SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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WENDY HAZEN,

Plaintiff,

- v -

DAVID BUNNING, DIANE DESANTOS, BONNIE GOLD, SAM KUCKLEY, PHILLIP MALTAGHATI, DAVIDSON WILLIAMS, YVONNE SUN, THE CORINTHIAN

Defendant.

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INDEX NO. 651156/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

This action arises out of alleged breach of fiduciary and waste against the Defendant Board of Managers.[1] Defendants now move to dismiss on the grounds that their actions are protected by the business judgment rule. For the foregoing reasons, the Defendants' motion to dismiss pursuant to CPLR § 3211 is granted.

Background Facts

Wendy Hazen (Plaintiff) is a Residential Unit Owner of the Corinthian, a condominium building located in Manhattan with approximately 57 floors. In 2022, 7 members of the Corinthian's Board of Managers, and specifically its Residential Committee (Defendants), voted to approve a $4.2 million "Elevator Modernization Project" for the building's six passenger elevators.

[1] The Court would like to thank Eric Chubinsky for his assistance in this matter.

Plaintiff now brings this derivative action against the Defendants for breach of fiduciary duty and waste with regards to their decision to approve this project. Plaintiff contends that, according to the bylaws of the Corinthian, the Defendants are required to obtain a 70% vote from all Residential Unit Owners before approving any "additions, alterations or improvements costing in excess of $100,000." (Bylaws Article V Section 13(b)). Defendants move to dismiss this complaint, arguing that the Board's actions are protected by the business judgment rule. For the reasons set forth below, Defendant's motion to dismiss is granted.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." (Leon v. Martinez, 84 N.Y.2d 83, 87 (1994)). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.*

Further, "[t]he business judgment rule, which applies to the board of directors of a condominium (citations omitted), provides that a court should defer to the board's determination so long as the board acts in good faith, within the scope of its authority under the bylaws, and to further a legitimate interest of the condominium" (Pomerance v. McGrath, 124 A.D.3d 481, 483 (2015) (citing Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium, 65 A.D.3d 985, 989, 886 N.Y.S.2d 378 (1st Dept. 2009)).

The facts of *Pomerance* are on point with the facts before this court. In that case, the plaintiff argued that "the board acted outside the scope of its authority under the bylaws because it failed to get approval from unit owners of an improvement costing more than $10,000." *Id.* The court ruled that the bylaws did not apply because the elevator project "did not constitute an improvement; rather, it merely involved 'the replacement of existing building components that

had fallen into a state of disrepair.'" *Id.* (citing Gennis v. Pomona Park Bd. of Mgrs., 36 A.D.3d 661, 663 828 N.Y.S.2d 472 (2d Dept. 2007)).

Here, the Corinthian's bylaws similarly require the board to obtain a 70% vote from all Residential Unit Owners to approve any "additions, alterations or improvements costing in excess of $100,000" with regards to the elevators. (Bylaws Article V Section 13(b)). But for reasoning similar to that of the 3rd Department in *Pomerance*, this Court finds that the $4.2 million project constituted repairs, rather than improvements.

According to a 2021 report regarding the elevators in the building, the elevators were in "Fair" condition, based on their age. However, the report named multiple aspects of the elevator that are either now considered "obsolete" or "nearing the end of its life expectancy." Further, the report found that spare parts for these elevators are "becoming more difficult to obtain with each passing year."

Thus, this Court holds that the Corinthian's board was fulfilling its fiduciary duty to ensure that the building does not fall into disrepair. To hold otherwise would effectively hamstring a board's ability to maintain the building and prevent it from falling "into a state of disrepair." *Pomerance*, A.D.3d at 663. Therefore, this Court will defer to the business judgment of the board in rejecting both the claim of breach of fiduciary duty, and the claim of waste, and therefore will not reach the other issues presented by the parties. Accordingly, it is hereby;

ORDERED that Defendants' motion to dismiss is granted and the Clerk of the Court shall enter judgment accordingly.

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10/11/2023
DATE

LYLE E. FRANK, J.S.C.

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