

**Matter of Zyuz v Board of Directors of 313-23
Owners, Corp.**

2018 NY Slip Op 32740(U)

October 12, 2018

Supreme Court, Kings County

Docket Number: 506065/2016

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 506065/2016

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In the matter of

The Application of ANASTASIA ZYUZ,

Petitioner,

For a Judgment under Article 78 of
The Civil Practice Law and Rules,

DECISION/ORDER

-against-

THE BOARD OF DIRECTORS OF 313-23 OWNERS,
CORP., IRENE SHREYBERG, Individually and as a
Managing Agent of 313-23 OWNERS CORP.,

Respondents,

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The following papers numbered 1 to were read on this petition:

| Papers: | Numbered: |
|---|------------------|
| Notice of Motion/Order to Show Cause | |
| Petition/Affidavits/Affirmations/Exhibits..... | 1 |
| Answering Affirmations/Affidavits/Exhibits..... | 2 |
| Reply Affirmations/Affidavits/Exhibits..... | 3 |
| Other..... | |

Upon the foregoing papers, the petition is decided as follows:

The petitioner, Anastasia Zyuz, a shareholder of a residential cooperative corporation known as 313-23 Owners Corp. (the “cooperative”) commenced this Article 78 proceeding against the Board of Directors of the cooperative and Irene Shreyberg, the alleged managing agent, seeking the following relief: (a) an injunction preliminarily and/or permanently enjoining

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and restraining the respondents from (I) evicting or ejecting her from the premises during the pendency of this proceeding on the basis of petitioner's alleged failure to cure her default, and (ii) imposing any additional fines or fees upon her without providing her an opportunity to be heard by the Board (b) directing respondent to reverse, rescind and annul its decision to terminate her lease with 313-23 Owners Corp based upon her failure to cure her default; (c) directing respondent to reverse, rescind and annul fines totaling \$24,483.59 that were imposed upon her, together with the accumulated costs and interests; (d) awarding her damages, including punitive damages against the Board of Directors and 313-23 Brightwater Court and Irene Shreyberg in an amount to be determined; (e) awarding petitioner costs and disbursements, including reasonable legal fees pursuant to RPL § 234 in an amount of be determined; (f) awarding damages, cost, disbursements and attorney fees (g) such other and further relief as to this Court may seem just and proper.

Background:

Petitioner has been a stockholder and proprietary lease holder in a residential cooperative corporation ("cooperative") known as 313-23 OWNERS CORP. since May of 2013. The cooperative owns the building located at 313-23 Bridgewater Court, Brooklyn, New York and the petitioner resides in apartment apt. 4C . Petitioner she has been living in the apartment with her husband since December of 2014. The building is managed by the Board of Directors of 313-23 Owners Corp. who apparently employs ARM Management to run the building, Irene Shreyberg is alleged to be the managing agent of the building.

Petitioner maintains the respondents have improperly terminated her proprietary lease and

are in the process of evicting her from the premises for failing to pay sublet fees, failing to pay maintenance charges and failing to pay a host of fines, including fines that were apparently imposed due to petitioner's failure to correct a violation due to an improperly installed air conditioner. She maintains that she was never given timely notice or the reasons why the fees, charges and fines were imposed and as never given an opportunity to cure any of the violation that she was apparently charged with. She further maintains that the fees, charges and fines were assessed against in violation of the proprietary lease and house rules.

Analysis:

Initially, the Court notes that a proceeding to review a determination of a board of a cooperative apartment may properly be commenced pursuant to CPLR article 78 (*see e.g. Matter of Cohan v. Board of Directors of 700 Shore Rd. Waters Edge, Inc.*, 108 A.D.3d 697, 969 N.Y.S.2d 547; *In re Dicker v. Glen Oaks Vill. Owners, Inc.*, 153 A.D.3d 1399, 1400-01, 61 N.Y.S.3d 338, 340 (N.Y. App. Div. 2017), *leave to appeal denied sub nom. Dicker v. Glen Oaks Vill. Owners, Inc.*, 31 N.Y.3d 907, 103 N.E.3d 1243). When called upon to review a determination of a board of a cooperative apartment, the Court is required to apply the "business judgment rule." In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination 'so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith' " (*40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 153, 760 N.Y.S.2d 745, 790 N.E.2d 1174, quoting *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

To obtain relief from a cooperative board's determination, "an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (*40 W. 67th St. v. Pullman*, 100 N.Y.2d at 155, 760 N.Y.S.2d 745, 790 N.E.2d 1174). "[T]he broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decision making and favoritism" (*id.* at 157, 760 N.Y.S.2d 745, 790 N.E.2d 1174, *see also In re Dicker v. Glen Oaks Vill. Owners, Inc.*, 153 A.D.3d 1399, 1401, 61 N.Y.S.3d 338, 340–41 (N.Y. App. Div. 2017), *leave to appeal denied sub nom. Dicker v. Glen Oaks Vill. Owners, Inc.*, 31 N.Y.3d 907, 103 N.E.3d 1243).

While many CPLR article 78 proceedings are resolvable by the court on the papers as a matter of law, as if determining a motion for summary judgment (*see* CPLR 409[b]; *Matter of Barreca v. DeSantis*, 226 A.D.2d 1085, 1086, 641 N.Y.S.2d 953; *Matter of Major v. Cohen*, 126 A.D.2d 205, 209, 513 N.Y.S.2d 271; *Matter of 22 Park Place Coop. v. Board of Assessors of County of Nassau*, 102 A.D.2d 893, 894, 476 N.Y.S.2d 935; *Matter of Battaglia v. Schuler*, 60 A.D.2d 759, 759–760, 400 N.Y.S.2d 951), CPLR article 78 proceedings may also involve questions of fact requiring trial (*see* CPLR 7804[h]; *American Assn. of Bioanalysts v. New York State Dept. of Health*, 75 A.D.3d 939, 941, 906 N.Y.S.2d 356; *ADC Contr. & Constr. Corp. v. New York City Dept. of Design & Constr.*, 25 A.D.3d 488, 488–489, 808 N.Y.S.2d 69; *Matter of Vergata v. Superintendent of Bldgs. of Vil. of Westbury*, 108 A.D.2d 750, 750–751, 485 N.Y.S.2d 97; *Matter of Agresti v. Buscemi*, 28 A.D.2d 877, 281 N.Y.S.2d 853, *affd.* 28 N.Y.2d 984, 323 N.Y.S.2d 840, 272 N.E.2d 339; *Matter of Wilder v. Straus-Duparquet*, 5 A.D.2d 1, 3, 168

N.Y.S.2d 1005).

Here, the parties submissions did not address what the Court believes are important issues: Does the proprietary lease or house rules provide the cooperative with authority to fine proprietary lease holders for improperly installed air conditions? If so, where does this authority come from? If the cooperative intends to fine a proprietary lease holder, for any reason, does the proprietary lease holder have the right to advance notice, and if so, how must notice be given? Is the proprietary lease given an opportunity to cure? If the cooperative intends to impose a special maintenance charge, what is the procedure? Is notice to the proprietary lease holder of such required? Can fines be imposed for violations of the occupancy restrictions set forth in the house rules? If a proprietary lease allows a family member to live with him, does that violate the sublet rules? Was the petitioner put on notice of any alleged violation at any time, and if so, when and how?

Until the above questions are answered, the Court will not be in a position to addresses the claims being made in this petition.

The Court further notes that the petitioner is seeking what appear to be compensatory and punitive damages. Only incidental damages may be recovered in proceedings pursuant to CPLR article 78 (*see*, CPLR 7806). Under CPLR 7806, “any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner” if damages are recoverable on the same set of facts in a separate action or proceeding (CPLR 7806). Typically, whether damages are “incidental to the primary relief sought” depends upon the facts of the case (*see, e.g., Matter of Schwab v. Bowen*, 41 N.Y.2d 907, 908, 394 N.Y.S.2d 616, 363 N.E.2d 341; *D.B.C.G., Inc. v. Town of Ramapo*, 97 A.D.2d 533, 468 N.Y.S.2d 37; *Matter of Golomb v. Bd. of*

Educ., 92 A.D.2d 256, 460 N.Y.S.2d 805; *cf.*, *Gross v. Perales*, 72 N.Y.2d 231, 532 N.Y.S.2d 68, 527 N.E.2d 1205; *Pauk v. Bd. of Trustees of City Univ. of NY*, 111 A.D.2d 17, 488 N.Y.S.2d 685, *affd.* 68 N.Y.2d 702, 506 N.Y.S.2d 308, 497 N.E.2d 675). Here, however, it appears that the petitioner is seeking more than just incidental damages, such as punitive damages. This raises another question, if the petitioner is seeking damages that are more than incidental, should those damages be addressed in this proceeding? Should all claims for other than incidental damages be dismissed or should the proceeding be dismissed?

Since the petition raises a multitude of questions that the Court not resolve on the record before the, it is hereby

ORDERED that the petition is **DENIED** without prejudice. It is further

ORDERED that to the extent petitioner is seeking to enjoin the respondents from taking any further action to evict her without further order of the Court, the application is **GRANTED**.

The parties are directed to appear before the undersigned on November 5, 2018, at 3:00 p.m., for a conference. At that time, the parties must be prepared to discuss whether the petitioner is required to post a bond and the amount thereof. The parties should also be prepared to discuss whether the petitioner should be required to pay use and occupancy and whether the parties are seeking discovery.

This constitutes the decision and order of the Court.

Dated: October 12, 2018



PETER P. SWEENEY, J.S.C.
HON. PETER P. SWEENEY

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