against the board members in their individual capacities. The board members have now moved seeking to dismiss the complaint against them personally on the grounds they are protected by the business judgement rule and no individual claims can exist.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor

of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

That business judgement rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgement in the lawful and legitimate furtherance of corporate purposes" (see, Deblinger v. Sani-pine Products Co., Inc., 107 AD3d 659, 967 NYS2d 394 [2d Dept., 2013]). However, in situations where there are allegations of "dual relations" and the "unprejudicial exercise of judgement" the business judgement rule is inapplicable (see, Allannic v. Levin, 57 AD3d 443, 870 NYS2d 286 [1st Dept., 2008]). In that case the court held the board members were not disinterested, and thus protected by the business judgement rule, where all the shareholders would not be treated equally thereby. The court noted that "as such there are questions of fact regarding whether the board engaged in self-dealing and whether its failure to treat all shareholders fairly and evenly constitutes a breach of its fiduciary duties" (id).


In this case the board members called a meeting to resolve a discrepancy among two versions of the by-laws. The unit members voted overwhelmingly in a way that financially harmed the plaintiff. However, there are no allegations the board members acted in any improper way in calling the meeting, presenting the issue and conducting the vote whereby they acted based upon their own personal interests. Indeed, the motion is opposed essentially on the grounds that further discovery is necessary to determine the intent of the board members. However, the intent of the board members is only necessary if there are legitimate allegations they acted improperly. As noted, no such allegations exist. The mere fact the vote negatively affected the plaintiff does not raise questions sufficient to ignore the business judgement rule.

Therefore, based on the foregoing the motion seeking to dismiss the complaint against the individual defendants is granted.

So ordered.

ENTER:

DATED: March 1, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC