

Hagberg v 442 Willoughby Condominium Assn.

2025 NY Slip Op 30740(U)

February 27, 2025

Supreme Court, Kings County

Docket Number: Index No. 522631/22

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 73, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of February, 2025.

PRESENT:

HON. PETER P. SWEENEY,

Justice.

-----X
EVA HAGBERG and PAUL LOEBACH,

Plaintiffs,

-against-

Index No. 522631/22

442 WILLOUGHBY CONDOMINIUM ASSOCIATION,
JESSICA TALLMAN and MARTINA CLARK,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	152-153
Opposing Affidavits (Affirmations)	165
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Upon the foregoing papers, defendants 442 Willoughby Condominium Association (Condo), Jessica Tallman (Tallman) and Martina Clark (Clark) (collectively, the Board) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiffs Eva Hagberg and Paul Loebach.

Background

Plaintiffs commenced this action for a declaratory judgment and for damages stemming from a dispute with the Board regarding certain construction, repairs and/or

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renovations to plaintiffs' condominium unit. The subject building consists of a three-unit (one unit per floor) condominium at 442 Willoughby Avenue in Brooklyn. Clark is the Treasurer of the Condo and resides in the first-floor unit (Unit 1). Tallman is the President of the Condo and resides in the third-floor unit (Unit 3). Plaintiffs took title to the second-floor unit (Unit 2) on March 26, 2021.

In their purchase application, plaintiffs indicated that they were planning to install a new floor, new windows and new appliances. The proposed work was commenced the day after closing. According to plaintiffs, their contractor's removal of floorboards revealed sagging floor joists which required sistering for support, and plaintiffs later discovered that there was no insulation or soundproofing in the ceiling or floor of their Unit. The work performed to the floor of plaintiffs' Unit triggered a response from downstairs occupant Clark, who complained that the work constituted demolition beyond the installation of new floors, windows and appliances as initially indicated in plaintiffs' purchase application. Plaintiffs subsequently advised defendants of the increased, unanticipated scope of the work.

On April 16, 2021, the Board demanded from plaintiffs a letter from a licensed contractor stating what work had been done in the Unit, what permits were filed and (if no permits were filed) an affirmation indicating that no permits were needed. The April 16, 2021 letter also stated that no work was to be completed by plaintiffs until the Board's concerns were addressed. On April 22, 2021, plaintiffs sent a response to the Board which included a letter from a new contractor, Alma Berman, who indicated that all work had

stopped and that required permits were in the process of being obtained. The same day, the Department of Buildings (DOB) issued four violations related to the absence of fire stopping in the Unit, the removal of the damaged subfloor and the removal of plumbing fixtures. The DOB further issued a Stop Work Order. Work to correct the firestopping was completed by April 26, 2021, and the DOB re-inspected the unit and rescinded the Stop Work Order.

On April 27, 2021, the Board sent a new letter to plaintiffs acknowledging the rescission of the Stop Work Order but instructed that no work was to be completed on the Unit pending the Board's receipt of work permits. The Board also demanded a letter from plaintiffs' contractor, plans for the Unit from a licensed contractor and a timeline of proposed work. The Board stated that after receipt of the requested documents, it would then determine if work may continue.

On April 29, 2021, plaintiffs sent a response letter indicating that they were doing no work in the Unit, that their licensed contractor indicated the Unit was structurally sound and that the prior work was cosmetic. Plaintiffs also advised that they planned to have a structural engineer, hired at their own personal expense, conduct a site survey the following day to further allay any fears.

On April 30, 2021, plaintiffs' licensed engineer performed a visual inspection of the Unit and determined that the space was in good/sound condition with no structural defects observed. The engineer's report also advised that additional work required a filing by a licensed architect and that work needed to be performed by a licensed contractor.

By letter dated May 28, 2021, the Condo's attorney, writing on behalf of the Board, complained that plaintiffs' work, characterized as gutting, was done without permits and without notifying the Board, was done outside of standard business hours, has negatively affected building residents, and has created unsafe living conditions. The letter stated that the Board had repeatedly asked plaintiff for information from a contractor regarding the scope of the work, insurance coverage, timeline of work and copies of any and all permits, which documents had not been turned over. Citing Section 6.14 of the Condo's By-Laws which, among other things, prohibits any structural addition, alteration or improvement in or to a Unit without the prior written consent of the Board, the attorney's letter warns that until the Board's demands were met, and, after the Board had a chance to review plaintiffs' application and approve said work, plaintiffs may not proceed with any construction, renovation or alteration work on the Unit. The letter notified plaintiffs that the Board also required an independent inspection by a licensed contractor, architect, structural engineer, and pest inspection and mitigation to review the current condition of the Unit, and in order for the Board to consider approving any additional work in the Unit, the Board must be provided with the proposed scope of work which includes all required plans, specifications, notices and/or certifications relating to such work along with all permits obtained and the licenses of the contractor(s). Additionally, the Board stated that it must be provided with a copy of the contractor's insurance which must meet the Condo's standards and name the Condo as an additional insured.

On June 29, 2021, copies of the plumbing permits and proposed work schedule for plumbing were submitted to the Board. On July 8, 2021, plaintiffs received an email from Clark requesting a copy of the original contractor's license and proof of insurance, proof of insurance on the unit and an acknowledgment of who is responsible for any future issues that arise due to the prior work on the Unit.

On July 22, 2021, the Board notified plaintiffs that as a precondition to plaintiffs resuming work, violations involving the Unit must be removed, an independent professional hired by the Board, with costs to be borne by plaintiffs, must inspect the Unit and make sure it remains up to code and structurally sound, plaintiffs must sign a statement that they accept full and complete responsibility for any and all issues that arise from the demolition of the apartment, and plaintiffs must comply with all requirements set forth in prior letters.

On August 2, 2021, plaintiffs responded to the Board's July 22, 2021 letter, stating that they hired an expeditor to help clear the violations and invited the Board to view the Unit. Plaintiffs stated that they had previously retained an independent professional to inspect the Unit but objected to bearing the entire cost of an additional independent expert, and further objected to open ended responsibility for anything that happened with respect to the work in the Unit.

On September 8, 2021, plaintiffs received a letter from the Condo's counsel making additional demands for documents. On March 9, 2022, plaintiffs sent the Board a letter indicating dismissal of the violations and that plaintiff obtained the required permits for

the renovations. Along with the letter, plaintiffs included plans filed with the DOB for the alterations to the Unit.

On March 18, 2022, plaintiffs sent a follow-up letter to the Board advising it of the fact that all conditions had been remedied and requesting that work be allowed to commence in light of the acquired approvals and permits. On March 24, 2022, plaintiffs received a letter from the Board containing additional demands as a precondition to permitting work to commence, including a demand for an independent review by a structural engineer of the Board's choice to be paid for by plaintiffs, an agreement that repairs to Unit 1 allegedly caused by the construction would be paid for by the plaintiffs, documentation which was previously requested in the Board's September 8, 2021 letter and an agreement to pay for energy costs for Clark's and Tallman's respective units. The letter also requested that the parties meet before a mediator.

In a letter from their counsel, dated March 31, 2022 plaintiffs responded that the demands set forth in the March 24, 2022 letter were beyond the Board's authority and that the proposed work was not structural in nature and has been approved by the DOB. Plaintiffs' counsel also maintained that the Board committed misconduct by failing to disclose deficiencies in the building; complaining about necessary work on the Unit to bring it in compliance with applicable fireproofing and other requirements, which work the Board directed; breaking and entering into the Unit to take unauthorized photographs and then sending those photographs to the broker of the Unit's seller; sending the May 28, 2021 letter requesting that plaintiffs immediately stop work on the Unit and comply with the

Board's demands despite the fact that work had already ceased work at the request of the Board and that plaintiffs already provided responses to those demands; leaving a note on plaintiffs' doorstep making groundless accusations of "perjury" on the part of plaintiffs at the hearing on the DOB violations; (as to Tallman) approaching plaintiffs stating that she would "never forget this;" demanding plaintiffs comply with directives of Board absent any authority by the Board to issue the pertinent directives; failing to host annual meetings of the unit owners as required by Article 3.1 of the By-Laws; refusing plaintiffs' access to common elements of the building, specifically the boiler, for inspection with their plumber and contractor; and failing to uniformly apply the By-Laws.

While the parties engaged in mediation in May 2022, such efforts proved unsuccessful. Plaintiffs commenced the instant action on August 5, 2022.

In their complaint, plaintiffs allege that their Unit is currently uninhabitable, lacking fixtures, proper flooring, and even rooms. Plaintiffs maintain that the existing plumbing must be brought up to building codes to prevent leaks from developing and that the Unit's pipework is not up to code due, in part, to a prior renovation Tallman conducted in her own unit that altered the location of certain pipes for the bathroom and kitchen. Plaintiffs contend that in order to bring the plumbing into compliance with the building codes, work must be performed on the plumbing.

Plaintiffs allege, in substance, that the Board's constant, sometimes repetitive demands and the Board's refusals to allow renovations were in bad faith and motivated by personal animosity, and as a result of the Board's refusals, plaintiffs' initial licensed

contractor, Alma Berman, was unable to commence work within a reasonable period of time, requiring upward revision of the initial quote for the work to be performed on the Unit and compelling plaintiffs to obtain a new licensed contractor.

Plaintiffs allege that they have been unable to enjoy the use of their space for at least sixteen (16) months but have nonetheless maintained appropriate insurance on the Unit and have been diligently paying their mortgage and associated condominium fees.

The complaint set forth five causes of action seeking declaratory judgments regarding the parties' rights and obligations under the Condo's By-Laws vis-a-vis the planned work in the Unit, in addition to causes of action for breach of fiduciary duty, private nuisance, tortious interference with a contract, trespass and prima facie tort. By stipulation dated September 12, 2024, the parties agreed to discontinuance of the second, third, fifth, seventh, eighth, ninth and tenth causes of action without prejudice.

In its remaining (first) cause of action of action for declaratory judgment, plaintiffs allege that they are in a deadlock with the Board concerning the plumbing work to be performed on the Unit and such deadlock creates a justiciable controversy the court can determine. Plaintiffs allege that Section 6.9 of the By-Laws mandates that the Unit's plumbing be maintained by the owner of the Unit and that making the Unit's plumbing compliant with the relevant code complies with the plaintiffs' obligations to maintain the exposed plumbing of the Unit in good repair pursuant to Section 6.9 of the By-Laws. Plaintiffs accordingly seek a declaration stating they are entitled to make plumbing compliant with applicable codes and standards as mandated by the By-Laws.

With respect to the remaining (fourth) cause of action for a declaratory judgment, plaintiffs allege that a justiciable controversy exists as to whether plaintiffs' DOB approved building plans are sufficient under the By-Laws to abate any perceived defects from prior work, and to respond to the Board's demands concerning prior work. Plaintiffs contend that in order to clear all violations, plaintiffs were required to submit building plans for the Unit and obtain necessary permits, that plaintiffs obtained approval from the DOB for their plans and acquired all permits for work, and that the DOB retroactively approved work performed on the Unit and authorized the plaintiffs' contemplated work. Plaintiffs seek a declaration stating that plaintiffs have complied with the By-Laws by obtaining required DOB approvals.

The remaining sixth cause of action seeks damages for breach of fiduciary duty by the Board stemming from its alleged conduct toward plaintiffs.

Discussion

The proponent of a summary judgment motion 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 prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers (*id.*) The proof submitted to the court should be scrutinized carefully in the light most favorable to the party opposing the motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is

any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

“The primary purpose of a declaratory judgment is to stabilize an uncertain or disputed jural relationship with respect to present or prospective obligations” (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]). Contrary to the contention of defendants, the first and fourth causes of action do not simply seek an advisory opinion but rather seek to set forth the parties’ respective rights and obligations under the By-Laws with respect to the work in the Unit. The facts adduced in this matter demonstrate a contentious relationship between plaintiffs and the Board which arose following the commencement of the work, differing views as to the applicability of the By-Laws to the work already performed and what remains, and uncertainty as to what work, if any, the Board will allow in the future and under what conditions. There are also issues as to the nature of the work (structural versus non-structural or cosmetic) and whether the Board’s demands upon plaintiffs and refusals to allow work on the Unit go beyond the scope of its authority under the By-Laws. Thus, a declaration as to plaintiffs’ rights will likely “have the immediate and practical effect of influencing [defendants’] conduct” (*M&A Oasis, Inc. v MTM Assocs., L.P.*, 307 AD2d 872, 872 [1st Dept 2003]), quoting *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]).

Accordingly, that part of defendants’ motion for summary judgment dismissing the first and fourth causes of action for a declaratory judgment is denied.

It is not in dispute that the Board owes a fiduciary duty to condominium unit owners when it is engaged in the business of management of the condominium (*see Caprer v Nussbaum*, 36 AD3d 176, 192 [2d Dept 2006]; *Murphy v State of New York*, 14 AD3d 127, 136 [2d Dept 2004]; *Board of Mgrs. of Acorn Ponds at N. Hills Condominium I v Long Pond Invs.*, 233 AD2d 472, 473 [2d Dept 1996]; *Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 325 [2d Dept 1993]). Defendants argue that the Board's conduct in this matter is protected by the "business judgment rule," which is applicable to the board of directors of cooperative and condominium corporations (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Helmer v Comito*, 61 AD3d 635 [2d Dept 2009]). Under that rule, a court's inquiry "is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" (*Schoninger v Yardarm Beach Homeowners' Assn., Inc.*, 134 AD2d 1, 9 [2d Dept 1987]).

However, the rule will not serve to shield boards from actions that have no legitimate relationship to the welfare of the condominium, or that deliberately single out individuals for harmful treatment (*see Katz v 215 W. 91st St. Corp.*, 215 AD2d 265, 266-267 [1st Dept 1995]). Plaintiffs allege that the Board breached fiduciary duties owed to plaintiffs on numerous occasions including, but not limited to, the following: a)

antagonistic comments and note made by Tallman; b) deliberate delay tactics and arbitrary demands concerning contemplated work including the failure to review documents submitted to the Board; c) failure to approve work after being provided with DOB approved permits and plans pursuant to section 6.14 of the By-Laws; d) unequal treatment of plaintiffs by permitting similar, unsupervised, work to be conducted by Tallman in Tallman's own unit without issue; e) unequal treatment of plaintiffs by permitting a prior unit owner to conduct the exact same kind of work (i.e. moving the kitchen and the bathroom) in the Unit without issue; f) requirement of plaintiffs to provide documents to the Board that fall outside the realm of the By-Laws and House Rules; g) failure to comply with the By-Laws by making demands beyond the scope of the Board's authority under the By-Laws; and h) failure to maintain the building in accordance with the By-Laws and House Rules.

Under the facts adduced in this matter, the court finds defendants have not eliminated all issues of fact or established as a matter of law that the disallowance of remedial work in the Unit, the demands made upon plaintiffs by the Board and the alleged disparate treatment of plaintiffs are protected under the business judgment rule or otherwise do not constitute a breach of fiduciary duty.

The court has considered defendants' remaining arguments and finds them unavailing.

As a result, defendants' motion for summary judgment is denied in all respects.

The foregoing constitutes the decision and order of the court.

ENTER,

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J. S. C.

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KINGS COUNTY CLERK
FILED