

Michaelson v 20 Sutton Place S., Inc.

2023 NY Slip Op 34090(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 654155/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

CRAIG MICHAELSON, as Executor of the Estate of
WARREN DAVIS,

Plaintiff,

- v -

20 SUTTON PLACE SOUTH, INC.,

Defendant.

-----X

INDEX NO. 654155/2020

MOTION DATE 11/16/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 60, 71

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that, only to the extent that it seeks dismissal of the remedy of a declaratory judgment (i.e., the remedy of specific performance in breach of contract), the motion of defendant for summary judgment is dismissed, as moot, as plaintiff has, on consent, discontinued seeking such remedy of specific performance; and it is further

ORDERED that, with respect to the remaining causes of action that seek damages in breach of contract and breach of the implied covenant of good faith and fair dealing, the motion of defendant for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to defendant

as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

Defendant is correct that "an action taken at the meeting of [the board of directors] may be proved (sic) [, in lieu of minutes,] in the same way as acts of any private individual." Matter of Teperman v Atcos Bath, 7 AD2d 854, 855 (2d Dept 1959). Here, defendant has come forward with the affidavits of its board's president, as well as one of the other board members, who served on its Transfer Review Committee, which constitute admissible evidence establishing (1) the formation of the Transfer Review Committee, formerly known as the Finance Committee; (2) the board's actions disapproving Purchaser Number 1 at its November 26, 2019 meeting; and (3) its Transfer Review Committee's action on or about March 18, 2020, denying the application of Purchaser Number 2.

Article II, paragraph 4 of the proprietary lease provides:

A written consent to such as assignment, authorized by a resolution of the Board of Directors, or signed by a majority of the directors, or by lessees owning of record at least a majority of the capital stock of the Lessor accompanying proprietary leases then in force, must be delivered to the Lessor. In the event the Lessee should die during the term of this lease, then the Board of Directors or the other lessees owning capital stock of the Lessor shall not unreasonably

withhold the consent provided for in this paragraph to any assignment or transfer of the stock and the lease which the Lessee may make in his or her last will and testament, or through the acts of his or her administrator or executor, to a financially responsible member of the Lessee's immediate family; provided, however, that the other conditions of this paragraph are complied with.

The action before the court does not involve the disposition of shares under the last will and testament of plaintiff's decedent but instead concerns the two proposed assignments of his proprietary lease and sale of shares to prospective purchasers, prior to his death, which were each disapproved by the board members. No reasonable consent is required with respect to such sales.

Judicial review of the acts of any board of directors of a corporate entity is limited by the business judgment rule.

Under the business judgment rule, which applies to the directors of residential cooperative corporations (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317), absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (Auerbach v. Bennett, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 393 N.E.2d 994.) Thus, without a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though "the results show that what [the directors] did was unwise or inexpedient." (Pollitz v. Wabash R.R. Co., 207 N.Y. 113, 124, 100 N.E. 721.) Inquiry into claims of fraud and self-dealing is permitted only where a factual basis exists to support such a claim. (Simpson v. Berkley Owner's Corp., 213 A.D.2d 207, 623 N.Y.S.2d 583.)

Jones v Surrey Cooperative Apartments, Inc., 263 AD2d 33, 36 (1st

Dept 1999).

Plaintiff does not allege that the board of directors breached a fiduciary duty to the corporation. Nor does plaintiff come forward with any evidence that the board did not act in the best interest of the shareholders when it refused to approve the subject purchases of shares. See Simpson v Berkley Owner's Corp, 213 AD2d 207, 207-208 (1st Dept 1995).

Moreover, in Jones, supra, at 37, in reversing the trial court's denial of defendant cooperative corporation's motion for summary judgment, the First Department, unanimously stated that:

Plaintiff failed to produce even a shred of evidence of bad faith or discriminatory practice. In fact, the complaint fails to allege, describe or allude to any incident involving lessees who were allowed to sell their shares at market value or any other type of disparate treatment. . . Thus, the complaint's allegation of discriminatory treatment is based upon mere speculation as to past or future unequal treatment.

Likewise, here, the complaint describes no incident involving lessees who were allowed to sell their shares to purchasers under the same circumstances as those purchasers presented by plaintiff, whose applications were declined, and only generically states that "Plaintiff has been treated unequally from other similarly situated shareholders of the Defendant". In any event, as such complaint is unverified, it is not equivalent to a responsive affidavit for purposes of opposing a motion for summary judgment. Compare CPLR 105(t) and Hladczuk v Epstein, 98 AD2d 990 (4th Dept

1983). Accordingly, plaintiff raises no issue of fact with respect to defendant's prima facie case that in disapproving each application, the directors were "acting in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes", Jones, supra.

Debra A. James

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<u>11/16/2023</u>			<u>DEBRA A. JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE