

**Well v Board of Mgrs. of the Battery Point
Condominium**

2016 NY Slip Op 30202(U)

February 2, 2016

Supreme Court, New York County

Docket Number: 153970/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MARTIN HEILWELL,

Index No.153970/2014

Plaintiff,
-against-

DECISION/ORDER

THE BOARD OF MANAGERS OF THE BATTERY
POINT CONDOMINIUM AND RY MANAGEMENT
CO, INC.,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1, 2</u>
Affidavits in Opposition.....	<u>3, 4</u>
Replying Affidavits.....	<u>5, 6</u>
Exhibits.....	<u>7</u>

Plaintiff unit owner has brought the present action against defendants the Board of Managers of the Battery Pointe Condominium (the "Board") and the management company of the condominium based on his allegation that defendants acted in violation of the bylaws by requiring plaintiff to obtain the consent of the defendant Board and execute an alteration agreement in order to install the heating unit in the bedroom of his condominium unit. Defendants have brought the present motion for summary judgment dismissing plaintiff's three claims and plaintiff has brought a cross-motion for summary judgment on his claims.

The relevant facts are as follows. Plaintiff is a resident and record owner of unit 7A at 300 Rector Place. In 2014, plaintiff contacted defendants requesting their cooperation to

authorize the draining of the riser in his bedroom line after the close of the heating season so that he could install a new heating unit in his bedroom. Defendants' representative advised plaintiff that he would be required to submit a scope of work, proof of insurance from his contractor and his contractor's license and that she would then submit his request to the Board. She also requested that he sign an alteration agreement. Plaintiff submitted all the information requested but did not submit the signed alteration agreement. He took the position that he was not required to sign any alteration agreement or obtain the Board's approval or consent to install the heating unit in his bedroom and have the risers drained. The defendants' representative informed him that all owners had to submit an alteration agreement for any work in their unit. The alteration agreement which defendants required plaintiff to submit had a provision in it that required plaintiff to request the permission of the Board for plaintiff to perform the work in his unit.

Based on the positions taken by defendants, plaintiff commenced the present action asserting three causes of action. In the first cause of action, plaintiff seeks damages based on defendants' insistence that plaintiff was required to obtain the Board's consent before he installed a new heating unit. In the second cause of action, he seeks a declaration that the replacement of the heating unit within his unit does not require defendants' prior approval and execution of an alteration agreement. In his third cause of action, he seeks an injunction that defendants immediately authorize the drainage of the riser in plaintiff's bedroom line and plaintiff's installation of a new heating unit.

The bylaws of the condominium provide in section 5.2 as follows:

A non-structural alteration to a Residential Unit or its appurtenant Limited Common Element that does not affect the exterior of the building or the value of Condominium Units may be made by any Unit Owner without consent of the Condominium Board. Subject to the terms of paragraph (B) of this section 5.2, no Unit Owner shall make any structural alteration, addition, improvement, or repair in or to his or her Unit or its

appurtenant Limited Common Elements without prior written approval of the Condominium Board.”

The bylaws further provide in section 5.2 (D) that any unit owner making any alterations, additions or repairs to his unit shall agree in a writing executed and delivered to the Board to indemnify and hold the condominium harmless from and against any liability, costs and expenses arising from the making of such alteration, improvement, addition or repairs or causing the same to be made in his unit.

Defendants seek summary judgment dismissing plaintiff’s complaint on the ground that the business judgment rule protects the Board’s determination to require plaintiff to submit an alteration agreement and obtain the Board’s consent before he replaces the heating unit in his condominium unit. Plaintiff has made a cross-motion for summary judgment on the ground that the Board is prohibited from requiring him to obtain the Board’s consent before he replaces the heating unit in his condominium unit.

The proper standard for reviewing the actions of a cooperative board of directors is through the lens of the business judgment rule. *See Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530, 537 (1990). The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. *See 40 West 67th Street v. Pullman*, 100 N.Y.2d 147 (2003). When an individual unit owner challenges a decision made by the condominium’s board of managers, the court will apply the business judgment rule. *Frisch v. Bellmarc Mgt.*, 190 A.D.2d 383, 389 (1st Dept 1993). Under the deferential business judgment rule, the 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.”

Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium, 65 A.D.3d 985, 989 (1st Dept 2009).

In the present case, the business judgment rule does not apply to the determination of the Board to require plaintiff to obtain its consent or sign the alteration agreement before he installs the heating unit as the Board was not acting within the scope of its authority under the bylaws in requiring the plaintiff to obtain the consent of the Board before he could perform non-structural alterations in his unit. Initially, defendants have conceded for purposes of this motion that the work that plaintiff wishes to perform in his unit is non-structural, although its accomplishment would require intervention with the water lines that serve the building wide heating system and therefore could have an impact on other units. The bylaws, which clearly govern the scope of the Board's authority, unambiguously provide that a unit owner can make non-structural alterations without the consent of the Board unless the alteration affects the exterior of the building or the value of condominium units in the building. In the present case, it is undisputed that the alterations that the plaintiff wishes to make are non-structural alterations which do not affect the exterior the building or the value of condominium units in the building. As a result, the bylaws do not provide the Board with authority to require that the plaintiff obtain the Board's consent before he performs the alterations. Similarly, the Board does not have the authority under the bylaws to require plaintiff to submit an alteration agreement which contains a provision that the plaintiff is seeking the Board's consent to perform the alterations. Although the Board could require that condominium unit owners sign some type of alteration agreement before they perform alterations in the unit, which could include an indemnification provision as provided for explicitly in the bylaws, such alteration agreement cannot contain a provision that

the unit owner is seeking the Board's consent for nonstructural alterations that do not affect the exterior of the building or the value of condominium units in the building.

Based on the foregoing, defendants' motion for summary judgment dismissing the complaint is denied and plaintiff's cross-motion for summary judgment is granted to the extent that this court hereby adjudges and declares that defendants have breached the bylaws by demanding that plaintiff seek the approval of the Board and execute an alteration agreement which contains a requirement that the Board approve the alteration in order to have a heating unit installed in the bedroom of his unit. This court further adjudges and declares that the replacement of the heating unit in his unit is a nonstructural alteration which does not require the Board's prior approval and execution of the alteration agreement as it is currently drafted. Finally, this court hereby finds that defendants should immediately authorize the drainage of the riser in plaintiff's bedroom line and plaintiff's installation of a new heating unit conditioned on an updated indemnification agreement from plaintiff and updated scope of work and proof of insurance of plaintiff's contractor who is performing the work. Plaintiff has withdrawn his claim for damages in this matter. The foregoing constitutes the decision, order and judgment of the court.

Date: 2/2/16

Enter: PK

J.S.C.

CYNTHIA S. KERN
J.S.C.