

**Matter of Kabba v Island House Tenants Corp.**

2024 NY Slip Op 30772(U)

March 8, 2024

Supreme Court, New York County

Docket Number: Index No. 158880/2023

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 158880/2023

In the Matter of

MOTION DATE 11/08/2023

FLORENCE KABBA,

MOTION SEQ. NO. 001

Petitioner,

- v -

DECISION, ORDER, AND JUDGMENT

ISLAND HOUSE TENANTS CORP. and BOARD OF DIRECTORS OF THE ISLAND HOUSE TENANTS CORP.,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this proceeding pursuant to CPLR article 78, the petitioner seeks judicial review of an August 3, 2023 determination of the respondent residential cooperative corporation, Island House Tenants Corp. (Island), that denied her application for permission to sell her shares in that corporation, which had been allocated to Apartment 218 at 551 Main Street, New York, New York, for the sum of \$1,170,000.00. The respondents oppose the petition, and submit documentation referable to the proposed transaction and the ultimate denial of the application. The petition is denied, and the proceeding is dismissed.

The relevant apartment building, located at 551 Main Street on Roosevelt Island in Manhattan (the building) was constructed in 1975 as part of a three-building residential apartment complex that had been included in the Mitchell-Lama program. That program authorizes a housing company such as Island to own and manage a subsidized cooperative residential apartment building for moderate-income residents, and issue proprietary leases and shares of stock to tenant/cooperators who take possession of an apartment (see Private Housing Finance Law § 236). The petitioner has lived in the building since 1984. She moved

into Apartment 218---a four-bedroom, two-and-a-half bathroom unit---in 1988, and purchased the shares allocated to that unit it when they became available in 2015.

The building, however, had withdrawn from the Mitchell-Lama program on September 28, 2012, thus removing several restrictions imposed upon the sale and resale price of shares in Island. To effectuate its withdrawal from the program, the building was obligated to obtain approvals from the New York State Division of Housing and Community Renewal (DHCR), Empire State Development, the Roosevelt Island Operating Corporation (RIOCI), and the Island House Tenants Association, as well as the withdrawal and conversion sponsor, IH Preservation Partners, LLC. Those approvals were made subject to Island's compliance with a plan known as the Island House Affordability Plan: A Plan For Preservation of Affordable Housing And Withdrawal From The Mitchell-Lama Program (the Affordability Plan). By its terms, the purpose of the Affordability Plan was "to preserve [the Building] as an affordable housing project for both existing tenants and future occupants." In this respect, the Affordability Plan placed various restrictions on the ownership and sale of the cooperative apartments in the building, with the restrictions required to remain effective until December 31, 2044. Specifically, the Affordability Plan provided for the creation of a leasehold condominium scheme for the three buildings, consisting of a residential component, two commercial components, and a retail component, and required the sponsor to transfer the residential component to Island in exchange for all of Island's shares, and to offer them for sale pursuant to an offering plan.

According to the petition, the Affordability Plan designated two types of apartments available for resale---affordable apartments and market apartments---with the former subject to certain resale restrictions and a "flip tax." Specifically, the Affordability Plan limited the upper end of "the resale prices of Cooperative Apartments and establish[ed] maximum income levels for second generation purchasers (and beyond)," while paragraph 9 of the Affordability Plan imposed conditions on resale by sellers other than the sponsor, such as the petitioner.

Paragraph 9 provided, among other things, that, "the resale of apartments by any shareholder

(other than Sponsor) will be (i) limited to the “Affordable Resale Price,” and (ii) made only to “Income Qualified Purchasers.” Hence, the Affordability Plan provided that no apartment that had been designated as an “affordable apartment” could be resold for a price *greater than* the “affordable resale price,” or to a purchaser other than an “income qualified purchaser,” as those terms were defined in the Affordability Plan. With respect to the flip tax imposed upon such resales, the Affordability Plan provided that,

“[e]ach Shareholder of a Cooperative Apartment that is an Affordable Unit . . . shall pay to the Apartment Corporation a Flip Tax in an amount equal to fifty (50%) percent of the ‘Gross Profit’ in connection with any assignment or other transfer of the Shares. ‘Gross Profit’ shall mean the gross consideration received from a bona fide third party, less the total consideration paid upon the acquisition of such Apartment, less qualified selling costs which shall mean expenses incurred after the acquisition of the Apartment after acquisition but not exceeding \$10,000 per room. Commencing on the fourth anniversary of the First Closing Date, the applicable percentage shall be reduced to forty-five (45%) and shall thereafter be reduced an additional five (5%) percent on each anniversary thereafter until the percentage shall reach thirty (30%) where it shall remain.”

Island’s by-laws reiterated the relevant provisions of the Affordability Plan, required Island and its board members to comply with the terms of the Affordability Plan, and required a transfer affidavit to be executed by the seller and purchaser who had contracted for the sale and purchase of an apartment. The by-laws further provided that no changes could be made either to the Affordability Plan or relevant portions of the by-laws without the written consent of DHCR or RIOC.

There is no dispute that the petitioner’s apartment falls within the “affordable apartment” category. The petitioner first submitted a sale and purchase application to Island in July 2021, after she had entered into a contract of sale with proposed purchasers at a contract price of \$1,075,000. The respondent Board of Directors of the Island House Tenants Corp. (the Board) did not consent to or approve the application, concluding that the sales price was too low, and instead required that the contract price match the proposed lender’s appraised value of \$1,156,000. In an attempt to satisfy the Board, the petitioner amended the contract price to \$1,126,000, and provided the proposed purchaser with a “seller’s concession” equal to the

increased contract price. The Board nonetheless rejected the proposed amended contract. The petitioner alleged that the Board rejected the application because the purchase price remained too low, while the respondents contended that, under the amended contract, the purchaser would have been required to finance more than 80% of the purchase price, which was prohibited both by the terms of the proprietary lease and the Board's financing policy, and that the petitioner would be improperly avoiding paying the entirety of the flip tax.

At some point in 2021, Island promulgated a requirement that the seller of shares allocated to any affordable apartment to be sold at less than the 2022 affordable resale price execute a transfer affidavit explaining the circumstances underlying the proposed sales price, and have it countersigned by the proposed purchasers. The rule also mandated that, in connection with such a sale, the seller was required to provide an appraisal by a Member of the Appraisal Institute (MAI) at his or her own expense. It also authorized the Board to retain its own appraiser where it deemed the appraisal that had been submitted by the seller to be inaccurate.

On February 15, 2023, the petitioner entered into a contract with a new proposed purchaser, with the sales price set at \$1,170,000. The proposed purchaser's lender, Citibank, initially appraised the apartment at an "open market value" of \$1,385,000, but, after purportedly considering the restrictions imposed by the Affordability Plan, provided an amended appraisal of the apartment at exactly \$1,170,000. In or about May 2023, the petitioner submitted her application, including that appraisal, to the Board. As of May 2023, the affordable resale price per share was fixed at \$568.43, which, when applied to the petitioner's 2,340 shares, came to \$1,330,126 for the total sales price.

The Board rejected Citibank's amended appraisal on the ground that it was "not supportive of the reduction in the Affordable Resale Price." According to Board treasurer Candee B. Chusid, upon review of the Citibank amended appraisal, the Board identified certain "incorrect" statements and assumptions in that appraisal that the appraiser had characterized as

“restrictions” that adversely affected the value of the apartment. Specifically, Chusid noted that the appraiser incorrectly concluded that Island was a Housing Development Finance Company (HDFC), which generally provides housing to persons with lower incomes than a corporation such as Island, that the maximum income for a potential purchaser thus was \$160,000 per year, and that the Board determined on a case-by-case basis what the purchase price would be, based on the purchaser’s income. She asserted that, contrary to that appraiser’s conclusions, none of these statements was true, and that the purported income cap of \$160,000 per year was inapplicable. Rather, Chusid noted that the actual annual income cap was \$667,106, and that it should have been obvious to the appraiser that the lower cap could not have been applicable since the proposed purchasers’ transfer affidavit reported their 2022 income as \$377,156 and their 2023 income was \$542,000, exclusive of a \$70,000 gift. She averred that, by making those improper assumptions, the appraiser improperly and artificially depressed the appraised value of the apartment by employing HDFC apartments as comparable units. As Chusid explained it, the downward amendment of Citibank’s appraisal was made despite the appraiser’s conclusion that the Affordability Plan essentially had no impact on marketability or market value, despite the fact that the appraisal indicated that the affordable resale price exceeded the amended appraised value for the apartment, and despite his conclusion that the applicable income limitation on purchasers would not limit marketability. Chusid also contended that Citibank’s appraiser measured the area of the subject apartment at 159 square feet less than its actual area.

The Board thereafter retained its own MAI appraiser, who determined that the market value of the apartment, notwithstanding all of the restrictions imposed by the Affordability Plan, was \$1,330,126. The Board thus formally denied the petitioner’s application on August 3, 2023. The petitioner was unable to renegotiate a contract of sale with the purchasers at a higher price, and instead commenced this proceeding on September 6, 2023.

To the extent that the petitioner is challenging the Board's adoption of a rule amending the applicable purchase/sale application, requiring the seller and purchasers of affordable apartments to submit a transfer affidavit explaining why an agreed-upon sales price was less than the affordable resale price, as defined in the Affordability Plan, and requiring the seller to submit his or her own MAI appraisal, that challenge is time-barred by the four-month limitations period of CPLR 217. The change in policy was effectuated in 2021, and the petitioner was aware of this change on September 7, 2021, at the latest, when she submitted her initial request for the Board's approval of a contract for the sale of her apartment. The four-month limitations period began to run on the date that the respondents adopted the change in policy, which was when the amendments became final and binding on the petitioner (*see Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 404 [1st Dept 2017]; *see also Fricke v Beauchamp Gardens Owners Corp.*, 222 AD3d 718, 719-720 [2d Dept 2023]). Even if the court measured the limitations period from the date that the petitioner became aware of the amendments, any challenge to those amendments must be dismissed as time-barred, since the petitioner did not interpose that challenge until two years after the new policy went into effect.

Nonetheless, the petitioner's challenge to the Board's August 3, 2023 determination is not limited to challenging the propriety of the 2021 amendments. Rather, she contends that the August 3, 2023 determination was arbitrary and capricious because, notwithstanding the application and transfer affidavit requirements, the respondents violated the terms of the Affordability Plan and by-laws by effectively imposing a minimum price upon the resale of cooperative apartment shares, while the Affordability Plan and by-laws only grant the Board authority to impose a maximum resale price. Hence, to the extent that the petitioner seeks to annul the August 3, 2023 determination as arbitrary and capricious or in violation of the Affordability Plan and by-laws, that challenge is timely.

With respect to the merits, however, the court concludes that the petitioner's challenge must fail.

While it has been frequently stated that most determinations made by the boards of residential condominiums and cooperative corporations, including those related to sales and purchases, are effectively insulated from judicial review by the “business judgment rule” (see *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 542 [1990]; *Woo v Irving Tenants Corp.*, 276 AD2d 380, 380 [1st Dept 2000]), the petitioner has provided this court with authority that the business judgment rule does not insulate a board from judicial review of a claim that it arbitrarily imposed an artificial “floor” on the resale price of an apartment (see *Stromberg v East Riv. Hous. Corp.*, 2023 NY Slip Op 23409, \*4, 2023 NY Misc LEXIS 23250, \*13 [Sup Ct, N.Y. County, Dec. 26, 2023] [Lebovits, J.] [coop board’s denial of “sales application for being below an arbitrary price floor” constituted “a ground for denial that would not be shielded by the business judgment rule”]; *Chappell v Trump Plaza Owners, Inc.*, 2011 NY Slip Op 32661[U], \*6-11, 2011 NY Misc LEXIS 4842, \*6-15 [Sup Ct, N.Y. County, Oct. 3, 2011]).

Even if the court were to apply the more deferential “arbitrary and capricious” standard, rather than the “business judgment rule,” the petitioner’s claim nonetheless must be denied. A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (see *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making entity fails to consider all of the factors it is required by statute to consider and weigh (see *Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

A cooperative’s or condominium’s board of directors has a legitimate interest in securing the highest possible price for the sale of its units (see *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Singh v Turtle Bay Towers Corp.*, 74 AD3d 568, 568 [1st Dept 2010]). Moreover, it is well settled that a cooperative may reasonably restrain the alienability of

its corporate shares to preserve the unique nature of the cooperative community (see *Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 540 [1957]; *Goldstone v Weisner*, 84 AD2d 519, 520 [1st Dept 1981]; *Penthouse Props., Inc. v 1158 Fifth Ave., Inc.*, 256 App Div 685, 690-691 [1st Dept 1939]; *Chappell v Trump Plaza Owners, Inc.*, 2011 NY Slip Op 32661[U], \*8, 2011 NY Misc LEXIS 4842, \*11; *Chemical Bank v 635 Park Ave. Corp.*, 155 Misc 2d 433, 436 [Sup Ct, N.Y. County 1992]).

Initially, contrary to the petitioner's suggestion, neither the terms of the Affordability Plan nor the by-laws expressly prohibit the Board from considering whether a proposed sales price is too low. Moreover, the petitioner has not demonstrated that the respondents arbitrarily and capriciously have adopted an unwritten omnibus policy that prohibits all sales of affordable apartments at less than a minimum sales price, or that such a minimum sales price arbitrarily is defined, in every circumstance, as the affordable resale price. Moreover, the application forms and 2021 rules allow for a proposed seller to explain why, in his or her particular circumstances, a sale at a price lower than the affordable resale price is warranted or necessary. This indicates that the Board retains authority to impose reasonable restrictions on sales and resales, including as to price, and may exercise its discretion on a case-by-case basis to determine whether a price is so low that it might affect the sale values of other apartments in the building. On the record before it, the court concludes that the petitioner has not established that the respondents' August 3, 2023 denial of her application was, under the circumstances presented here, arbitrary and capricious or violative of the Affordability Plan or by-laws.

Accordingly, it is,

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

3/8/2024

DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: