

<b>Starke v Board of Mgrs. of 20 Pine St. Condominium</b>
2022 NY Slip Op 33343(U)
September 26, 2022
Supreme Court, New York County
Docket Number: Index No. 151287/2022
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

CHARLES H. STARKE, JANTHIMA STARKE,  
and PINE STREET COLLECTIONS 1911, LLC,

Index No. 151287/2022

Plaintiffs

- against -

DECISION AND ORDER

BOARD OF MANAGERS OF 20 PINE STREET  
CONDOMINIUM,

Defendant

LUCY BILLINGS, J.S.C.:

Plaintiff owners of residential condominium unit 1911 at 20 Pine Street, New York County, challenge defendant condominium Board of Managers' denial of plaintiffs' application to install a pergola on their terrace. Defendant moves to dismiss the complaint on the grounds that the condominium's governing documents establish that the business judgment rule protects defendant's denial. C.P.L.R. § 3211(a)(1) and (7). For this purpose the court may consider the affidavit by defendant's building manager only to the extent that she authenticates and lays the foundation for admissibility of the documents on which defendant relies. Serao v. Bench-Serao, 149 A.D.3d 645, 646 (1st Dep't 2017); Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016); Asmar v. 20th & Seventh Assoc., LLC, 125 A.D.3d 563, 564 (1st Dep't 2015); City of New York v. VJHC Dev. Corp., 125

A.D.3d 425, 426 (1st Dep't 2015). See Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 601 (2017); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002).

I. THE DOCUMENTARY EVIDENCE AND PLAINTIFFS' ALLEGATIONS

Defendant's "Private Terrace Rules and Regulations" ¶ 12 provides that: "No awnings, trellises, gazebos or any other type of structure can be installed without prior written permission of the Board." Aff. of A.G. Chancellor, III, Ex. A (Aff. of Jessica Quinn) Ex. B, at 3. The complaint alleges, and defendant does not dispute, that the Board denied plaintiffs' application to install a pergola on their terrace on the grounds that the proposed pergola "would at least partially obstruct neighboring units' views and be visible from the street." Chancellor Aff. Ex. B (V. Compl.) ¶ 13. The complaint alleges, and the affidavits by plaintiff Charles Starke and by plaintiffs' neighbors supplementing the complaint attest, however, that (1) the proposed pergola does not protrude above plaintiffs' terrace fence and thus would not block neighboring units' views, and (2) plaintiffs' unit is an inside unit on the 19th floor and thus is not visible from the street. Id. ¶¶ 14-16; Aff. in Opp'n of Charles H. Starke ¶¶ 8-9; Aff. in Opp'n of Jonathan Crowley ¶¶ 6-7; Aff. in Opp'n of Giulia Iacobelli ¶¶ 6-7. While defendant may dispute those facts, for purposes of its motion the court must

accept those facts as true. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d 538, 538 (1st Dep't 2019).

Plaintiffs also submitted to defendant an engineer's report to the same effect as their affidavits, but the court may not consider the unsworn report's contents to supplement the complaint. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); US Suite LLC v. Barata, Baratta & Aidala LLP, 171 A.D.3d 551, 551 (1st Dep't 2019); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013). Nor may the court consider the allegations by plaintiffs' attorney, who does not demonstrate his personal knowledge, that defendants did not retain an expert to rebut plaintiffs' plans and engineer's report based on those plans: allegations outside the parameters of the complaint.

Plaintiffs do not challenge defendant's denial of plaintiffs' application based on the condominium sponsor's installation of structures on the roof, as defendant suggests. Plaintiffs recognize that the condominium Offering Plan affords the sponsor rights not afforded to unit owners to install structures on the building's common elements, which do not obstruct units' views and are for use by all residential unit

owners.

## II. APPLICATION OF THE BUSINESS JUDGMENT RULE

To insulate defendant's denial based on the proposed pergola blocking neighboring units' views and being visible from the street against judicial review, defendant relies on the business judgment rule. That rule protects corporate directors' actions only if taken in the exercise of honest judgment and in the legitimate furtherance of corporate purposes. Consumers Union of U.S., Inc. v. State of New York, 5 N.Y.3d 327, 360 (2005); 40 W. 67th St. v. Pullman, 100 N.Y.2d 147, 153-54 (2003); Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 538 (1990); Caldwell v. Two Columbus Ave. Condominium, 92 A.D.3d 441, 441 (1st Dep't 2012). Even disregarding plaintiffs' inadmissible evidence, their complaint and affidavits nonetheless dispute that defendant's conclusions, that the proposed pergola will block neighboring units' views and be visible from the street, represent an honest assessment of the true facts. Moreover, if those facts, which defendant claims further its corporate purpose, are untrue, then the legitimate corporate purpose is lacking. Kleinerman v. 245 E. 87 Tenants Corp., 105 A.D.3d 492, 493 (1st Dep't 2013); 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541, 542 (1st Dep't 2011).

While plaintiffs may supplement their complaint with admissible evidence, defendant is limited to conclusive

documentary evidence and the complaint's allegations.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175; Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d at 538-39; VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 A.D.3d 189, 193 (1st Dep't 2019).

Therefore, to the extent that defendant's building manager or its attorney, without personal knowledge, attests that plaintiffs' proposed pergola will exceed seven feet in height and that a structure of that height will partially obstruct neighboring units' views and be visible from the street, the court may not consider those allegations that are not in the complaint. Even if the court considers them, they only emphasize the disputed facts that challenge the applicability of the business judgment rule.

Even if the court considers as documentary evidence under C.P.L.R. § 3211(a)(1) defendant's photograph supporting its motion and even its photographs in reply, see Glencore Ltd. V. Freepoint Commodities LLC, 198 A.D.3d 413, 414 (1st Dep't 2021), the photographs do not demonstrate that plaintiffs' proposed pergola will obstruct neighbors' views and be visible from the street without an affidavit that the photographs were taken from neighboring units and from the street. Finally, a factual issue remains as to what constitutes visibility from the street: with the naked eye or with a telephoto lens. If the former, any

photograph from the street would require an affidavit that the photograph was not taken with a telephoto lens.

III. CONCLUSION

For all the reasons explained above, the court denies defendant's motion to dismiss the complaint. C.P.L.R. § 3211(a)(1) and (7). Within 10 days after entry of this order, defendant shall answer the complaint. C.P.L.R. § 3211(f). The parties shall appear for a Preliminary Conference via video October 25, 2022, at 3:00 p.m.

DATED: September 26, 2022



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C