

**Matter of Mass v Board of Mgrs. of the 1286 Halsey
St. Condominium**

2022 NY Slip Op 30456(U)

February 4, 2022

Supreme Court, Kings County

Docket Number: Index No. 526283/20

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of February, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

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In the Matter of the Application of SHERRILL MASS and DANIEL ROTHBART,

Petitioners,

For, inter alia, A Judgment Pursuant to Articles 30 and 78 of the Civil Practice Law and Rules

-against-

Index No. 526283/20

THE BOARD OF MANAGERS OF THE 1286 HALSEY STREET CONDOMINIUM, SHEILA FLAUCHER a/k/a SHEILA GARSON, KENNETH J. GARSON, FRANCINE McGIVERN a/k/a FRANCES McGIVERN, CODY TRENTON SCHULTZ, RACHEL ELIZABETH SCHULTZ and JUSTIN DENUNE,

Respondents.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____	2-1, 33-34, 60-61
Opposing Affidavits (Affirmations) _____	_____	42, 46, 67
Affidavits/ Affirmations in Reply _____	_____	_____
Other Papers: _____	_____	_____

Upon the foregoing papers, petitioners Sherrill Mass and Daniel Rothbart seek by way of a CPLR article 78 proceeding: (1) a judgment declaring that a “First Amendment to the Condominium Declaration” of the subject condominium is valid and enforceable;

(2) a judgment, pursuant to CPLR 7803, vacating, annulling or otherwise reversing the decision of respondent Board of Managers of the 1286 Halsey Street Condominium (Board) to not record the “First Amendment to the Condominium Declaration;” and (3) a judgment compelling the Board, having power of attorney for each condominium unit owner, to record the “First Amendment to the Condominium Declaration” and confirmatory deeds for Units 2B, 3A and 3B of the condominium. The Board and respondents Sheila Garson and Rachel Elizabeth Schultz move (Motion Sequence [MS] No. 2) for an order, pursuant to CPLR 3211 (a) (3), (a) (5), and (a) (7), dismissing the petition. By separate application, the Board moves (MS No. 3) for an order, pursuant to CPLR 3211 (a) (3), (a) (5), (a) (7), and 7804 (d), dismissing the amended complaint interposed by Mass, as sole plaintiff against the Board, as sole defendant.

Rothbart and Mass are the owners of Units 1A and 1B in the subject condominium at 1286 Halsey Street in Brooklyn. The condominium was created by the sponsor by virtue of a condominium declaration, dated February 1, 2005 and recorded on April 25, 2005. The common interest percentage for each unit in the building was set forth in the condominium declaration and original offering plan as follows: Unit 1A, 16.33%; Unit 1B; 16.33%; Unit 2A, 16.67%; Unit 2B, 16.67%; Unit 3A, 17.00%; and Unit 3B, 17.00%. On January 26, 2005, the sponsor issued a “First Amendment to Offering Plan,” which amended, among other components of the offering plan, the common interest percentage allocations for the units of the building. According to the amendment, the common interest percentage for each unit in the building was reallocated as follows: Unit 1A, 17.00%; Unit 1B; 19.00%; Unit 2A, 16.00%; Unit 2B, 16.00%; Unit 3A, 16.00%;

and Unit 3B, 16.00%. While the first amendment to the offering plan was approved by the Attorney General and the sponsor proceeded to sell and deed units based upon the new common interest allocations in the amended offering plan, an amendment to the condominium declaration reflecting the changes to the common interest allocations was never recorded.

In correspondence dated July 28, 2020, Mass and Rothbart notified the Board of the common interest percentage discrepancies and requested that the Board take action to address the problem, including filing an amendment to the condominium declaration. According to correspondence dated August 1, 2020, the Board held their annual meeting on July 29, 2020 and no motion was made by any unit owner to amend the declaration. On December 29, 2020, Mass and Rothbart filed a petition pursuant to CPLR article 78 against the Board and other individual unit owners. In response, the Board and two of the named respondents filed a motion to dismiss under CPLR 3211. On October 6, 2021, Mass filed an amended complaint naming herself as sole plaintiff and the Board as sole defendant. In the amended complaint, Mass seeks a judgment declaring that the Board is “required to submit for recording a corrected Declaration to correct the scrivener’s error in the allocation of common interest contained in the Condominium’s Declaration” as well as an injunction “mandating that the Board submit for recording a corrected Declaration to correct the scrivener’s error in the allocation of common interest contained in the Condominium’s Declaration.”

Inasmuch as an amended complaint has been filed, evincing an intent by Mass to reframe this matter as a plenary action, the court will deem this matter a plenary action

rather than a special proceeding (*see* CPLR 103 [c]). Because the amended complaint supersedes the petition, the petition (MS No. 1), as well as the motion to dismiss the petition (MS No. 2), are denied as academic (*see Oppedisano v D'Agostino*, 196 AD3d 500, 501 [2d Dept 2021]).

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Meyer v North Shore–Long Is. Jewish Health SYS., Inc.*, 137 AD3d 880, 880–881 [2d Dept 2016]). A defendant's dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but “[i]f the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action” (*Sokol v Leader*, 74 AD3d 1180, 1181–82 [2010], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Real Property Law [RPL] § 339-s (1) provides:

1. The declaration, any amendment or amendments thereof, and every instrument affecting the property or any unit included within the meaning of “conveyance” as used in article nine of this chapter, shall be entitled to be indexed and recorded pursuant to and with the same effect as provided in said article nine. The recording officer shall not accept such an instrument constituting a condominium map unless it has endorsed thereon or attached thereto a certificate of the county director of real property tax services that the fee authorized by section five hundred three of the real property tax law, if any, has been paid. Neither the declaration nor any amendment thereof shall be valid unless duly recorded.

RPL 339-i (2) provides that “[t]he common interest appurtenant to each unit as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all unit owners affected.” Further, section 14 of the condominium declaration provides, in pertinent part:

14. AMENDMENT TO DECLARATION: This Declaration may be amended, modified, added to or deleted from by vote of Unit Owners representing at least 66-2/3% of the Common Interest of all Unit Owners, cast in person or by proxy at a meeting duly held in accordance with the provisions of the By-Laws, or in lieu of a meeting, any amendment may be approved, in writing by vote of Unit Owners representing at least 66-2/3% of the Common Interest of all Unit Owners; provided however,

* * *

b) No amendment which shall change the percentage of Common Interests allocated to any Unit or Units may be made without the written consent of such Owner.

While Mass frames the relief requested in the amended complaint as a mere correction of a “scrivener’s error,” such a correction, effectively, would constitute an amendment of the condominium declaration altering the common interest allocations and would be subject to the provisions of RPL 339-i (2) and section 14 of the condominium declaration. However, there is no allegation in the amended complaint that all unit owners affected by the proposed amendment have consented to a change in their common interest percentages or that an amendment of the condominium declaration was approved by 66.67 % of the unit owners. Without these conditions, the Board is powerless to record an amendment to the condominium declaration having the effect of altering the common interest allocations. The Board was advised of such by its counsel in a memorandum dated March 31, 2020 (NYSCEF Doc No 18). Insofar as the actual square

footage of each unit (which serves as the basis for the common interest allocation) was not definitively known, the Board's counsel recommended in the memorandum that either a formal unit owners' meeting be held wherein the unit owners can come to an agreement upon the allocation of common interest or that the Board hire an independent professional to measure the units' floor space, inclusive of limited common elements, to determine the common interest percentage (*id.*). Because there is no proof regarding the square footage of each unit, it is not clear that an amendment of the condominium declaration is even necessary, or that the amendment must reflect those same percentages listed in the amendment to the offering plan as requested by plaintiff.

Accordingly, the court finds no ripe justiciable controversy or cognizable grounds to issue the injunctive relief requested by Mass. Moreover, where the plaintiff is not entitled to the declaration that he/she seeks, the declaratory relief cause of action should not necessarily be dismissed but rather a declaration of the parties' rights should be made (*Einbinder v Anocwitz*, 38 AD2d 721 [2d Dept 1972]).

As a result, the Board's motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (7) is granted to the extent that plaintiff's claims for injunctive relief are dismissed and the court declares that the Board is not required, under the circumstances of this case, to submit for recording a corrected Declaration modifying the allocation of

common interest contained within the Condominium's Declaration.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.