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Co-Ops — Sellers Rented Apartment Before Board Approved the Pending Sale of Their Co-Op and Board Rejected the Sale — Sellers Sued — Individual Board Members Had No Personal Liability— NYS Human Rights Law — Federal Fair Housing Act— Breach of Fiduciary Duty — Prima Facie Tort — Tortious Interference With Contract — Breach of Contract — Business Judgment Rule.

Comment: The plaintiffs' counsel, **Adam Leitman Bailey, Esq.**, stated that "[t]his decision is a clear statement by the Court that the New York Human Rights Law protects all persons injured by acts of unlawful discrimination— whether the defendant causes their injury directly or indirectly. In addition to the remedies the law gives to the victims of direct discrimination, defendants who would discriminate should be aware that they can also be held liable for the harmful rippling economic consequences their actions cause to third parties—which, as in this case, can amount to substantial monetary damages."

This case involved a claim for money damages arising from a dispute involving a cooperative corporation's (co-op) failure to "consent to a proposed sale [of the plaintiffs'] cooperative apartment [apartment]." The husband and wife plaintiffs owned the apartment. The plaintiffs sued the co-op and each member of the co-op's Board of Directors (board). The plaintiffs asserted claims under the New York State Human Rights Law (NYSHRL) and the Fair Housing Act (FHA), as well as claims for breach of fiduciary duty, prima facie tort, tortious interference with contract and breach of contract. The defendants moved to dismiss, arguing that the plaintiffs lacked standing and had failed to state a cause of action.

The plaintiffs had agreed to sell the apartment to Mr. and Mrs. "A" (buyers) for \$1,750,000. The contract was subject to board approval. However, the buyers' application was rejected by the board. The plaintiffs asked the board to reconsider. The buyers' application was again rejected on the grounds that they would not be using the apartment as a primary residence, "an alleged violation of the by-laws." The plaintiffs thereafter contacted the defendant board members, who allegedly "reported that they had not been involved in the decision-making process regarding

the application." The president of the board had allegedly told the plaintiffs that the entire board had met on Oct. 15, 2008 and had at that time, rejected the application for a third time.

Thereafter, Mr. "A" died. Mrs. "A" decided to move to New York on a permanent basis and still wanted to purchase the apartment. Although this would now be Mrs. "A"'s primary residence, the board president refused to reconsider Mrs. "A"'s application. The plaintiffs, with board approval, then sold the apartment for a reduced price of \$1,425,000.

The plaintiffs asserted that the defendants' rejection of the buyers' application was "racially motivated" because the plaintiff husband is a "Latino" and defendants had "previously discriminated against Latinos in the building." Out of 350 apartments in the building, only five were allegedly owned by Latinos and historically, "Latino employees had been "routinely...fired or demoted."

The plaintiffs also claimed that the buyers' application was rejected because they are "senior citizens" and that the defendants regularly discriminated against elderly residents by asking elderly residents to limit the time "they spend in the building's lobby." The plaintiffs also alleged that the defendants had "confiscated" the plaintiffs' storage unit and assigned it to another resident, in violation of the by-laws.

The defendants argued that the plaintiffs lacked standing to assert a NYSHRL claim since the plaintiffs were neither elderly nor members of the protected class. The defendants also argued that the plaintiffs lacked standing to assert a discrimination claim under the FHA. The defendants claimed that although the plaintiff husband may be a member of the protected class, there was no precedent recognizing a claim for "discrimination against a seller of residential housing and the FHA is only intended to protect renters or buyers."

Additionally, the defendants asserted that the breach of fiduciary duty allegations were merely speculative, the plaintiffs offered no factual support and the defendants' "decisions are protected under the business judgment rule." As to the prima facie tort claim, the defendants argued that the decision to deny the buyers' application was "rationally based on the primary residence rules set forth in the by-laws." The defendants further emphasized that since the buyers' contract was subject to board approval and the board was authorized to deny the application "in its sole discretion," the tortious interference with contract claim should also be dismissed. The defendants further asserted that the breach of contract claim failed to specify which contract had been breached and did not specify what damages resulted from the breach. Finally, the defendants argued that punitive damages were not available and the plaintiffs had improperly sued the members of the board in their individual capacities.

Under NYS Executive Law §296(5), plaintiffs must demonstrate, "as buyers: (1) that they are a member of the class protected by the statute; (2) that they sought and were qualified to purchase the apartment; (3) that they were rejected; and (4) that the co-op's denial of their application occurred under circumstances giving rise to an inference of discrimination."

Although the plaintiffs were not purchasers, they allegedly suffered damages as a direct consequence of the discriminatory conduct against the buyers who were members of a

protected class. The court noted that "at least one trial court has held that a plaintiff/seller has a viable cause of action if the plaintiff/seller can show that it was adversely affected by discrimination perpetrated against the prospective buyer who is a member of a protected class." Moreover, "[c]laims by persons who are not themselves members of a protected class but who were personally affected, albeit indirectly, by discriminatory acts taken against another, have been found to have stated a valid cause of action under the NYSHRL." Thus, the court found that the plaintiffs had pled a viable cause of action under the NYSHRL and had "standing to bring a cause of action for age discrimination."

Under the FHA, a plaintiff must establish that he is a member of a protected class, that he applied for and was qualified to purchase the housing, that he was rejected and that the housing opportunity remains available. Although the plaintiff husband is a member of the protected class, he had neither applied for nor was rejected from housing accommodations. He only claimed to have been "discriminated against as the owner of shares in a residential co-op. Thus, by definition, [plaintiff husband] is not someone who applied for or made an offer to buy an apartment and was rejected." Although courts have "broadly interpreted the FHA to eradicate discriminatory housing practices," there was "no instance where such protections have been expansively applied to include sellers." Therefore, the court dismissed the FHA claims.

When breach of fiduciary duty claims are asserted against a co-op, courts "must decide whether the board's determination was made in violation of its lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion." Courts will apply the "business judgment rule" as enunciated in [*Matter of Levandusky v. One Fifth Avenue Apartment Corp.*](#), 75 NY2d 530 (1990). Courts will "defer to good faith decisions made by the board...and absent illegal discrimination, fraud, self-dealing, etc., the Board has the right to withhold its approval of the purchase or sale of an apartment, for any reason, or even for no reason...."

Here, the plaintiff alleged that certain board members had not been involved in the decision-making process and the "primary residence rule" does not actually exist "but was a pretext for denying [the buyers'] otherwise acceptable Application to buy plaintiffs' co-op." Since the court believed [that taken together, the allegations "support a claim that the Board violated the business judgment rule by acting in bad faith," the court denied the motion to dismiss the breach of fiduciary duty claim.

The court then dismissed the prima facie tort claim because the plaintiffs did not claim that the defendants' "sole motivation was either due to their 'disinterested malevolence' or desire to harm the plaintiffs." The court also dismissed the tortious interference with contract claim. The contract was subject to board approval and the plaintiffs' decision to lease a new apartment before the board had approved their application to sell their co-op apartment had been made "independently."

Thus, "any damages that plaintiff sustained as a result of getting a rental apartment they did not need is not causally related to defendants' decision to deny the Application. Plaintiffs knew or should have known that the Application could have been denied for any number of reasons, but they decided to enter into a rental agreement that was not contingent on the Board's approval of the Application."

Moreover, there could not be an interference with contract, "because there was no breach." However, the court held that the plaintiffs had stated a claim for breach of contract relating to the alleged confiscation of the plaintiffs' storage unit.

The court then explained that individual members of a cooperative or condominium board may be sued for discrimination or similar wrongdoing when the plaintiffs plead "with specificity independent tortious acts by each individual defendant in order to overcome the public policy that supports the business judgment rule." "Where a complaint fails to plead that the individual members of a cooperative's board of directors have 'acted tortiously other than in their capacity as board members,' the cause of action as to the individual members shall be dismissed."

The court therefore dismissed the claims against the defendants in their individual capacities because the plaintiffs failed to show that any Board member "has engaged in individual wrongdoing." The plaintiffs did not allege that defendants engaged in wrongful acts separate from the "actions taken by the board members collectively and on behalf of" the co-op.

The court then explained that punitive damages may be awarded where the defendant "acted with such a high degree of bad faith, and their wrongful act was so wanton, reckless, or malicious, that its actions are intentional, deliberate and therefore reprehensible to society as a whole.... Punitive damages are generally permitted for breach of contract where plaintiffs "demonstrate egregious tortious ...but also that such conduct was part of a pattern of similar conduct directed at the public generally.... In cases involving breach of fiduciary duty, harm aimed at the public is not required, 'so long as the very high threshold of moral culpability is satisfied.'"

The NYSHRL permits an award of punitive damages not to exceed the amount of \$10,000, "in cases of housing discrimination only." The court found that the alleged facts did not "rise to the level of being reckless or conscious disregard of the rights of others" and the plaintiffs did not demonstrate that "confiscation of a storage unit constitutes 'egregious and willful conduct' that is 'morally culpable, or is actuated by evil and reprehensible motives'...." However, discrimination is a "serious claim that offends the public. If there is a pattern or practice of pervasive discrimination, it may be construed as disregarding the rights of others." Thus, the court denied the motion to dismiss the punitive damage claims with respect to the NYSHRL and the breach of fiduciary duty claim. However, the court granted the motion to dismiss the punitive damage claim in connection with the breach of contract claim.

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██████████ *v. Stewart Tenants*, Sup. Ct., N.Y. Co., Index No. 102442/10, decided Nov. 24, 2010, Gische, J.