SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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ANDREW LUSK,

Petitioner,

- v -

170 WEST 81ST OWNERS CORP., MICHELLE SIMMONS, JOHN REARDON, GABRIEL SPERBER, MARY ANNE NIDIRY

Respondents.

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INDEX NO. 157152/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 21, 22, 23, 24, 25, 26, 27

were read on this motion for ARTICLE 78 (BODY OR OFFICER) RELIEF.

Upon the foregoing documents, this CPLR Article 78 petition is hereby granted, as set forth more fully herein.

Preamble

New York City denizens must suffer through a variety of afflictions that are almost biblical in nature: buses that crawl; subways that stall; high prices at the mall; cold weather in the fall; a Flushing Team that can't play ball; friends that don't call; neighbors with gall; graffiti in the hall; plumbing expensive to install; buildings too tall; looking out your window at a wall. But seriously, the drawbacks to city living are legendary: high prices; crowded sidewalks; noise pollution; air pollution; bedbugs and cockroaches; prevalent crime; transportation tottering on the brink; vast income inequality; inadequate schools. And then there's that ubiquitous limitation on the quality of life; that thorn-in-the-urbanite's-side: the imperious Co-op building Board of directors. The one at issue here, the board of directors ("the Board") of respondent 170 West 81st Street Owners Corp. is attempting to prevent petitioner, Andrew Lusk, from purchasing the apartment (5E) next to his (5D) and combining them for his growing family, which is all he wants to do.

Background

This CPLR Article 78 proceeding arises from the Board's attempt to rescind its prior agreement to permit petitioner and his wife, Dana, conditionally, to purchase the shares associated with Unit 5E. Petitioner has been living in the building for five years and has always promptly paid his maintenance. The maintenance on the "new" apartment is a rather modest sum for this day and age.

On February 22, 2018, Lusk and non-party Stacey V. Judd, Unit 5E's owner and shareholder, entered into a contract of sale pursuant to which Judd agreed to sell the co-op shares allocated to Unit 5E for $679,500 ("the Proposed Sale"). On June 6, 2018 ("the June 6th Resolution"), after a telephonic meeting of the Board, Sean Lyons, the managing agent of the building, and, also, the disclosed agent of the Board, e-mailed Lusk that "The Board will approve [the Proposed Sale] under two conditions": (1) Lusk was required "to add an additional $125,000 (net cash) [into his] savings account, and cash on hand post-closing & renovation"; and (2) Lusk was required to enter into an escrow agreement, pursuant to which one years' maintenance ($26,652) was to be held in the co-op's escrow account for one year. As Lusk points out, the Board and its managing agent did not reserve any power to modify or change the terms of its approval. Indeed, in their August 31, 2018 Answer, respondents state, "Considering all of the circumstances, the Board advised Mr. Lusk that it would conditionally approve his purchase of 5E if he increased the cash balance in his bank account by $125,000 before the closing and placed 12 months of maintenance in escrow for a year."

In a June 8, 2018 e-mail Lusk accepted the approval including the enumerated conditions. In order to satisfy these conditions, Lusk borrowed money from his father's retirement account and deposited the $125,000 into his savings account, thus satisfying the first condition. It is undisputed that Lusk entered into an escrow agreement for one-year maintenance for the combined apartments and deposited those funds into the co-op's escrow account, thus satisfying the second condition.

On June 20, 2018, Lusk sent the Board bank records confirming the deposit of new funds ($125,000) into his savings account. On June 22, 2018 ("the June 22nd Resolution"), Lyons, on behalf of the Board, sent Lusk an email notifying him of the Board's attempt to rescind its June 6th Resolution and detailing the Board's new offer, which, inter alia, required Lusk to deposit $125,000 in escrow, rather than the previously agreed-to sum of $26,652. The Board alleges that after it consulted with co-op's counsel, she stated that the nature of Lusk's loan from his father raised a number of legal issues and concerns, and that the Board should either reject the Proposed Sale in whole, or require Lusk to place $125,000 in escrow for at least one year. The June 22nd Resolution also provides that if Lusk did not comply and deliver additional funds by June 29, 2018, "the offer [would be] rescinded and the Board will reject the purchase of apartment 5E and the combination of apartments 5D & 5E." Lusk did not accept the new conditions and did not deliver additional funds. On July 5, 2018, Lyons informed Lusk via email that the Board had purportedly rescinded its offer and rejected his purchase of Unit 5E.

On July 31, 2018, Lusk commenced the instant proceeding, seeking a declaratory judgment annulling the June 22nd Resolution and reinstating the June 6th Resolution approving the Proposed Sale, subject to the original two conditions, which he has already satisfied. Lusk argues, inter alia: (1) that the June 6th Resolution is a binding commitment upon which he was entitled to rely; (2) that the Board's arbitrary decision to attempt to rescind the June 6th Resolution is not protected by the Business Judgment Rule; (3) that the Board violated its bylaws by failing to provide notice to all directors of a special meeting, failing to convene a quorum, and failing to maintain minutes; and (4) that the Board improperly denied his request to inspect the co-op's books and records.

On August 31, 2018, respondents served an answer, arguing, inter alia: (1) that the June 22nd Resolution is protected by the Business Judgment Rule, as the Board may reject the Proposed Sale "for any reason or no reason"; (2) that Lusk failed to demonstrate discriminatory animus or bad faith on the Board's part in reaching the June 22nd Resolution; (3) that having followed co-op counsel's advice, Lusk is barred from asserting that the Board's decision was made in bad faith; (4) that the Board was not precluded from changing the conditions under which it would approve the Proposed Sale, as the June 6, 2018 email was not a formal resolution; (5) that the Board did not violate the co-op's bylaws; and (6) that Lusk's demands for books and records are moot, as they have already been satisfied.

Discussion

Pursuant to the Business Judgment Rule, courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. See Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538-39 (1990) ("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") (internal quotations omitted). However, the Business Judgment Rule does not foreclose inquiry by courts into whether a co-op may rescind approval of a proposed sale of a unit within its building if it otherwise would be an impermissible breach of contract. See Barbour v Knecht, 296 AD2d 218, 224 (1st Dept 2002) ("The business judgment rule is not an insuperable barrier, however, and permits review of improper decisions") (internal quotations omitted); see also 40 W. 67th St. v Pullman, 100 NY2d 147, 153-54 (2003) ("In adopting this rule, we recognize that a cooperative board's broad powers could lead to abuse through arbitrary or malicious decisionmaking"). Simply put, the Business Judgment Rule is not a get-out-of-jail-free card protecting any and all board activity.

Here, the June 6th Resolution was a conditional but binding commitment upon which Lusk was entitled to rely. See Demas v 325 W. End Ave. Corp., 127 AD2d 476, 477-78 (1st Dept 1987) ("This resolution was, on its face, a binding commitment upon which plaintiffs were entitled to rely. ... The [Board] resolution was complete and unambiguous on its face"). Thus, the Board's rescission of its decision to approve the Proposed Sale detailed in the June 6th Resolution was improper and is not protected by the Business Judgment Rule. See Dinicu v Groff Studios Corp., 257 AD2d 218, 222-23 (1st Dept 1999) ("while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim. Thus, the Business Judgment Rule does not protect [respondents] from liability"); see also Whalen v 50 Sutton Place S. Owners, 276 AD2d 356, 357 (1st Dept 2000) ("while it may be good business judgment to walk away

from a contract, this is no defense to a breach of contract claim"). Respondents' argument that the June 6th Resolution does not constitute a formal resolution is unavailing; case law permits judicial review of "improper decisions," not just formal resolutions, and respondents concede that the Board conducted a telephonic meeting in which all four then-current directors participated and unanimously voted to approve Lusk's application (with the subject conditions). Respondents' argument that the Board rescinded its June 6th offer because it was concerned with Lusk's method of financing the additional funds (i.e., borrowing the money from his father) and, hence, his post-closing liquidity, is equally unavailing; the June 6th Resolution does not (although it easily could have) condition how Lusk was to obtain additional funds, or that he was not allowed to borrow them. In other words, the Board is estopped from setting conditions that were not already contained in the June 6th Resolution.

This Court is surprised at respondents' attempt to rely on the following two First Department cases: Hirschmann v Hassapoyanes, 52 AD3d 221 (1st Dept 2008), and Kallop v Board of Directors for Edgewater Park Owners, 155 AD3d 491 (1st Dept 2017). In both instances, the courts refused to let the subject boards rescind their offers (albeit for reasons inapplicable here). You cannot rely on case in which courts refused to let co-op boards rescind decisions for the proposition that boards can rescind their decisions.

The Court has considered respondents' other arguments and finds them to be unavailing and/or non-dispositive.

Accordingly, this CPLR Article 78 petition is hereby granted.

Conclusion
Petition granted. The clerk is hereby directed to enter judgment in favor of petitioner, Andrew Lusk, and against respondents, 170 West 81st Owners Corp., Michelle Simmons, John Reardon, Gabriel Sperber, and Mary Anne Nidiry, (1) annulling respondents' June 22, 2018 resolution rescinding its prior approval of petitioner's application to purchase Unit 5E in the cooperative building located at 170 West 81st Street, New York, NY 10024, and (2) restoring respondents' June 6, 2018 resolution approving petitioner's application to purchase the same, subject to certain conditions, which conditions petitioner has already satisfied.

9/14/2018
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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