SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOAN TAMBERINO,

Petitioner,

-against-

BOARD OF DIRECTORS OF THE MEADOWBROOK POINTE HOMEOWNERS ASSOCIATION, INC., TOTAL COMMUNITY MANAGEMENT CORP. and the BOARD OF MANAGERS OF THE MEADOWBROOK POINTE CONDOMINIUM,

Respondents.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 5440/11
Motion Seq. No.: 01

DECISION AND ORDER

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In this Article 78 proceeding, petitioner seeks an order: (1) striking the January 28, 2011determination of respondents that the petitioner's dog must be permanently removed from the grounds of the condominium and the fines based thereon; and (2) preliminarily and permanently enjoining respondents from fining and/or threatening petitioner with the removal of her dog from the condominium based upon the January 28, 2011 determination.

Petitioner is the owner of the premises known as 406 Pacing Way, Westbury, New York, which is a condominium unit within the community known as Meadowbrook Pointe ("the Condominium"). Respondents are the Board of Directors of the Meadowbrook Pointe Homeowners Association ("HOA Board"), the Condominium's property manager, Total Community Management Corp. ("Property Manager") and the Condominium's Board of Managers.

Petitioner is the owner of a 5-year old, 25 pound Cocker-Spaniel/Bichon mix named Oliver.

Oliver was jointly owned by petitioner and her mother. Petitioner's mother was a stroke victim prior to her death in April 2010 at the age of 94. Petitioner is allegedly disabled.

On February 16, 2009, petitioner's dog bit Rita Browne, a unit owner, on her right leg. Ms. Browne went to her doctor on February 19, 2009 and received a tetanus shot.

On August 2, 2009, petitioner's dog allegedly jumped on Virginia Maley's right leg and bit her, resulting in a bruise. This incident was reported to respondents.

As a result of these incidents, petitioner received notice from the Property Manager that certain measures had to be taken with regard to Oliver, including, but not limited to muzzling Oliver at all times in common areas of the complex. While petitioner complied substantially with respondent's demands, she did not muzzle Oliver "at all times" on the advice of her trainer.

On or about January 5, 2011, Oliver allegedly bit Madeline Magarian's right leg which caused bleeding and bruising.

Upon this January incident, the HOA Board and/or Board of Managers through the Property Manager, and by certified letter dated January 28, 2011, notified petitioner that Oliver must be permanently removed from the Condominium by February 7, 2011 and that petitioner would be responsible for escalating and compounding fines if she failed to comply. Although petitioner has never received notice of any formal HOA Board action, the penalties apparently imposed thereby and communicated to petitioner through the Property Manager's office, have since appeared on petitioner's monthly maintenance bills. Thereafter, petitioner received yet another certified mailing from the Property Manager dated February 23, 2011, notifying her that fines were being imposed upon her for her refusal to permanently remove Oliver from Meadowbrook Pointe. Notably, all correspondence received by petitioner is from the Condominium's Property Manager, not the HOA Board and while

this correspondence references HOA Board "directives" and "actions," it provides no evidence of same.

Petitioner asserts that she is a "Class A" member of the voting community and is entitled to a vote on any resolution or directive of the HOA. Petitioner, however, was never given any indication that any alleged vote, hearing or other HOA Board action was being undertaken with regard to the attempted removal of Oliver from the Condominium. Certain members of the HOA Board, including but not limited to Carol Bosco, David Goldstein and Susan Flaum, have publicized to the general community that Oliver is a "vicious" dog that attacks even when unprovoked.

Since the January 2011 incident, petitioner has allegedly undertaken to muzzle Oliver at all times he is outside of the unit and has had Oliver trained by a "world-renowned trainer at a substantial cost." (¶ 20 of petition).

On February 8, 2011, Brian T. Foran, Property and Clubhouse Manager, observed the petitioner's dog go after another resident until petitioner jerked back the leash preventing yet another dog bite. (See Exhibit C, annexed to Affirmation in Opposition).

In the petition, petitioner contends that neither HOA Board nor the Property Manager have authority to order the permanent removal of Oliver from the Condominium under the By-Laws and Covenants or otherwise. Specifically, the By-Laws and/or Covenants and Restrictions do not mention anything regarding allegedly dangerous animal or the procedure for their permanent removal from the Condominium, in the face of escalating penalties for refusal to do so.

Petitioner also annexes affidavits from several of petitioner's neighbors, indicating that Oliver is neither vicious, nor a threat to the community.

In opposition to this application, the respondents assert the following: the Condominum By-Laws gives the Board of Managers the power to abate nuisances and to enjoin or seek damages from

homeowners for violations of the house rules and regulations; Meadowbrook attempted to work with petitioner even after the dog had bitten two people; petitioner's dog is a nuisance; the Board's action is authorized and protected by the business judgment rule; and ~~petitioner~~ respondent's determination to order petitioner to permanently remove the dog was taken in furtherance of the legitimate interest of the Condominium. Respondents further argue that preliminary injunctive relief is unavailable here as petitioner is not likely to succeed on the merits of the case.

Article VIII, Section 5, A(7) of the Condominium By-Laws gives the Board of Managers the power to abate nuisances and to enjoin or seek damages from homeowners of the property for violations of the house rules and regulations. In an attempt to abate the nuisance in this case, the petitioner's dog, the Board first sought to have petitioner muzzle the dog following the second dog bite incident. Petitioner, however, did not muzzle the dog at all times. Following the third dog bite incident, the Board made the determination that this particular nuisance, petitioner's dog, could only be abated by having the dog permanently removed from the Condominium. This decision is protected by the business judgment rule as it was made in good faith and in furtherance of the legitimate interests of the Condominium. *See Skouras v Victoria Hall Condominium*, 73 AD3d 902 [2d Dept 2010]; *Levine v Greene*, 57 AD3d 627 [2d Dept 2008]; *Schoninger v Yardarm Beach Homeowners Ass'n*, 134 AD2d 1 [2d Dept 1987].

Article VIII, Section 3 of the By-Laws of the Condominium, states as follows: "Owners of a home, members of their families, their families, their employees, guests and their pets shall not use or permit the use of the premises in any manner which would be illegal or disturbing or a nuisance to other said owners, or in such a way as to be injurious to the reputation of the condominium."

The Declaration of Covenants, Restrictions, Easements, Charges and Liens, Section

IX(d) and (h) provides that: "No nuisances shall be allowed upon the properties nor shall any use or practice be allowed which is a source of annoyance to residents or which interferes with the peaceful possession and proper use of the property by its residents." "Pets may not impact on the quiet enjoyment of other homeowners."

Subsection (n) provides that, "No person shall be permitted to use the common areas except in accordance with the rules and regulations established by the Association's Board of Directors." Furthermore, Subsection (q) provides that: "Nothing shall be done or kept on the Association property which will increase the rate of insurance of the common areas or contents thereof without the prior written consent of the Board. No member shall permit anything to be done or kept on the properties which will result in the cancellation of insurance on the common areas or which would be in violation of any law."

The By-Laws of the Condominium, specifically Article VIII, Section 8, Subsection (p) authorizes the Board to assess fines for a homeowner's violation of the rules and regulations. Here, petitioner was ordered to remove her dog and failed to abide by the decision of the Board which resulted in fines being properly assessed against her.

"Where a unit owner challenges an action by a Condominium Board of Managers, courts apply the business judgment rule" (*Yusin v* Saddle *Lakes Home Owners Ass'n, Inc.*, 73 AD3d 1168 [2d Dept 2010]; *Helmer v Comito,* 61 AD3d 635, 636 [2d Dept 2009], *See Matter of Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530 [1990]; *Kaung v Board of Managers of Biltmore Towers Condominium Ass'n,* 70 AD3d 1004 [2d Dept 2010]; *Acevedo v Town 'N Country Condominium Section I, Bd. of Managers*, 51 AD3d 603 [2d Dept 2008]; *Shoninger v Yardam Beach Homeowners' Ass'n, Inc., supra*, at p. 10. The business judgment rule limits judicial review of decisions made by a

condominium's board of managers to whether the board's "action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium" *Shoninger v Yardam Beach Homeowners' Ass'n, supra*, at p. 9.

The Board established that it acted within the scope of its authority, in good faith and in furtherance of the legitimate interests of the Condominium. *Molander v Pepperidge Lake Homeowners Ass'n,* 82 AD3d 1180 [2d Dept 2011]; *Skouras v Victoria Hall Condominium,* 73 AD3d 902 [2d Dept 2010].

"A nuisance is a continuous condition or persistent condition that threatens the comfort and safety of neighboring tenants which is likely to recur." *Stanley v Amalithome Realty, Inc.*, 921 N.Y.S. 2d 491, 2011 WL 1226895 [N.Y. Sup.]; *See Domen Holding Co. v Aranovich*, 1 NY3d 117 [2003]. Petitioner's dog has bitten three people in two years and may be considered a nuisance. The dog also threatens the comfort and safety of neighboring tenants. *Zipper v Haroldon Court Condominium*, 39 AD3d 325 [1st Dept. 2007], *lv to app dism.* 9 NY3d 919 [2007]; *See* 17th *Holding, LLC v Rivera*, 21 Misc3d 55 [N.Y.Sup App Term 2008].

Further, having a dog with known vicious propensities in the Condominium is also injurious to the reputation of the Condominium (*see Pargament v the Oaks at Latourette Condo, 1, 2, 3 4*, 30 Misc3d 319 [2010]) and the Condominium is exposed to potential liability. *See Illian v Butler*, 66 AD3d 1312, 1313 [3rd Dept. 2009]; *Collier v Zambito,* 1 NY3d 444, 446-447 [2004].

The Board's January 2011 determination requiring petitioner to permanently remove her dog from the Condominium was made after petitioner's dog had bitten three individuals. *(See* the Affidavit of David Goldstein, Property Manager, employed by Total Community Management Corp., the managing agent for the Condominium, annexed as Exhibit "A").

Moreover, Meadowbrook attempted to work with petitioner even after the dog had bitten two (2) people. Following the dog's second bite incident, petitioner was sent a letter by the managing agent at the direction of the Board ordering that petitioner's dog be muzzled at all times while in common areas. Despite the reasonable request that petitioner muzzle her dog at all times while the dog was in the common areas, petitioner did not fully comply with such request. As a result thereof, another person Madeline Magarian was bit on January 5, 2011.

Petitioner has also failed to raise a triable issue of fact as to her allegation that the Board deliberately singled her out for harmful treatment or selected enforcement of its rule. *Skouras v Victoria Hall Condominium, supra; see Matter of Levandusky v One Fifth Ave. Apartment Corp., supra* at p. 540.

Petitioner's request for injunctive relief is denied in light of the instant determination and upon the relevant law.

To obtain a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR §6312 [c]; *Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011]; *Board of Managers of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824 [2d Dept 2010]; *Yemini v Goldberg,* 60 AD3d 935, 936 [2d Dept 2009]; *Aetna Ins. Co. v Capasso,* 75 NY2d 860, 862 [1990]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*see Gluck v Hoary*, 55 AD3d 668, [2d Dept 2008]; *Automated Waste Disposal, Inc. Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008]).

"A party seeking the drastic remedy of a preliminary injunction must establish a clear right to

that relief under the law and the undisputed facts" (*Board of Managers of Wharfside Condominium v Nehrich, supra*; *Omakaze Sushi Restaurant, Inc.v Ngan Kam Lee*, 57 AD3d 497 [2d Dept 2008]; *see Peterson v Corbin*, 275 AD2d 35, 37 [2d Dept 2000]; *Nalitt v City of New York*, 138 AD2d 580, 581 [2d Dept 1988]). "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]; *see Village of Westhampton Beach v Cayea*, 38 AD3d 760, 762 [2d Dept 2007]; *St. Paul Fire & Marine Ins. Co. v York Claims Service*, Inc. 308 AD2d 347 [1st Dept 2003]).

Since petitioner's application requests the ultimate relief to which she would be entitled in a final judgment, petitioner is required to demonstrate extraordinary circumstances. (*Board of Managers of Wharfside Condominium v Nehrich, supra; St. Paul Fire & Marine Ins. Co. v York Claims Serv., supra)*. The circumstances presented herein do not warrant mandatory injunctive relief pending the resolution of the litigation (*Id.*); *see SHS Baisley, LLC v Res Land, Inc., supra.*

Furthermore, petitioner did not demonstrate a likelihood of success on the merits.

In view of the foregoing, petitioner's application is ***denied*** and the petition is herewith ***dismissed***.

This constitutes the Decision and Order of the Court.

DATED: June 14, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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F:\DECISION - ARTICLE 78\TAMBERINO V BD OF DIRECTORS MEADOWBROOK POINTE HBL.wpd