SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART J.H.O.

X

ROBERT GREENBERG and BONNIE GREENBERG,

Plaintiffs,

- against -

BOARD OF MANAGERS OF PARKRIDGE CONDOMINIUMS,

Defendant.

X

INDEX NO. 20257/95

MEMORANDUM

DECISION

SIDNEY LEVISS, JUDICIAL HEARING OFFICER:

Based on the credible evidence adduced at the trial of this matter, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

Plaintiffs are the unit owners at the Parkridge Condominiums, residing at 67-06 230th Street, Bayside, New York. Defendant is the duly elected governing body of Parkridge Condominiums. Parkridge is a condominium association organized under the laws of the State of New York.

Plaintiffs request an order permanently enjoining defendant from prohibiting the erection of a Succah upon their balcony for the Jewish holiday of Succah, from assessing penalties against plaintiffs for erecting a Succah on their balcony and cancelling any penalties so assessed and that defendant shall

desist from preventing plaintiffs' access to any and all common elements of Parkridge.

In a short-form order dated December 6, 1995, Justice James F. O'Donoghue set forth the law of the case. The pertinent portions of the order are as follows:

> "This is the second proceeding commenced by the plaintiffs herein regarding the erection of a Succah. The prior action involved plaintiffs placing a Succah on property adjacent to their condominium unit which property is an unrestricted common element of the condominium. The Court, in permanently enjoining plaintiffs, found that the erection of the Succah interfered with the right of the other unit owners from free and unrestricted use of the common area and was expressly prohibited by the condominium Rules and Regulation and By-Laws. Thus, the Court concluded that not only were the actions of the Board proper but mandatory in view of their responsibilities towards the condominium as a whole. The instant case, however, poses entirely new factual issues and principles of law, and defendant's reliance upon the Court's prior holding is, therefore, misplaced.
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> It is undisputed in this instance that the balcony while being a 'common element' is an irrevocably restricted common element which by its nature and express designation in the Offering Plan, the Declaration, the By-Laws and the Rules and Regulations of the Condominium is restricted in use to the owner and/or occupants of the individual condominium unit owners with only certain rights expressly retained by the condominium. There is nothing contained in the By-Laws which expressly or implied prohibit the use of the balcony for the placement of a Succah or any similar item.
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> Thus, the issue here is whether or not the Board exceeded its authority and acted in bad faith and in violation of its fiduciary duty to the individual unit owner in interpreting the By-Laws and the Rules and Regulations in this case.

The standard for judicial review of the actions of a condominium governing board is one that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors. (Levandusky v One Fifth Avenue, 75 NY2d 530, 537.) The Court of Appeals in Levandusky further noted that a standard of review must be sensitive to a variety of concerns for when the governing board acts within the scope of its authority, some check on its potential rights is necessary to protect individual residents from abusive exercise, regardless of the fact that the unit owners have to some extent consented to be regulated and selected their own governing representatives (Levandusky, supra, at 537.) The business judgment rule protects the board's business decisions and managerial authority while at the same time it permits a review of improper decisions where it is alleged that the board's action has no legitimate relationship to the welfare of the condominium, or the action is taken without consideration of relevant facts and circumstances, or if it is beyond the scope of its authority, or in violation of its fiduciary duty.

The Board of Managers has to treat all the unit owners fairly and evenly and to discharge its responsibilities in good faith and with conscientious fairness, morality and honesty of purpose. (See, Aronson v Crane, 14 AD2d 455, 456.)

The Board's reliance upon Article VIII, Section 7 of the By-Laws dealing with alterations is not dispositve, since it cannot be said as a matter of law that the placement of the Succah constitutes an alteration of the exterior of the home. In addition, since there is nothing contained in the documents provided to plaintiffs prior to purchasing their unit which would constitute notice that they cannot use the balcony for the placement of a Succah, it cannot be said as a matter of law they had voluntarily accepted such restrictions. In addition, the plaintiffs have presented evidence that the Board took no action with respect to numerous violations of the By-Laws by other unit owners. There is

> sufficient facts alleged to raise a question of fact as to whether or not the Board's prohibition of the placement of the Succah was in furtherance of a legitimate bona fide purpose or interest of the condominium or an act beyond the scope of their authority or a breach of their fiduciary duty to plaintiffs.
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> Finally, the defendant's assertion that plaintiffs did not seek Board approval is disturbing. It is the Board's questionable behavior when faced with plaintiffs' express request to address the Board on this issue which may have lead plaintiffs to act without Board approval. Although the Court does not condone plaintiff's conduct, the action of the board in denying plaintiffs an opportunity to be heard raises further questions of fact regarding the Board's possible bad faith in dealing with this problem."

The plaintiffs had previously erected a Succah on the common walkway adjacent to their premises and were enjoined by Justice O'Donoghue.

In 1993 after examining the Offering Plan and By-Laws of the Condominium, the plaintiffs erected a Succah on their balcony. The Succah is a temporary structure used by people of the Jewish faith during the Succah holiday which occurs in either September or October of each year and lasts for eight days and is removed usually on the ninth day.

The defendant by letter dated September 29, 1993, demanded that the Succah be removed.

In a letter dated October 13, 1993, the plaintiffs requested an opportunity to meet with the Board to discuss the matter.

In a letter dated October 15, 1993, the defendant refused to allow plaintiffs to attend its October and November 1993 monthly

meetings claiming a full agenda, but invited plaintiffs to attend the defendant's December 1993 meeting. The plaintiffs accepted the invitation in a letter dated October 18, 1993.

In a letter dated October 20, 1993, the defendants stated that the issue of the Succah was discussed during their October 1993 meeting and they voted to fine plaintiffs $1,000.00 for violating the Rules and Regulations by erecting a Succah on the balcony of their unit, without obtaining prior written consent from the Board of Managers.

That in October 1995 the plaintiffs erected a Succah on the balcony of their unit without obtaining prior written consent from the Board of Managers.

In addition to the $1,000.00 fine, the defendant threatened the plaintiffs to accelerate all common charges and assessments and denied plaintiffs access to the condominium swimming pool and exercise room.

CONCLUSIONS OF LAW:

The Condominium Offering Plan states on page 51:

Powers and Duties of Board of Managers

"7. To make reasonable rules and regulations."

(Plaintiffs' 1 in Evidence.)

The Rules and Regulations of the Parkridge Condominiums do not specifically prohibit the erection of a Succah on a balcony. (Plaintiffs' 8 in Evidence.)

Justice O'Donoghue has previously ruled that the erection of a Succah is not an alteration.

The Offering Plan of the Condominium states:

"IRREVOCABLY RESTRICTED AREAS

> Certain portions of the common elements are irrevocably restricted in use to specified Home owners, subject to the right of the Board of Managers to enter upon any restricted area for maintenance, repair or improvement of a Home or common element and subject to the rules of the Board of Managers (see By-Laws, Article VIII). Any portion of the common elements which is not restricted in use may be used by any Home Owner. The common elements are not subject to partition nor are they severable from the Homes except in accordance with the Real Property law. Following are detailed descriptions of the irrevocably restricted common elements:
>
> 3. Each balcony shall be limited in use to the home owner who has direct access to the balcony from the interior of his home."

(Plaintiffs' 1 in Evidence.)

The By-Laws of the Condominium, Article III, Section 5, Powers of the Board of Managers, page 165 (top of page), page 6 (bottom of page) provides as follows:

> "8. To make reasonable rules and regulations and to amend the same from time to time, and such rules and regulations and amendments shall be binding upon the Home Owners when the Board has approved them in writing. A copy of such rules and all amendments shall be delivered to each Home."

The Board of Governors violated the provision of their powers by not complying with same. There was no evidence that the Board approved a rule or regulation in writing prohibiting the

erection of a Succah on a balcony. Nor was a copy of any such rule or regulation delivered to each home.

In the Matter of Ronald Levandusky v One Fifth Avenue Apartment Corp., 75 NY2d 530, 537-539, the Court of Appeals stated:

> "It is apparent, then, that a standard for judicial review of the actions of a cooperative or condominium governing board must be sensitive to a variety of concerns -- sometimes competing concerns. Even when the governing board acts within the scope of its authority, some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary to protect individual residents from abusive exercise, notwithstanding that the residents have, to an extent, consented to be regulated and even selected their representatives (see, Note, The Rule of Law in Residential Associations, 99 Harv L Rev 472 [1985]). At the same time, the chosen standard of review should not undermine the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit.
>
> We conclude that these goals are best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors (see, Auerbach v Bennett, 47 NY2d 619, 629). A number of courts in this and other states have applied such a standard in reviewing the decisions of cooperative and condominium boards (see, e.g., Kirsch v Holiday Summer Homes, 143 AD2d 811; Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d 1; Van Camp v Sherman, 132 AD2d 453; Papalexiou v Tower W. Condominium, 167 NJ Super 516, 401 A2d 280; Schwarzmann v Association of Apt. Owners, 33 Wash App 397, 655 P2d 1177; Rywalt v Writer Corp., 34 Colo App 334, 526 P2d 316). We agree with those courts that such a test best balances the individual and collective interests at stake.

Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' (Auerbach v Bennett, 47 NY2d 619, 629, supra.) So long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] 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.' (Pollitz v Wabash R.R. Co., 207 NY 113, 124.)

Application of a similar doctrine is appropriate because a cooperative corporation is -- in fact and function -- a corporation, acting through the management of its board of directors, and subject to the Business Corporation Law. There is no cause to create a special new category in law for corporate actions by coop boards.

[1] We emphasize that reference to the business judgment rule is for the purpose of analogy only. Clearly, in light of the doctrine's origins in the quite different world of commerce, the fiduciary principles identified in the existing case law -- primarily emphasizing avoidance of self-dealing and financial self-aggrandizement -- will of necessity be adapted over time in order to apply to directors of not-for-profit homeowners' cooperative corporations (see, Goldberg, Community Association Use Restrictions, op. cit., at 677-683). For present purposes, we need not, nor should we determine the entire range of the fiduciary obligations of a cooperative board, other than to note that the board owes its duty of loyalty to the cooperative -- that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available.

In reaching this conclusion, we reject the test seemingly applied by the Appellate Division majority and explicitly applied by Supreme Court in its initial decision. That inquiry was directed at the reasonableness of the board's decision; having itself found that relocation of the riser posed no 'dangerous aspect' to the building, the Appellate Division concluded that the renovation should remain. Like the business judgment rule, this reasonableness standard -- originating in the quite different world of governmental agency decision-making -- has found favor with courts reviewing board decisions (see, e.g., Amoruso v Board of Managers, 38 AD2d 845; Lenox Manor v Gianni, 120 Misc 2d 202; see, Note, Judicial Review of Condominium Rulemaking, op. cit., at 659-661 [discussing cases from other jurisdictions]).

As applied in condominium and cooperative cases, review of a board's decision under a reasonableness standard has much in common with the rule we adopt today. A primary focus of the inquiry is whether board action is in furtherance of a legitimate purpose of the cooperative or condominium, in which case it will generally be upheld. The difference between the reasonableness test and the rule we adopt is twofold. First -- unlike the business judgment rule, which places on the owner seeking review the burden to demonstrate a breach of the board's fiduciary duty -- reasonableness review requires the board to demonstrate that its decision was reasonable. Second, although in practice a certain amount of deference appears to be accorded to board decisions, reasonableness review permits -- indeed, in theory requires -- the court itself to evaluate the merits or wisdom of the board's decision (see, e.g., Hidden Harbour Estates v Basso, 393 So 2d 637, 640 [Fla Dist Ct App]), just as the Appellate Division did in the present case.

The more limited judicial review embodied in the business judgment rule is preferable. In the context of the decisions of a for-profit corporation, 'courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments * * * by definition the

> responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility.' (Auerbach v Bennett, 47 NY2d, supra, at 630-631.) Even if decisions of a cooperative board do not generally involve expertise beyond the usual ken of the judiciary, at the least board members will possess experience of the peculiar needs of their building and its residents not shared by the court."

In violating their own powers, the Board of Governors did not comply with the standards as enunciated in Levandusky v One Fifth Avenue Apartment Corp. (supra).

The plaintiffs claim that the defendant Board of Managers discriminated against them by failing to enforce violations of the Rules and Regulations against other condominium owners. Since the Court has found that the Board of Managers violated their own By-Laws, such claim is not germane to the issues in this case and it is not necessary to consider same at this time.

The defendant, Board of Managers of Parkridge Condominiums, is enjoined from prohibiting the plaintiffs, Robert Greenberg and Bonnie Greenberg, from erecting a Succah on the balcony of their premises, 67-06 230th Street, Bayside, New York in observance of the Jewish holiday of Succah, provided same is removed within one or two days after the conclusion of the holiday. All penalties which have been assessed against the plaintiffs for erecting a Succah on their balcony are revoked, monetary and otherwise, and plaintiffs shall be permitted access and use of all common elements of the Parkridge Condominiums which includes the swimming pool and exercise room.

The above constitutes the decision and judgment of the Court.

Enter judgment accordingly.

Dated: September 1, 2000

SIDNEY LEVISS
Judicial Hearing Officer

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