

Matter of McCabe v 511 W. 232nd Owners Corp.

2022 NY Slip Op 34900(U)

June 9, 2022

Supreme Court, Bronx County

Docket Number: Index No. 802172/2022E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of the Application of
MARY ANN McCABE and MARYANN
McCABE AS EXECUTOR OF THE ESTATE
OF DAVID BURROWS

DECISION and ORDER
Index No. 802172/2022E

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules

-against-

511 WEST 232ND OWNERS CORP.,
Respondent.

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HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the petitioner Maryann McCabe (the “Petitioner”) seeks an order pursuant to Article 78 of the CPLR reversing and annulling the respondent 511 West 232nd Owners Corp. (the “Respondent”)’s written decisions to refuse to transfer the cooperative stock certificate/shares (the “Shares”) and proprietary lease (the “Lease”) for the Cooperative Unit known as #E52 at 511 West 232nd Street, Bronx, NY 10463 (the “Apartment”), and an order requiring Respondent issue the Shares and Lease for the Apartment in the name of Petitioner, and for any and other relief that is just and proper. Respondent has filed an answer to the petition.

Background

This matter arises out of the disputed ownership of the Shares and Lease for the subject Apartment. The Apartment is part of the 511 West 232nd Owners Corp Cooperative (the “Co-Op”). The Lease and the Shares for the Apartment are in the name of David Burrows (“Burrows”). Petitioner and Burrows allegedly resided in the Apartment together from 2006 onward. On March 3, 2015, Burrows executed a Last Will and Testament (the “Will”) which bequeathed the Apartment to Petitioner (NYSCEF Doc. No. 3, page 2). On July 6, 2018, Petitioner requested by letter to Respondent to be added as a shareholder and tenant to the Lease and Shares (NYSCEF Doc. No. 7). Petitioner sent another letter on December 14, 2018, requesting the same (NYSCEF Doc. No. 8). On April 23, 2019,

Respondent replied and requested a domestic partnership certificate or proof that Petitioner was the spouse of Burrows, pursuant to paragraph 16 of the lease, which concerns the manner assignment may be made (NYSCEF Doc. No. 9). David Burrows then passed away on June 9, 2019.

On February 4, 2020, the Co-Op served Petitioner with a Notice to Cure and vacate the unit (NYSCEF Doc. No. 11). On February 21, 2020, Petitioner responded by letter seeking assignment of the shares under paragraph 16, subsection (b) (“If the Lessee shall die, consent shall not be unreasonably withheld or delayed to an assignment of the lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse as to whom no consent is required)”) (NYSCEF Doc. No. 12). The Co-Op responded on March 9, 2020, stating that Petitioner was required to apply to the Cooperative to purchase the apartment as she had not demonstrated she was a spouse or family member (NYSCEF Doc. No. 13). Petitioner applied for purchase. On March 24, 2021, the Co-Op served Petitioner with an additional Notice to Cure (NYSCEF Doc. No. 14). On June 9, 2021, the Co-Op served Petitioner a Notice of Termination (NYSCEF Doc. No. 15). On July 28, 2021, the Co-Op requested more documents for the purchase application (NYSCEF Doc. No. 16). The Co-Op ultimately rejected Petitioner’s application on October 27, 2021 (NYSCEF Doc. No. 17). Petitioner now seeks reversal.

Standard of Review

Where a cooperative shareholder seeks to challenge a cooperative board's action, such challenge is to be made in the form of an Article 78 proceeding (*Musey v. 425 E. 86 Apartments Corp.*, 154 A.D.3d 401, 403 [1st Dept. 2017], *Katz v. Third Colony Corp.*, 101 A.D.3d 652, 653 [1st Dept. 2012]). CPLR Article 78 proceedings determine whether an administrative or quasi-judicial review was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (CPLR 7803(3), *Cohan v. Bd. of Directors of 700 Shore Rd. Waters Edge, Inc.*, 108 A.D.3d 697, 699 [2d Dept. 2013]). The courts defer to a cooperative board’s determination, “so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith” (*40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 153 [2003]). Absent bad faith or discrimination the courts will defer to the business judgment of a board (*Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 538 [1990]). Where a lease's directive states that “consent shall not be unreasonably withheld” the court applies a “heightened standard of reasonableness” to be applied in lieu of the usual business judgment rule and the burden shifts to the Co-op to reasonably show that the proposed transferee is not “financially responsible” (*Kotler v. 979 Corp.*, 191 A.D.3d 473 (1st Dept. 2021), *Olcott*

v. 308 Owners Corp., 189 A.D.3d 687 [1st Dept. 2020]; *Estate of Del Terzo v. 33 Fifth Ave. Owners Corp.*, 136 A.D.3d 486, 488 [1st Dept. 2016])

Applicable Law and Analysis

The subject lease sets out in relevant portion that: “16. (b) If the Lessee shall die, consent shall not be unreasonably withheld or delayed to an assignment of the lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse as to whom no consent is required).” (NYSCEF Doc. No. 5 par. 16[b]).

Petitioners allege the Respondent is wrongfully refusing to permit the transfer of the Shares for the Apartment and the assignment of the Lease as directed by Burrows in his Will. Petitioner alleged she is the “equivalent of Mr. Burrows’ spouse” and therefore she is entitled to the Shares and Lease without the need of acquiring board approval pursuant to the terms the Lease. Petitioner alleges Respondent is violating “relevant federal, state, and city discriminatory laws, which forbid discrimination based on marital status” (NYC Human Rights Law Administrative Code of the City of New York §8-107(5); New York State Human Rights Law §296(5); the Federal Fair Housing Act and Civil Rights Act of 1964).

In reply, Respondent argues that Petitioner’s status as “like a spouse” is insufficient to qualify her to come in under the lease terms reserved for assignment between spouses. The Lease sets forth shares may be transferred (assigned) to a shareholder’s spouse without need to gain the approval of the Co-Op board, but transfer to a shareholder's family member, or a transfer to an individual unrelated to the shareholder, is subject to the approval of the board. Respondent argues, as New York does not recognize common law marriage, Petitioner is not a spouse, and therefore the Co-Op is not required to permit the assignment of the Lease without their approval. Further, as Petitioner did not establish she was a family member, Respondent is not required to permit her to seek assignment under the preferred status of a family member. Therefore, Respondent examined Petitioner’s application as they would an unrelated individual and rejected her based on an analysis of the financials provided. Respondents submits to the Court Petitioner’s application and provides their explanation for rejection based on those financial records. Respondent additionally argues that there is doubt as to whether Petitioner was considered a spouse, as Burrows Last Will and Testament and his Health Care Proxy both refer to Petitioner as "my friend", and Petitioner’s tax returns for the years 2018, 2019 and 2020 has a self-reported “single” filing status. Respondent adds that the Co-op is not attempting to deprive Petitioner of the value of the shares for the apartment, which she may sell to a person financially qualified and

approved by the cooperative to obtain the value of the same.

Discrimination Based on Marital Status

The board of directors of a cooperative apartment may generally withhold consent to the assignment of a proprietary lease for any reason absent bad faith or discriminatory practice (*Simpson v. Berkley Owner's Corp.*, 213 A.D.2d 207 [1st Dept. 1995]). A cooperative board can be challenged for refusing to approve a prospective purchaser or assignee if the decision is based on prohibited discriminatory grounds (*Sayeh v. 66 Madison Ave. Apt. Corp.*, 73 A.D.3d 459 [1st Dept. 2010]). The burden is on the prospective buyer or assignee to establish a prima facie case of discrimination against the cooperative, and if they do so, the burden then shifts to the cooperative to offer a legitimate, nondiscriminatory reason for rescinding its approval (*Hirschmann v. Hassapoyannes*, 52 A.D.3d 221 [1st Dept. 2008]).

Section 8–107 (5)(a)(1) of the Administrative Code of the City of New York makes it an unlawful discriminatory practice to refuse housing accommodations to any person because of that person's “actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, or alienage or citizenship status”.

In this case, Petitioner did not meet her burden of demonstrating a prima facie case of discrimination based upon marital status because eligibility for the cooperative apartment “does not turn on the marital status” of the individual (see *Putnam/N. Westchester Bd. of Co-op. Educ. Servs. v. Westchester Cnty. Hum. Rts. Comm'n*, 81 A.D.3d 733, 736 [2d Dept. 2011]; *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 490 [2001]). This distinction being that here, the issue faced by Petitioner arises not because she was unmarried, but because the lease restricts transfer or assignment on the lease without Board approval unless it is to spouses; Respondent did not refuse her based on discrimination against her marital status (see *Hudson View Prop. v. Weiss*, 59 N.Y.2d 733 [1983]).

Therefore, absent discrimination, Respondents are entitled to the deference due under the business judgment rule (*Levandusky*, 75 N.Y.2d at 538).

Business Judgment Deference

A proprietary lease is a valid contract that shall be enforced according to its terms (*Himmelberger v. 40-50 Brighton First Road Apartments Corp.*, 94 A.D.3d 817 [2d Dept 2012]; *Fe Bland v. Two Trees Mgmt. Co.*, 66 N.Y.2d 556, 565 [1985]). The tenant-shareholder of a cooperative apartment is bound by the provisions contained in its proprietary lease with the cooperative corporation

(*Darnet Realty Associates, LLC v. 136 East 56th St. Owners, Inc.*, 246 A.D.2d 312 [1st Dept. 1998]). “In the absence of discriminatory practices prohibited by law, the directors of a residential housing cooperative have the contractual and inherent power to approve or disapprove the transfer of shares and the assignment of proprietary leases” (*Bachman v. State Div. of Human Rights*, 104 A.D.2d 111, 114 [1st Dept. 1984], *Bresnick v. Farquahar*, 151 A.D.2d 390 [1st Dept. 1989]).

Petitioner cites NYC Human Rights Law Administrative Code of the City of New York §8-107(5) in support of her claim of marital discrimination. The definition of spouse can be found in §8-102 which states “[t]he term “spouse” means a person to whom a caregiver is legally married under the laws of the state of New York.” Petitioner was not legally married to Burrows. It has long been settled law that New York does not recognize common-law marriages (*Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292 [1980]). Petitioner argues they are “the equivalent of Mr. Burrows’ spouse” (NYSCEF Doc. No. 1 at 5) due to their long relationship. Petitioner has not established she was the spouse of Burrows as defined by this section. Further, being the equivalent of a spouse is insufficient under the lease terms. As the lease is a contract, by the contract is to be read using plain language of the lease terms as they are written, constrained to the four corners of that agreement (*see Riesenburger Properties, LLLP v. Pi Assocs., L.L.C.*, 49 Misc. 3d 1206(A) [Sup. Ct. Queens Co. 2015, Ritholtz, J.], *aff’d sub nom.* 155 A.D.3d 984 [2d Dept. 2017])[petitioner could not receive transfer under lease provision for spouse where assignment was sought to an LLC representing the spouse, as the rules of contract interpretation foreclosed on reading outside of the four corners of the lease]; *see also Zunce v. Rodriguez*, 22 Misc. 3d 265, 276 [Civ. Ct. Kings Co. 2008, Heymann, J.][a long term relationship does not qualify as a spouse]). Respondent permissibly applied the plain language of the term spouse and found Petitioner did not qualify. As this was within the scope of their authority under the lease, and in good faith under the law, the Court shall defer to a board’s determination (*40 W. 67th St. Corp.*, 100 N.Y.2d at 153).

Heightened Reasonableness Standard

Respondent is not required to show that it rejected Petitioner’s application under the heightened reasonableness standard, as Petitioner did not show she was a family member (*cf. Estate of Del Terzo v. 33 Fifth Ave. Owners Corp.*, 136 A.D.3d 486, 488 [1st Dept. 2016]). Nevertheless, Respondent submits Petitioner’s purchase application and avers the documentation establishes it was reasonable to determine Petitioner was not financially responsible. Respondent cites concerns raised by the fact that Petitioner

holds a mortgage already on the adjacent apartment, Apartment E51, which she is also the shareholder of. Respondent cites the high level of interest paid on that mortgage, as well as concerns over the inconsistently reported rental income derived from that apartment. Respondent further alleges Petitioner incorrectly states her "total assets" by including the total amount of payments Petitioner has made on the existing mortgages for apartments E51 and E52, which are not assets. Respondent therefore presents sufficient documentation to establish the Co-Op provided a reasonable basis for rejecting Petitioner even under the heightened applicable standard for family members, which Petitioner does not qualify for regardless (*Leonard v. Kanner*, 239 A.D.2d 153, 154, [1st Dept. 1997]).

Transfer of Value

The requirement that a transfer be approved by the cooperative board does not prevent a testator from disposing of a cooperative by will, although it may nonetheless prevent the legatee from occupying the apartment (*Estate of Finkelstein*, 186 A.D.2d 90 [1st Dept. 1992], *Joint Queensview Housing Enterprise, Inc. v. Balogh*, 174 A.D.2d 605 [2d Dept. 1991]).

Respondents aver they do not seek to block Petitioner's receipt of the monetary interest of the value of the cooperative shares, in compliance with this precedent.

Accordingly, it is hereby

ORDERED, that the Petition is denied, and the proceedings are dismissed, and it is further,

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly,

This constitutes the Decision and Order of this Court.

E N T E R

Dated: JUNE 9, 2022



Mary Ann Brigantti, J.S.C.