

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

In the Matter of PETER BECKERMAN,

TRIAL/IAS PART 3

Petitioner,

INDEX NO. 586/18

For a Judgment Pursuant to CPLR Article 78

- against -

MOTION SEQUENCE
NO. 1 & 2 & 3

LATTINGTOWN HARBOR PROPERTY OWNERS
ASSOCIATION, INC. and THE BOARD OF
DIRECTORS OF THE LATTINGTOWN HARBOR
PROPERTY OWNERS ASSOCIATION, INC.,

MOTION SUBMISSION
DATE: October 24, 2018

Respondents,

- and -

PETER TULLY and RANDOLPH JOHNSON,

Intervenor-Respondent

The following papers read on this motion:

- Order to Show Cause X
- Notice of Cross Motion XX
- Affirmation X
- Affirmation in Opposition X
- Affidavit in Support X
- Memorandum of Law X

This Petition for a Judgment pursuant to Article 78 of the CPLR annulling a License Agreement dated November 29, 2017, whereby The Board of Directors of The Lattingtown Harbor Property Owners Association ("the Board") granted the Intervenor-Respondent Peter Tully certain exclusive rights of use of Lattingtown Harbor Property Owners Association, Inc.'s ("POA") community property; annulling a verbal Agreement whereby the Board granted Intervenor-Respondent Randy Johnson certain exclusive rights of use of the POA's community property; staying the Respondents from permitting any exclusive use of any

of the POA's common area property pursuant to the License Agreement dated November 29, 2017 or the oral Agreement(s) with Johnson or Joseph Gil; ordering the Respondents to remove any erection at the dock area or in the alternative, declaring any such erection to be community property; and, awarding the Petitioner costs and attorney's fees pursuant to Public Officers' Law § 89 (4) © and CPLR 6802 is determined as provided herein.

These cross-motions by the Intervenors-Respondents Peter Tully and Randolph Johnson for an order pursuant to CPLR 7804 (f) dismissing the Petition on the grounds that: (1) the claims herein are time-barred; (2) the Respondent's challenged actions here satisfy the Business Judgment Rule; and, (3) the claims herein are barred by the doctrine of laches, is determined as s provided herein.

Succinctly put, the Petitioner in this proceeding, an owner of real property within the jurisdiction of the POA, seeks to annul written and oral agreements entered into by the POA with other owners of real property within the POA which affords them exclusive use of portions of the community dock at the POA's Community Beach House. The Petitioner alleges that that property is community property and that the aforementioned agreements are violative of the POA's By-Laws, Declaration and Amended Declaration. He alleges that any agreement by the POA's Board granting exclusive use of any portion of the POA's common area properties is in excess of its power and authority and is in violation of and inconsistent with its By-Laws and its Amended Declaration. He alleges that the POA's By-Laws and/or Amended Declaration by their terms prohibits the Board from entering into such agreement with anyone. In addition, the Petitioner alleges that via counsel, it has repeatedly asked the Board about the agreements and asked it to rescind them but it has refused to do so. Petitioner alleges that at a minimum, notice of a Special Meeting is required as well as a unanimous vote by the members of the POA as a prerequisite to granting exclusive rights to any of the POA's common property.

The Petitioner alleges that the issues here actually began during the summer of 2017 with certain POA members attempting to use the dock exclusively. As a result, a Dock Committee was formed. That Committee submitted a proposal to the Board which was approved by it, as a result of which signs have been posted at the community dock which state that no boat could be docked for more than 48 consecutive hours. The Petitioner also alleges that Peter Tully constructed his own dock slip annexed to the community dock which is also not permitted by the governing By-Laws or Declarations. He alleges that the POA has the right to summarily abate and remove that erection at Tully's expense.

In opposition to the Petition, Intervenor-Respondent Tully attests that he has had private dock rights -which consists of a floating dock attached to the community dock and is not a part of it- spanning approximately 16 years. In exchange for that right, his construction company, the Tully Group, has provided between \$ 800,000 and \$ 1,000,000 worth of services to the POA by maintaining and improving the land, structures and waterways of the POA during the past 16 years. More specifically, he attests that his company has dredged the Harbor and the Channel three times to protect the flow of water into and out of the Harbor; provided construction services to the Frost Creek Bridge; upgraded electrical and water services at the POA's community dock; and, installed speed bumps on community roads. All these services resulted in a loss of profits to his company as the resources required for these projects could have and would have been targeted elsewhere. He explains that he has provided these services in exchange for being permitted to maintain two private docks which consists of a floating structure that is attached to the POA's community dock. He attests that he is solely responsible for his docks: He maintains them, removes them and reinstalls them every year. He attests that the private docking rights are the most significant reason he has provided his company's services to the POA at virtually no cost and that but for those rights, his company would not have provided those services for free. Finally, he attests that if his rights are revoked, his services will no longer be provided to the POA for free.

In opposition to the Petition, Intervenor-Respondent Johnson attests that he was given permission by the POA to affix his two floating docks to the community dock during the summer of 1996, some 22 years ago and that action has been ratified ever since by each new Board. Like Tully, he maintains his docks himself including installing and removing them. He notes that the Petitioner has had constructive notice of his docks the entire time they have been there and explicit knowledge of them for at least a year. He attests that his floating docks have never interfered with the POA's members' use of the community dock. In fact, he notes that the Petitioner has attested in his affidavit, "I learned of the BOARD granting exclusive rights to certain members of the LHPOA approximately one year ago." His attorney notes that the private floating docks only leave more room at the community dock for POA members.

The Intervenor-Respondents seek dismissal of the Petition as untimely. They maintain that because this is an Article 78 proceeding seeking review of an act by the POA's Board, the four month Statute of Limitations set forth in CPLR 217 (1) applies.

The statute of limitations does not begin to run until the "agency's 'definitive position on the issue [becomes] readily ascertainable'" to the complaining party (quotations and citations omitted) " (*School Administrators Ass'n of New York State v New York State Dept. of Civ. Serv.*, 124 AD3d 1174, 1176-77 [3d Dept 2015], *affd* 26 NY3d 904 [2015]). Despite repeated attempts to determine the status of the relationship between the Intervenor-Respondent Tully and the POA, the Petitioner did not definitively learn of their License Agreement until April 26, 2018. That act therefore did not become final and binding upon him until such time. His claim challenging the validity of that agreement a/ka/a the License Agreement has been timely interposed. Similarly, his claim regarding the arrangement between the POA and the Intervenor-Respondent Johnson has also been timely interposed since the exact nature of their arrangement and when it became final and binding as against the Petitioner is unclear. Technically, there has been nothing more than a verbal agreement. It could be a month to month agreement giving rise to a separate claim at each renewal. His awareness of the Intervenor-Respondents' use of the dock without more hardly establishes knowledge by him that the POA's Board technically approved of it. Contrary to Tully's position, an examination of the e-mail sent by then President Joseph Gil on December 4, 2017 at 12:09PM which stated that the Board had resolved the dock issue with Tully by entering into an agreement with him that allowed him to use the dock in exchange for a usage fee and services to be rendered was not sent to the Petitioner's attorney. In fact, while he was on the preceding inquiry regarding the dock situation that was sent by the Head of the Dock Committee, he was excluded from the Reply e-mail which only confirms the Petitioner's position here that he was intentionally kept in the dark about the specifics of the dock arrangement until Tully's wife ultimately provided him with a copy of the written License Agreement. In addition, even if the petitioner's attorney had been included on the responsive e-mail, much pertinent information remained unknown. Similarly, the Petitioner's statement that he learned of the Board granting exclusive rights to certain members approximately a year ago and that he heard rumors in the Fall of 2017 that the Board had granted Tully a written licensed agreement hardly establishes notice of an actual event which began the Statute of Limitations running. Without a copy of the agreement itself, it was not possible to ascertain whether the agreement violated the POA's Declarations or By-Laws.

In the alternative, the Intervenor-Respondents seek dismissal of the complaint against the POA on the ground that the POA's actions here are protected by the Business Judgment Rule. The Respondent POA and the Board have not filed an Answer or made an application vis a vis the Petition here. They appear to be relying on the Intervenor-Respondents despite the fact that it is their authority that is in question here. The Intervenor-Respondents are the ones who will suffer collateral damage should this court find that the Board has exceeded its authority or not acted in the best interests of the POA by entering into the challenged agreements.

As for the Board's authority to enter into agreements with them for exclusive use of community

property, the Intervenor-Respondents rely on the purpose of the POA as set for the in its By-Laws, to wit:

“To advance, influence and aid in the development of the community of Lattingtown Harbor; to promote good fellowship among its residents; to further the best interests of property owners therein; to establish and maintain for members and their guests recreational facilities in Lattingtown Harbor, and to maintain roadways, drains and other facilities within Lattingtown Harbor.”

They also notes that the POA through its Board of Directors has the power to carry out those purposes and “to take any appropriate and necessary action in connection therewith not inconsistent with these By-Laws, the certificate of Incorporation and the Laws of the State of New York.”

“ ‘In reviewing the actions of a homeowners' association, a court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association (citations omitted)’ ” (*Tucciarone v Hamlet on Olde Oyster Bay Homeowners Ass'n, Inc.*, 154 AD3d 898, 900 [2d Dept 2017], quoting *19 Pond, Inc. v. Goldens Bridge Community Assn., Inc.*, 142 AD3d 969, 970 []). The business judgment rule requires courts to “defer to good faith decisions made by boards of directors in business settings” (*40 W. 67th St. v. Pullman*, 100 NY2d 147, 153 [2003]). “So long as the [Association] acts for the purposes of the [Association], within the scope of its authority and in good faith, courts will not substitute their judgment for the [Association]. Stated somewhat differently, unless a resident challenging the [Association's] action is able to demonstrate a breach of this duty, judicial review is not available” (*Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). While “the business judgment rule protects [an Association's] decisions from indiscriminate attack,” it “permits review of improper decisions, such as when the challenger demonstrates that the [Association's] action has no legitimate relationship to the welfare of the [Association], deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority (*Waterways at Bay Pointe Homeowners Ass'n, Inc. v Waterways Dev. Corp.*, 38 Misc 3d 1225(A) [Sup Ct Suffolk County 2013], *affd*, 132 AD3d 975 [2d Dept 2015], citing *Matter of Levandusky*, 75 NY2d at 540).

The governing documents here are contracts and must be interpreted and applied accordingly (*Olszewski v Cannon Point Ass'n, Inc.*, 148 AD3d 1306, 1308 [3d Dept 2017]). ¶ 10 of the POA's Amended Declaration provides that all of the residents and owners shall have a right to use the community recreational facilities which are reserved for “Community Recreational Facilities,” which indisputably includes the dock. ¶ 11 of that Amendment provides that “nothing contained herein shall permit the cancellation or modification of the rights and privileges of the Residents to the community beaches and roads.” Finally, in the event of any violations or restrictions of conditions or breach of any of the covenants or agreements contained therein , ¶ 12of the Amended Declarations affords the POA the right to enter upon the property upon which any violation exists and to “summarily abate and remove” it at the owner's expense.

The POA's members clearly have the unfettered right to use the entire community dock as community property. Therefore, the Board's agreements to allow the Intervenor-Respondents exclusive use of a portion of the community dock is clearly not authorized. It is in fact specifically barred by the governing documents. While the Intervenor-Respondents maintain their own docks, those docks are attached to the POA's community dock which, again, is community property and may not be segregated and excluded from the members' use. Permitting select members of the POA to have exclusive use of even a portion of that property is violative of the Amended Declaration. If the impact of the restriction on the Board's authority to enter into agreements authorizing the exclusive use of the community property is so detrimental to the POA as to warrant a change in the Board's authority, then “their task is to persuade the required percentage of each association's homeowners/members as to the merit of their position and amend the

bylaws [and/or Declarations] accordingly. Absent appropriate amendment to the relevant governing documents, however, the [agreements challenged here] constitute an impermissible exercise of [the POA and/or Board's] powers." (*Olszewski v Cannon Point Ass'n, Inc.*, 148 AD3d at 1311).

Furthermore, two of the five members on the Board when Tully's License Agreement was entered were the Tullys themselves, calling the Board's good faith into serious question. Whether the agreement was in furtherance of the legitimate interests of the POA is also open to question. While the contributions made by Tully in exchange for his privileges cannot be ignored, whether they are enough to outweigh the detriment to the community en masse is not an issue readily determined. In fact, the challenged actions here do not truly carry out the stated purposes of the POA. The history here reflects the divisiveness that has been caused in the community on account of select members being given special or exclusive uses; The Dock Committee was formed in response in an attempt to ameliorate this inequity. The Board's actions here hardly "promote good fellowship among its residents... further the best interests of [all of the]property owners therein or ... establish[es] and maintain[s] for [all of the] members and their guests recreational facilities in Lattingtown Harbor..." While there is a benefit to the POA as the recipient of Tully's companies' services in exchange for the License Agreement, that alone does not negate all of the foregoing effects of the Board's actions. Simply put, the Board's actions here are inconsistent with the POA's Amended Declarations.

Finally, the doctrine of laches does not preclude this action, either. "The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party (quotations omitted)" (*Diecidue v Russo*, 142 AD3d 686, 687-88 [2d Dept 2016], quoting *Markell v Markell*, 91 AD3d 832, 834 [2d Dept 2012], quoting *Skrodelis v Norbergs*, 272 AD2d 316, 316 [2d Dept 2000]). "Prejudice may be demonstrated by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay (quotations omitted)" (*Diecidue v Russo*, 142 AD3d at 687-88, quoting *Skrodelis v Norbergs*, 272 AD2d at 317; citing *Markell v Markell*, 91 AD3d at 834). The situation here came to a head and became ripe for judicial review when a formal License Agreement was entered into. The Petitioner did not unreasonably delay taking action. In addition, prejudice is lacking. While Tully provided the POA with valuable services for many years, he enjoyed an exclusive dock for the same length of time as and for his compensation. Moving forward, he is free to decline to provide those services or to charge for them should he ultimately lose his private dock. As for Johnson, no prejudice at all has been shown.

The Petitioner's request for costs and attorney's fees pursuant to Public Officers' Law § 89 (4) © and CPLR 8602 is denied, without prejudice. The Petitioner has not demonstrated that these Statutes apply here let alone that they entitle him to recover costs and attorney's fees.

Finally, petitioner's counsel's request that this court advise precisely what action must be taken by the Board to afford exclusive use of community property to a member of the POA is refused. That issue is not ripe for judicial review.

In conclusion, the Petition is granted to the extent that :

(1) The License Agreement dated November 29, 2017, which grants Peter Tully certain exclusive rights of use of the POA's community dock is annulled;

(2) The verbal Agreement which grants Randy Johnson certain exclusive rights of use of the POA's community dock is annulled;

(3) The Respondents POA and Board are stayed from permitting any exclusive use of any of the POA's common area property;

(4) The Respondents are directed to remove any erection at the dock area or in the alternative, declaring any such erection to be community property.

SO ORDERED.

DATED:

11/2/2018



J.S.C.

ENTERED

NOV 07 2018

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**