Wong v Berg
2022 NY Slip Op 34245(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 150165/2020
Judge: Lori S. Sattler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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ANDY Y WONG, FORT RENO, LLC.

Plaintiff,

- v -

JENNIFER BERG AS PRESIDENT, THE BOARD OF MANAGERS OF THE 45 WEST 67TH STREET CONDOMINIUM,

Defendant.

INDEX NO. 150165/2020

MOTION DATE 03/10/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for JUDGMENT - SUMMARY.

In this real property dispute, Plaintiffs Andy Wong and Fort Reno, LLC ("Plaintiffs") move for summary judgment and injunctive relief. Defendant Jennifer Berg as President, The Board of Managers of the 45 West 67th Street Condominium ("Defendant" or "the Board") opposes the motion.

Mr. Wong owns Apartment #12G and Apartment #12H ("the Apartments") in the condominium building located at 45 West 67th Street ("the building"). Apartment #12G is titled to Mr. Wong, while Apartment #12H is owned by Fort Reno, LLC, of which Mr. Wong is the sole member and owner. The Apartments face one another at a dead end of a hallway on the building's 12th floor. It is undisputed that the hallway between the Apartments provides access to those units only and is not used for any other purpose.

The building's By-Laws provide that Defendant "shall have all of the powers and duties necessary for, or incidental to, the administration of the affairs of the Condominium," including the power "to operate, maintain, repair, restore, add to, improve, alter and replace the Common

Elements" of the building (Exhibit 2, § 2.4, NYSCEF Doc No. 28). The parties do not dispute that this includes the building's hallways. The By-Laws further provide:

> The owner or owners of any two of more Residential Units, if such Residential Units are the only Residential Units serviced or benefited by any General Common Element or Residential Limited Common Element adjacent or appurtenant to such Units and not affecting access to any other Unit (for example, that portion at the end of any hallway that is directly adjacent to any such Units located on opposite sides of such hallway) shall, with the consent of the Residential Condominium Committee (which consent shall not be unreasonably withheld or delayed), have the right to use such General or Residential Limited Common Elements exclusively, in the same manner as a Limited Common Element (including the right, in the above example of a portion of the hallway, to enclose such portion), and no amendment to the Declaration or reallocation of Common Interests shall be made by reason thereof. In such event, however, such owner or owners shall, at his, her, or their sole cost and expense, both (i) operate, maintain and repair such General or Residential Limited Common Element for so long as such owner or owners exercise such exclusive right of use and (b) [sic] restore such General or Residential Limited Common Element to its original condition, reasonable wear and tear excepted, after such owner or owners cease to exercise such exclusive right of use.

(§ 5.8[B][i]). At a meeting in September 2010, the Board voted to adopt what it calls the "Hallway Takeover Rule," which requires: "upon future requests for a hallway takeover, a one-time fair value purchase price will be imposed; and an appraised monthly license fee will be applied for use of the extra space" (Exhibit 3, NYSCEF Doc No. 29). The rule further provides that as to units which have already enclosed a portion of a hallway, a one-time fee will be imposed at the time of any future sale or transfer (*id.*).

As set forth in the Complaint, Plaintiffs informed Defendant of their desire to combine the Apartments. In doing so, Plaintiffs proposed to enclose the portion of the hallway that solely serves the Apartments, an area that encompasses approximately fifty square feet, and incorporate that space into the combined unit. Defendant approved the combination and enclosure of the hallway provided that Plaintiffs sign a license agreement and pay an upfront fee of $90,000 and a monthly fee "equal to the per-square-foot equivalent of the common charges assessed" to all the

building's units (Complaint ¶ 11). It is undisputed that when Mr. Wong inquired as to the basis of those fees, he was told that a one-time fee was in consideration for an agreement that "[Plaintiffs] and all subsequent transferees will own units with additional space (the former Hallway Space) and not be required to restore the Hallway Space upon sale or transfer of the unit" (Exhibit 7A, NYSCEF Doc No. 19). According to Defendant, the parties attempted to negotiate the fees using different methodologies, despite Defendant having required and collected fees based on their own methodology from two other units since adopting the Hallway Takeover Rule, but those negotiations failed.

Plaintiffs commenced this action seeking a judgment declaring that Defendant does not have the authority to condition the approval of the project on payment of a one-time and monthly fees, enjoining it from doing so, and directing it to execute all documents required to effectuate the combination of the Apartments and enclosure of the hallway. Plaintiffs now move for summary judgment. They argue the By-Laws do not authorize Defendant to require fees in exchange for its approval of the proposed enclosure, and that their doing so amounts to unreasonably withholding consent. Plaintiffs contend that similar combination and enclosure projects have been permitted without the same requirements, specifically one unit which was sold in 2013 without being restored to its original condition or payment of any fees.

Defendant opposes the motion. It takes the position that Plaintiffs fail to meet their burden of making a prima facie case in their favor and instead that summary judgment should be granted in its favor, as Defendant has the authority under the By-Laws and in accordance with the business judgment rule to impose the requirements that it has. It further argues that if the Court does not find that the business judgment rule applies to this case, Plaintiffs have failed to raise an issue of fact as to whether consent was unreasonably withheld. In the alternative,

Defendant argues that if the Court were to find that Plaintiffs have successfully made a prima facie case, there are material issues of fact requiring denial of the motion. Finally, it argues that the motion is premature as there has been no discovery in the matter.

A party seeking summary judgment pursuant to CPLR 3212(b) "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). If such showing is made, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324).

In *Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530 (1990), the Court of Appeals held that in adjudicating disputes between residential building boards and unit owners stemming from enforcement of building policy, the standard of review to be used is analogous to the business judgment rule, "a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 [2003]). However, where a board's disputed decision is based on a governing document which provides that consent shall not be unreasonably withheld, the "heightened standard of reasonableness" is to be applied "in lieu of the usual business judgment rule" (*Matter of Kotler v 979 Corp.*, 191 AD3d 473, 474 [1st Dept 2021], quoting *Olcott v 308 Owners Corp.*, 189 AD3d 687 [1st Dept 2020]). The question to be answered is whether a board's decision, or in this case the preconditions placed upon granting consent, are "in fact reasonable, i.e., legitimately related to the welfare of" the condominium (*Silver v Murray House*

Owners Corp., 126 AD3d 655 [1st Dept 2015]; *Seven Park Ave. Corp. v Green*, 277 AD2d 123 [1st Dept 2000]; *Rosenthal v One Hudson Park, Inc.*, 269 AD2d 144, 145 [1st Dept 2000]).

Plaintiffs have tendered sufficient evidence to demonstrate the absence of material issues of fact. The parties do not dispute the specifics of Plaintiffs' proposed combination and enclosure and that Defendant has approved the project subject to the payment of certain fees. There is no disagreement as to Defendant's stated justification for the fees or the existence of a policy adopted at a September 2010 board meeting. The parties agree on the relevant language of the By-Laws and neither argues the language is ambiguous. Moreover, the parties ultimately agree on how the policy has been applied to other units in the building.

As to their prima facie entitlement to judgment as a matter of law, Plaintiffs contend it is beyond Defendant's authority to precondition its consent on payment of a fee. However, the By-Laws explicitly vest Defendant with broad authority over alterations of the building's hallways (Exhibit 2, § 2.4) and permit Defendant to withhold consent for permission to enclose a portion of the hallway so long as doing so is reasonable (*id.* § 5.8[B][i]).

Plaintiffs argue that "[i]mposing a burdensome fee is tantamount to withholding permission" (Wong Aff ¶ 17, NYSCEF Doc No. 10). They contend that "[t]his is unreasonable, and contrary to the substance and spirit of Section 5.8(B), which says that consent to such a combination shall not be unreasonably withheld or delayed" (*id.*). As described in Plaintiffs' papers, Defendant states it adopted the policy of imposing fees first "because the opportunity to take a piece of the hallway was not intended to be a gift; and second, in return for the payment of the Up-front Fee, Defendant would be giving Plaintiffs the right to freely transfer the combined units without having first to restore the hallway to its original condition" (Plaintiffs' Memorandum of Law at 8, NYSCEF Doc No. 23).

The Court finds that Defendant's imposition of license fees as a precondition of permitting a unit owner to enclose a portion of the hallway is legitimately related to the welfare of the condominium. The fees generate revenue for the building as consideration for allowing an area previously accessible to all owners to be enclosed for one owner's private use. The policy further enables owners to re-sell combined units without having to deconstruct them prior to sale, a requirement which could reasonably be expected to undermine any sale of that unit, depreciate its value, and be unnecessarily disruptive to all unit owners. Plaintiffs contend case law prohibits building boards from imposing fees as a precondition to granting consent (*see*, *e.g.*, *Kotler*, 191 AD3d 473 [co-op could not a demand a transfer fee when transferring shares from deceased owner to decedent's family member]; *Giordano v Miller*, 288 AD2d 181, 182 [2d Dept 2001] [a landlord's imposition of a fee as a condition precedent to consenting to a tenant's assignment of a commercial lease in a shopping center was unreasonable]). Those cases are distinguishable from this matter, where a condominium board has imposed a fee as a precondition of permitting a unit owner to enclose part of the common area for that owner's exclusive use.

To the extent Plaintiffs argue that the Hallway Takeover Rule has been applied in an arbitrary or discriminatory matter (*see West v 332 East 84th Owners Corp.*, 68 AD3d 499 [1st Dept 2009]), this argument stems from Defendant's decision not to impose a fee upon the sale in 2013 of a combined unit which enclosed a portion of the hallway prior to 2010. As set forth in a letter to Mr. Wong's prior counsel from the Board's attorney, "the Board made a business decision in the exercise of its judgment that it would not impose its new policy to the few units that had long ago been renovated to include hallway space" (Exhibit 8, NYSCEF Doc No. 20). The parties do not dispute that since the Board adopted its policy in 2010, two combination projects were subject to the policy, and the apartment owners paid voluntarily, while a third

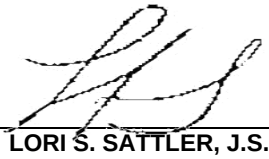
would have been subject to the policy but elected to combine units without enclosing a portion of the hallway. The Court finds that Plaintiffs have not shown Defendant's policy has been inconsistently applied. Plaintiffs therefore fail to demonstrate a prima facie entitlement to judgment as a matter of law and their motion must be denied.

The Court is empowered to search the record and grant summary judgment to a non-moving party (CPLR 3212[b] ["If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion"]; *New Hampshire Ins. Co. v MF Global, Inc.*, 108 AD3d 463, 467 [1st Dept 2013]). In the affidavit of Board President Jennifer Berg and the accompanying Memorandum of Law, Defendant asks the Court to do so. Having found that no material issues of fact exist, that Defendant's imposition of a fee as precondition to approving Plaintiffs' project is legitimately related to the welfare of the building and therefore reasonable, Defendant is entitled to summary judgment in its favor.

Accordingly, for the reasons set forth herein, it is hereby

ORDERED that Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.



12/15/2022
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE