

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. HON. JUDITH J. GISCHE

PART 10

Index Number : 113614/2004

PELTON, DEAN

vs

77 PARK AVENUE CONDOMINIUM

Sequence Number : 001

DISMISS DEFENSE

INDEX NO. \_\_\_\_\_

MOTION DATE

10/27/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

*motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**FILED**  
JAN 24 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/18/06

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

-----x

DEAN PELTON and JULIE HUTTON,

Plaintiffs,

-against-

77 PARK AVENUE CONDOMINIUM, JOHN  
HORVITZ, MARGARET SHAW, AIDA  
CHINLOY, EMIL DABORA, TOM BROOKS,  
STUART BENTON, GRETCHEN  
MORGENSON, ROBERT PASCH, DENNIS  
GATES, and BUCHBINDER & WARREN, LLC,

Defendants.

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**DECISION/ORDER**

Index No.: 113614/04

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's motion dismiss w/LB affid, SB affid .....	1
Def's exhs (sep back) .....	2
Pltf's JJG affirm w/DP affid, exhs .....	3
Def's LB reply affid w/SB reply affid .....	4
Def's exhs (sep back) .....	5

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*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Dean Pelton and his wife, Julie Hutton, for damages on account of defendants' alleged violation of the New York City Human Rights Law.

Defendants are the condominium board ("the board"), the nine (9) individual board members ("board members"), and the condominium's managing agent ("managing agent").

The nine (9) board members' have brought this motion for partial summary judgment, dismissing the complaint against them in their individual capacities. The managing agent

joins in the motion and also seeks partial summary judgment dismissing the complaint against it as well. Since issue has been joined and defendants' motion is timely, it may be heard. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

### **Background**

Plaintiff has alleged the following in his complaint:

He is the owner of condominium unit 5G at 77 Park Avenue, New York City. When he purchased his unit in 1987, he was able bodied and had no problem navigating the one step into and out of the building, or steps to the elevators and the laundry room. Since, then, plaintiff has developed mobility problems associated with Muscular Dystrophy. The disease is progressive and incurable.

Plaintiff notified the defendants in January 2002 that he was having problems with these steps and he inquired about reasonable accommodations for his increasing disability. Initially, the board responded that it had no legal obligation to provide him with the accommodations he was asking for, but subsequently, after he contacted the Human Rights Commission ("HRC"), members of the board contacted him to set up a meeting. Together, they developed ideas on how the building could be made handicap accessible. They later sent him a letter proposal dated June 10, 2004, along with a request that he countersign it, if the recommendations therein met with his approval.

Plaintiff did not sign the letter but responded in writing that although most of the proposals were acceptable, including an inclined chair lift, there was no definite time frame for a permanent solution in the letter. He also noted that the letter proposal was subject to financial feasibility ("to the extent that [the plan] is legally, mechanically and economically feasible"). Thereafter, the inclined chair lift was installed and the board indicated it would be a permanent fixture, not a temporary measure. The plaintiff objects to the chair as a

permanent solution. He claims it is an unsafe means of transportation, and that he can fall off of it at any time.

### **Applicable Legal Standard**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts that would entitle it to judgment as a matter of law. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). The initial burden is here on the defendants who must establish their defenses. Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 (1979). If this burden is met, it will shift to plaintiff who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

The board members argue that the complaint must be dismissed as to them in their individual capacities upon application of the "business judgment rule". Levandusky v. One Fifth Avenue Apartment Corp., 75 NY2d 530 (1990); 40 West 67<sup>th</sup> Street v. Pullman, 100 NY2d 147 (2003). The business judgment rule "prohibits judicial inquiry into action of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." Levandusky v. One Fifth Avenue Apartment Corp., *supra* at 537-538 (1990). "So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of their powers for the common and general interest of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." *Id.*

Where the action of a condominium board of managers is challenged by an individual unit owner, "absent claims of fraud, self-dealing, unconscionability or other misconduct, the 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 condominium." Schoninger v. Yardarm Beach Homeowners Assn., 134 AD2d 1, 10 (2<sup>nd</sup> dept. 1987).

Plaintiff's claims are pursuant to New York City Administrative Code § 8-107 (5) and 15. He alleges that the defendants refused to make "reasonable accommodations" for his physical disability which would allow him to use and enjoy the premises in the same manner as other unit owners who are not disabled. He seeks an order requiring the defendants to implement such accommodations. He also seeks damages and punitive damages from the defendants.

### **Discussion**

The board members argue that the complaint must be dismissed, as a matter of law, upon application of the business judgment rule. They maintain that because they acted in "good faith" and exercised "honest judgment" in responding to and handling plaintiff's request for reasonable accommodations, their actions are shielded from judicial scrutiny. They claim that as unpaid volunteers who were elected to serve on the board, they fulfilled their fiduciary duty to the corporate defendant. They contend further that they followed the advice of their attorneys, hired architects, and even heeded the HRC's recommendations in trying to make the building more handicap accessible, and also please Mr. Pelton. Relying upon the condominium bylaws, the board members further argue that it was prudent for them to first try obtain Mr. Pelton's approval before presenting the proposed project to the

unit owners for a vote.

The business judgment rule does not prohibit judicial inquiry into actions of the board where the decision is alleged to have been on an unlawful discriminatory basis (e.g. on the basis of age, race, physical disability, etc.). Jones v. Surrey Cooperative Apartments, Inc., 263 AD2d 33 (1<sup>st</sup> dept. 1999). Thus, the board's decision may be scrutinized since plaintiff alleges he was the target of discriminatory practices and/or the board took action in bad faith. Hunter v. Board of Directors of Grymes Hill, 204 AD2d 395 (2<sup>nd</sup> dept. 1994); Faiola v. JAC Towers Apartments, 7/11/90, NYLJ, p. 27, col. 4 (Sup. Ct. Queens Co., Katz, J.). Though defendants collaterally state that plaintiff's claims are largely blunderbuss, and they did not engage in discriminatory practices, these claims are not the basis for their motion. Board of Directors of Grymes Hill Owners Corp., 204 AD2d 395 (2<sup>nd</sup> dept. 1994). Having failed to prove that the complaint has to be dismissed against them as a matter of law, defendants' motion for partial summary judgment upon the application of the business judgment rule must be denied.

The motion by the building management company must be denied as well. Although, at common law an agent for a disclosed principal bears no personal liability for actions it undertakes within the scope of its agency, this broad rule is not without exceptions. Reliance v. Morris, 200 AD2d 728 (2<sup>nd</sup> dept. 1994). Thus, it does not shield the agent, for example, from liability for his own negligent acts. Reliance v. Morris, *supra*. Nor does this rule apply to a breach of duty that is owed by the agent himself to third persons. Michaels v. Lisperard Holding Corp., 11 AD2d 12 (1<sup>st</sup> dept. 1960).

The Human Rights Law extends liability for discriminatory acts to the agents of an owner. Bartman v. Shenker, 5 Misc3d 856 (Sup. Ct. N.Y. Co. 2004). In relevant part, the

Human Rights Law provides as follows:

"[it shall be] an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation . . . (2) To discriminate against any person because of such person's actual or perceived race, creed, color, national origin, gender, age, disability . . ."

NYC Hum Rts Law § 8-107 (5).

Thus, the managing agent's status as the agent for a disclosed principal does not as a matter of law shield it from plaintiff's claims. Therefore, the managing agent's motion for summary judgment must be denied.

### Conclusion

The motion by the individual board members for summary judgment dismissing the complaint against them (e.g. defendants Horvitz, Shaw, Chinloy, Dabora, Brooks, Benton, Morgenson, Pasch and Gates) is denied. The motion by the managing agent to have the complaint dismissed against it as well is also denied.

An all-purpose/ status conference is scheduled in Part 10 at 80 Centre Street, Room 122 on **February 9, 2006 at 9:30 a.m.**

Any relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
January 18, 2006

So Ordered

  
\_\_\_\_\_  
HON. JUDITH J. GISCHAR

**FILED**  
JAN 24 2006  
COUNTY CLERK'S OFFICE  
NEW YORK