

Glodek v Fine Arts Dev. Labs., Inc.
2022 NY Slip Op 34018(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 161355/2021
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

KEVIN GLODEK

Plaintiff,

- v -

FINE ARTS DEVELOPMENT LABORATORIES, INC.,

Defendant.

-----X

INDEX NO. 161355/2021

MOTION DATE 11/03/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents and after oral arguments, plaintiff's motion is denied in its entirety.

Plaintiff moves pursuant to CPLR § 3025(b), seeking leave to amend his complaint dated to assert the following causes of action as against the defendant: (i) breach of contract; (ii) declaratory judgment that he is in good standing; (iii) declaratory judgment that the plaintiff's objection to the sale is valid; (iv) breach of fiduciary duty for invidious and unequal treatment of plaintiff; and (v) a permanent injunction enjoining the implementation of the amendment of its by-laws ("the Amendment"). Plaintiff also seeks a preliminary injunction enjoining the adoption of the Amendment and the sale of the unit vertically adjacent to plaintiff's unit.

Preliminary Injunction

Defendant, through its board of directors, adopted an amendment to its by-laws which added a requirement that a shareholder must be in good standing to validly object to the sale of a vertically-adjacent unit. Prior to the Amendment plaintiff and any other shareholder not in

“good standing” would be able to object to the sale. The by-laws provide that only members in “good standing” may attend meetings and vote in any matter, and that the by-laws may only be amended by upon the consent of holders of 87% of outstanding shares and members in “good standing”. Plaintiff contends that defendant’s definition of “good standing” is inconsistent, and arrears do not include maintenance fees only assessments. This contention is rebutted by the plain language of the by-laws and the unrebutted ledger establishing amounts due and owing by plaintiff. Plaintiff does contend, as alleged in the complaint, that he disputes amounts charged and seeks a credit for alleged overpayments.

“In order to obtain a preliminary injunction, the moving party must demonstrate (i) likelihood of success on the merits; (ii) irreparable injury absent the injunction; and (iii) a balancing of the equities in its favor.” 35 *New York City Police Officers v City of New York*, 34 AD3d 392, 394 [1st Dept 2006] (emphasis added); *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]. If the movant fails to meet its burden to establish each and every element, the request for injunctive relief must be denied. *See, e.g., Doe v Axelrod*, 73 NY2d 748, 750-51 [1988].

Here, the Court finds that the determination by defendant that plaintiff was not in good standing to attend the meeting or vote, either in favor of or in opposition to the Amendment of the by -laws, is not dispositive for the purposes of the analysis of plaintiff’s likelihood of success on the merits. The Court finds that defendant’s conduct, of amending the by-laws, is governed by the business judgment rule and was consistent with its by-laws. It is well established that the decisions of cooperative boards are entitled to deference under the business judgment rule *Bregman v 111 Tenants Corp.* 97 AD 3d 75, 83 [1st Dept 2007]. Since the purpose of the Amendment that was approved by 10 of the 11 shareholders voting in its favor, was to effectuate

a sale that would benefit the cooperative, the Court finds that that is the very essence of the business judgment rule.

Regardless of plaintiff's contention that the Amendment was adopted purposefully as to prevent plaintiff from exercising his right, plaintiff's vote would not have changed the outcome or prevented the Amendment that plaintiff now seeks to enjoin. Even if the Court found that plaintiff was in "good standing", which it does not, plaintiff has still failed to demonstrate likelihood of success on the merits, thus the Court need not reach the factors of irreparable harm or balancing of the equities. Accordingly, the Court denies the plaintiff's request for injunctive relief.

Amend Complaint

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, . . . , at any time by leave of court . . . [and] [l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." The Court of Appeals recognizes that "[a]s a general rule, 'leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is **not patently lacking in merit** . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.'" *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] (internal citation omitted) emphasis added.

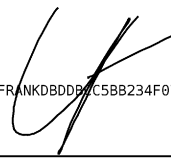
The Court finds that in light of the determination above, allowing plaintiff to amend its complaint would be futile. Preliminarily, as the Court determined that the defendant's amendment of its by-laws is lawful and supported by the business judgment rule, allowing plaintiff's amendment to include declaratory judgment that the plaintiff's objection to the sale is

valid and to add a permanent injunction enjoining the implementation of the Amendment is meritless.

Defendant contends, and the Court agrees, that based on the record and the reasoning set forth above plaintiff cannot succeed in a claim seeking declaratory judgment that he is in good standing, and is unable to establish causes of action sounding in breach of contract, breach of fiduciary duty for invidious and unequal treatment of plaintiff, based on the lawful conduct of the defendant. Accordingly, it is hereby

ADJUDGED that plaintiff's motion is denied in its entirety.

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<u>11/28/2022</u>			
DATE		LYLE E. FRANK, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE