

**Frankel v Board of Mgrs. of the 392 Cent. Park W.
Condominium**

2021 NY Slip Op 31744(U)

April 16, 2021

Supreme Court, New York County

Docket Number: 654501/2017

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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KEVIN FRANKEL,

Plaintiff,

- v -

BOARD OF MANAGERS OF THE 392 CENTRAL PARK
WEST CONDOMINIUM, SCOT GLEASON, JOHN
FLEMING, ROBIN KELLY, NAOMI HOLOCH, JANET
SMITH, JANISE POTICHA, PATRICIA WILLIAMS, TOM
BRENNAN, JOHN DOES AND JANE DOES, THE 392
CENTRAL PARK WEST CONDOMINIUM,

Defendant.

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INDEX NO. 654501/2017

MOTION DATE 01/05/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 126, 127 were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is

In this declaratory judgment action, plaintiff, a condominium unit owner, seeks access to the condominium's books and records and a declaration that the condominium's 2017 election of its board of managers was invalid. Plaintiff alleges that defendants violated the condominium bylaws during the 2017 board election and that defendants now refuse to allow unit owners to inspect condominium books and records. Prior decisions from this Court and the First Department establish that the remaining causes of action are: (1) access to the books and records for the 2017 board elections and (2) declaratory judgment that the condominium board 2017 election was null and void. Plaintiff moves for Partial Summary Judgment as to his First Cause of Action, directing Defendants to produce within ten days all documents responsive to Plaintiff's request for books and records; a declaratory judgment that Plaintiff was entitled to all

of the requested books and records when he first requested them; and an Order awarding attorney fees and lawful costs and disbursements.

Analysis

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

First Cause of Action

Plaintiff contends that he has a right to inspect the condominium board’s books and records as he has demonstrated that his request is in good faith and for a valid purpose. Specifically, Plaintiff is seeking to inspect: 1) the ballots from the 2016 Board election; 2) the tabulated results of the 2016 Board election; 3) the ballots from the 2017 Board election; 4) the tabulated results of the 2017 Board election; 5) the complete records reflecting parking space assignments; and 6) the complete financial records of the Condominium. Prior decisions from this Court and the First Department dismissed Plaintiff’s claims as to the 2016 election and any

contention that the parking space fees were improperly low. Accordingly, Plaintiff's request to inspect is limited to the ballots from the 2017 Board election, the tabulated results of the 2017 Board election, and the complete financial records of the Condominium¹.

In opposition, Defendants argue that in response to Plaintiff's demand for production of documents, documents relating to the 2017 Board election were made available for inspection by Plaintiff's counsel. Further, Defendants argue that Plaintiff's request to inspect such records has not been made in good faith or for a valid purpose.

It is undisputed that condominium owners have a right to inspect the building's books and records, so long as they "seek the inspection in good faith and for a valid purpose" (*see Pomerance v McGrath*, 143 AD3d 443, 446, 38 NYS3d 164, 167 [2016]). However, any issue Defendants raise concerning the good faith and validity of the purpose of Plaintiff's request shall be determined by the court after a hearing (*see Crane Co. v Anaconda Co.*, 39 NY2d 14, 382 NYS2d 707 [1976]; *Schulman v Louis Dejonge & Co.*, 270 AD 147, 59 NYS2d 119 [App Div 1945]; *Ret. Plan for Gen. Emps. of City of N. Miami Beach v McGraw-Hill Companies, Inc.*, 120 AD3d 1052, 1053, 992 NYS2d 220, 221 [2014]).

Accordingly, it is hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the Special Referee for such purpose: The issue of whether Plaintiff's requests for the ballots from the 2017 Board election, the tabulated results of the 2017 Board

¹ As Plaintiff's claims as to the 2016 election and the pricing of the parking spaces have been dismissed on the merits, Plaintiff cannot articulate a good cause for obtaining the ballots from the 2016 Board election, the tabulated results of the 2016 Board election, and the complete records reflecting parking space assignments. Accordingly, Plaintiff fails to establish, *prima facie*, his right to these documents.

election, and the complete financial records of the Condominium, were made in bad faith or for an improper purpose; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until

completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.



4/16/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: