SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** 2
Justice

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THE EAST DRIVE HOUSING DEVELOPMENT FUND CORPORATION and VANREA FEARRON

Plaintiffs,

- v -

EMILY ALLEN,

Defendant.

INDEX NO. 652641/2016

MOTION SEQ. NO. 003

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, as well as the documents considered on the original motion, listed by document number 28, 22-23, 24, 30, 34, 36-39

were read on this application to/for Renew/Reargue/Resettle/Reconsider

This is an action by a cooperative corporation for, among other things, a declaratory judgment that defendant Emily Allen's shares and proprietary lease associated with apartment 3B of 205-207 East 124th Street, New York, NY have been canceled. This Court granted plaintiff East Drive Housing Development Fund Corporation's (hereinafter "plaintiff") prior motion (motion sequence No. 001) for summary judgment in its favor on, among other things, its ejectment cause of action, and found that plaintiff had established its entitlement to possession of the apartment and a declaration that defendant's shares and proprietary lease were properly canceled. Defendant now moves, by order to show cause, to renew or reargue that motion.

Plaintiff is a housing development fund company (hereinafter "HDFC") organized pursuant to Private Housing Finance Law article 11. (Doc. No. 38.) According to its initial deed from the City of New York and its certificate of incorporation, plaintiff is organized exclusively for the purpose of developing a "housing project for persons or families of low income." (Doc. Nos. 38 and 37.) As was noted in this Court's prior judgment, by letter dated February 18, 2016, plaintiff's board of directors informed defendant that, based on her protracted refusal to pay maintenance for seven years, repeated refusal to allow access to her apartment to fix a leak, and for various acts of vandalism and harassment, including destroying holiday decorations, the board would hold a meeting on February 29, 2016, to discuss its grievances against her and allow her an opportunity to resolve them. (Doc. No. 23, Ex. 1.) Following that meeting, by letter dated March 3, 2016, the board informed plaintiff that it had voted preliminarily to terminate her proprietary lease, authorize the commencement of an action or proceeding to recover possession of her apartment in the building, and to cancel her share certificate. (*Id.*, Ex. 2.) The board further notified defendant that a special meeting would be held on March 9, 2016, at which the board would vote on whether to confirm the preliminary vote, and at which she was invited to appear. By letter dated March 15, 2016, the board informed defendant that it had voted to confirm its decision to terminate the lease, commence an action to recover possession of her apartment, and to cancel her share certificate. It further notified her that she had 90 days in which to vacate the premises. (*Id.*, Ex. 3.)

After plaintiff commenced this action, it moved for, among other things, summary judgment on its ejectment cause of action, which motion this Court granted to that extent. (Doc. No. 43.) After plaintiff obtained a five-day eviction notice from the New York City Sheriff, defendant, pro se, moved to vacate this Court's prior judgment and stay the eviction notice.

(Motion Sequence No. 002.) By order dated April 20, 2017, this Court (Edmead, J.) resolved the motion by staying the eviction for a period of about one week. (Doc. No. 46.) Defendant, now with the aid of counsel, moves to either renew or reargue the summary judgment motion.

First, under the circumstances presented here, including the short timeline that defendant had to complete this filing, this Court overlooks defendant's failure to separately file each document submitted and to submit a copy of the full submissions on the initial motion. *See* CPLR 2001.

Decisions of a coop board to terminate its relationship with one of its shareholders is generally protected by the business judgment rule and will be upheld unless it is outside the scope of its authority, does not further the coop's corporate purpose, or was made in bad faith. *See 40 W. 67th St. v Pullman*, 100 NY2d 147, 155-158 (2003); *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 (1990). The Court of Appeals has consistently upheld the application of the business judgment rule for cooperative corporations in recognition of "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." *Id.* at 154, quoting *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d at 536.

Notwithstanding the sweeping reach of the business judgment rule for coops, courts have limited its application in certain circumstances. The most notable exception developed in the context of a coop's attempt to evict a tenant who elected not to purchase shares when the building converted. *See 512 E. 11th St. HDFC v Grimmet*, 181 AD2d 488 (1st Dept 1992), *appeal dismissed* 80 NY2d 892 (1992). In *512 E. 11th St. HDFC v Grimmet*, the tenant's apartment was subject to Rent Stabilization until the building's conversion into an HDFC

brought it within a statutory exemption to that law. The Court held that, notwithstanding the fact that the tenant could no longer rely on the Rent Stabilization Law, the HDFC was sufficiently intertwined with the government such that "constitutional due process protections requiring notice of the reasons for an eviction" applied.

Subsequent to the decision in *512 E. 11th St. HDFC v Grimmet*, courts have regularly found that non-shareholder tenants in HDFCs cannot be evicted in the absence of good cause consisting of more than mere expiration of their lease, notice of the cause for eviction, and a sufficient opportunity to be heard. *See e.g. 322 W. 47th St. HDFC v Loo*, 50 Misc 3d 143(A), 2016 NY Slip Op 50227(U) (App Term, 1st Dept 2016); *330 S. Third St., HDFC v Bitar*, 28 Misc 3d 51, 54 (App Term, 2d Dept, 11th & 13th Jud Dists 2010); *92 St. Nicholas Ave. HDFC v Rasheed*, 46 Misc 3d 1211(A), 2015 NY Slip Op 50039(U), *3 (Civ Ct, NY County 2015); *207-213 W. 114th St. HDFC v Jenkins*, 44 Misc 3d 1224(A), 2014 NY Slip Op 51300(U), *2 (Civ Ct, NY County 2014); *601 West 136 Street HDFC v Olivares*, 2014 NY Slip Op 314747(U), 2014 WL 2623599 (Civ Ct, NY County 2014); *50 W. 113th St. HDFC v Ali*, 13 Misc 3d 1237(A), 2006 NY Slip Op 52150(U) (Civ Ct, NY County 2006).

The instant case is not one in which the board seeks to evict a non-shareholder tenant. Defendant owns shares in the corporation and is in possession of a proprietary lease. Unlike the tenants in the foregoing cited cases, defendant voluntarily agreed to become a member of plaintiff. Her shares and lease afford her the power to vote for the representatives on the board. In becoming a member of plaintiff, defendant agreed that she would be governed by the rules of the board, that she would pay maintenance, and that she would submit to the board's authority. *See generally 151 First Ave. Hous. Dev. Fund Corp. v Gorman*, 2015 NY Slip Op 30006(U) (Sup Ct, NY County 2015, Jaffe, J.) The rights and responsibilities that accompany participation

in a coop distinguish this case from those concerning mere tenants to landlord coops, in which the deviation from the business judgment rule was recognized. Different rules should apply where an HDFC board makes decisions concerning its members and where the board acts as a landlord to a tenant with no voting rights.

It must be noted that, in *167-169 Allen St. H.D.F.C. v Ebanks* (22 AD3d 374, 376 [1st Dept 2005]), curiously not cited or discussed by either party, the Appellate Division, First Department applied *512 E. 11th St. HDFC v Grimmet* (181 AD2d 488) to a determination to evict a tenant-shareholder, without offering any specific reasoning. In the absence of any explanation in that decision as to why a doctrine that developed in the context of evictions of non-shareholder tenants should be expanded to apply to a shareholder-tenant, it is difficult to discern the precedential effect of that holding. The lower courts' rulings similarly did not address that issue. Furthermore, since the Court found that the shareholder in that matter had sufficient notice and an opportunity to be heard, its decision did not turn on whether *512 E. 11th St. HDFC v Grimmet* applied.

Thus, in this Court's view, the business judgment rule should apply to an HDFC's determination to terminate its relationship with a tenant-shareholder. *See e.g. 151 First Ave. Hous. Dev. Fund Corp. v Gorman*, 2015 NY Slip Op 30006(U); *Imani Hous. HDFC v Wilson*, 18 Misc 3d 1104(A), 2007 NY Slip Op 52405(U), *1-2 (Civ Ct, Kings County 2007). While the provisions of the proprietary lease and any agreements with the City and its agencies must, of course, be complied with, those are the only legal protections that need be afforded to tenant-shareholders. This Court sees no reason why constitutional due process would require more protection for defendant's property interests in these circumstances than it does in market-rate coops. Any other rule would ignore defendant's voluntary decision to become a member of a

coop, and thus of a community, and submit to the will of a board chosen to represent and make decisions for that community. Under this rule, plaintiff's determination must be upheld.

Even assuming, for the sake of argument, that plaintiff had to accord defendant notice and an opportunity to be heard, defendant fails to raise an issue of fact. Defendant's contention that plaintiff was required to afford her a hearing on the record before a neutral finder of fact is unsupported by a single citation to authority, and this Court can find none to support it. In any event, plaintiff notified defendant of the behaviors that it found objectionable and gave her many opportunities to correct that conduct. Defendant's refusal to participate in mediation or appear at the special meetings that the board held to deliberate on her relationship with plaintiff does not give rise to a right to do so here, before this Court, as defendant's papers suggest. This Court does not find it credible that the meetings were not duly noticed as asserted by Linsford Dominguez, a member of the board, in defendant's submission. Plaintiff's more specific submissions, which included text messages sent to Dominguez, are far more credible. There is no issue of fact as to good cause, notice, or an opportunity to be heard.

In short, defendant has failed to establish a ground for renewal or reargument of the prior motion. *See generally Menkes v Delikat*, 148 AD3d 442 (1st Dept 2017).

Accordingly, it is hereby:

ORDERED that the motion for renewal or reargument of plaintiff's prior motion for summary judgment is denied; and it is further

ORDERED that the stay of the sheriff's notice will be lifted, and the sheriff may proceed with the eviction of defendant, after a period of 20 days from service of this order with notice of entry on defendant.

This constitutes the decision and order of the court.

7/17/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	DO NOT POST		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE