

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

PRESENT.

EMILY JANE GOODMAN

PART

17

Index Number : 110936/2009

KIKIS, THOMAS P.

vs

1045 OWNERS CORP.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance
with accompanying memorandum
decision in motion sequence #002

FILED

APR 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

[Signature]

JSC
EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 17

-----X
THOMAS P. KIKIS,

Plaintiff,

Index No. 110936/09

-against-

1045 OWNERS CORP. and ELISABETH
BRENHOUSE,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Plaintiff, Thomas P. Kikis (Kikis), is the owner of the shares of several apartments in the Defendant co-operative building located on Fifth Avenue in the Metropolitan Museum of Art district. Defendant Elisabeth Brenhouse is the President of the Board of Directors.

Mr. Kikis sought to use his apartments, one of which was appraised at seven million dollars, as collateral for a home equity line of credit (HELOC) in the amount of three million dollars. The Board of Directors denied his application for a Recognition Agreement without which the bank would not approve the loan/line of credit. Kikis also complains of the Board's failure to approve his planned irrigation system on his terrace.

Defendants move to dismiss and for summary judgment, and oppose Plaintiff's cross motion. Plaintiff cross moves for partial summary judgment and for an order requiring Defendants to approve his loan, permitting Plaintiff to obtain the HELOC. He also seeks damages, both exemplary and punitive alleging a breach of fiduciary duty,

challenging the procedures surrounding an alleged corporate resolution. Plaintiff also cites Defendants' failure with regard to prior Court orders. Plaintiff opposes Defendants' motion in all respects.

The basis of denial of the HELOC is the Board's claim that they are not approved for any apartments even though that is not stated in the Proprietary Lease or corporate By-Laws, or by any other formal policy except the Purchase Application and a disputed Corporate Resolution. Primarily the case is about the Board's decisions being within the "business judgment rule."

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026). 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 (*Leon v. Martinez*, 84 N.Y.2d 83 (1994), *Marone v. Marone*, 50 N.Y.2d 481, 484).

The co-operative (often, and perhaps in this case, a misnomer) submits that not approving the HELOC is "policy," and has "never been done before." However, the Court of Appeals has bestowed upon the boards of "co-op" buildings (which are found primarily in New York City), virtually unfettered power to make decisions based upon the "business judgment rule." *Matter of Levandusky v. One Fifth Avenue Apartment Corp.*, 75 NY2d 530, et seq.

The Kikis arguments are in the nature of denial of due process because there is nothing foreclosing HELOCs in By-Laws or Proprietary Lease, there was no notice of an alleged Resolution; that said Resolution was created for Kikis; that the Board's president (the individual Defendant) has a personal relationship with the Board's secretary, which even if established, is not necessarily relevant in the absence of a conflict of interest of which there is no evidence.

There is no evidence of the Board's actions being discriminatory, or of Kikis receiving disparate treatment. Nor is there a denial of a resolution though Kikis argues it was passed after his application was denied. Still, there is no evidence that others in the building have been granted permission. There is also no evidence or argument that Kikis lacks the finances or assets to support the line of credit. It is simply that the Board does not wish to have such an encumbrance on the shares allocated to apartments in the building, or, the Kikis apartments. This the Board has the power to decide.

As to the claims of breach of fiduciary duty,

A fiduciary, in the context of property management, is "one who transacts business, or who handles money or property, which is not his (or her) own or for his (or her) own benefit, but for the benefit of another person, as to whom he (or she) stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part" (*Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 A.D.2d 322, 325 (1993)). The Court of Appeals

has determined that the managing agent is a fiduciary as to the corporation but not as to the individual unit owners. (*Caprer v Nussbaum*, 36 A.D.2d 176, 825 N.Y.S. 2d 55 (2nd Dept 2006)). Defendants, therefore allege that as a result, there can be no cause of action for Breach of Fiduciary duty on the part of Board or individual defendant and are correct.

On the claim of whether the Board of Directors should be held individually liable for breach of fiduciary duty, this Court has dissected Plaintiff's various arguments and find that they are largely based on personal relationships which establish no conflict of interests.

The Court of Appeals established a standard of review analogous to the corporate business judgment rule for a shareholder-tenant challenge to a decision of a residential cooperative corporation. *Matter of Lavandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d, supra. Thus, Defendants must allege facts showing that the Board of Directors or any individual members acted outside of the scope of their authority, or in a way that did not legitimately further the cooperative's legitimate purpose, or in bad faith. *40 West 67th St. Corp. v Pullman*, 100 NY2d 147, 153, 790 N.E.2d 1174, 760 N.Y.S.2d 745 (2003).

When dealing with individual liability, courts will dismiss complaints that fail to allege with specificity independent tortious acts by the board members. (*See, e.g., Pelton v 77 Park Avenue Condominium*, 38 AD3d (1st Dept 2006)). Plaintiff are required to plead with specificity independent tortious acts by each individual defendant in order to overcome the public policy that supports the business judgment rule (*see Murtha v*

Yonkers Child Care Assn., 45 NY2d 913 (1978), *Pelton v 77 Park Avenue Condominium*, 28 AD3d 1, 825 N.Y.S.2d 28 (2006). *Konrad v 136 E. 64th St. Corp.*, 245 AD2d 324 (1998). In *Konrad*, where the complaint failed to allege any independent wrongful conduct by an individual director of a cooperative, the Court stated (at 326):

“That the cooperative corporation’s board of directors may have taken action that ‘deliberately singles our individuals for harmful treatment’ does not, ipso facto, expose the individual board members to liability. The proposed cause of action ascribes no independent tortious conduct to any individual director, and plaintiff’s proposes...cause of action is therefore deficient as a matter of law (citation omitted).”

Under *Levandusky*, the exercise of a Board’s power for the common and general interests of the corporation may not be questioned, although the results show that what they did was “unwise or inexpedient” (*Id* at 537-538). The choice of the board may not be what others similarly situated might have done. However, this collective decision on the part of the Board does not expose the individual board members to liability, since once again, their action ascribes no independent tortious conduct to any individual director except as mentioned above. The Plaintiff has not indicated in this pleadings that there was a plan to harm him, whether through denial of the credit line or denial of approval of plans for an irrigation and waterfall which had the potential to cause general damage.

Plaintiffs claim that the Defendant the Board of Directors adopted resolution did not comport with due process, but even if true, would not change the outcome, because the action even without any resolution would still be in accord with *Levandusky* (supra).

It is hereby

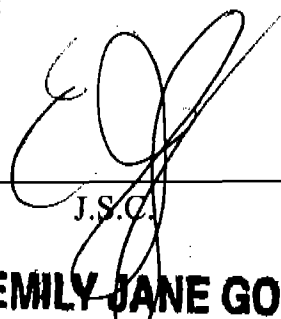
ORDERED that Defendants' motion to dismiss is granted; and it is further

ORDERED that the motion by Plaintiffs is denied.

This constitutes the Decision and Order of the Court.

Dated: April 11, 2011

ENTER:


J.S.C.
EMILY JANE GOODMAN

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