SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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GARY FITTERMAN

Petitioner,

- v -

SEWARD PARK HOUSING CORPORATION,

Respondent.

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INDEX NO. 151381/2021

MOTION DATE 04/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 45, 46, 47, 48, 49, 50, 51

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

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Gary Fitterman (motion sequence number 001) is denied, and it is further

ORDERED AND ADJUDGED that the cross-application of respondent Seward Park Housing Corporation to dismiss the petition is granted, and this proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Gary Fitterman (Fitterman) seeks a judgment to overturn two decisions by respondent Seward Park Housing Corporation (Seward Park; motion sequence number 001). Respondent cross-moves for dismissal. For the following reasons, this petition is denied and this proceeding is dismissed.

FACTS

Seward Park is a co-operative corporation which owns a residential apartment building located at 385 Grand Street in the City, County and State of New York (the building). *See* NYSCEF document 1 (verified petition), ¶ 3. Fitterman is a tenant/shareholder of Seward Park who holds the proprietary lease to studio apartment L902 in the building. *Id*., ¶ 8. This proceeding involves two applications that Fitterman submitted to Seward Park's board of directors (the board).

On March 10, 2020, Fitterman entered into a contract to purchase one-bedroom apartment unit L104 at the building from its shareholders, Kirsten Youngren and Christian Skelly, along with their corresponding 22.75 shares of Seward Park stock. *See* NYSCEF document 1 (verified petition), ¶ 11. Fitterman's purchase was subject to board approval. *Id*., ¶¶ 12-14. At its May 6, 2020 scheduled meeting the board voted not to approve the purchase. *Id*., ¶ 15; exhibit A.

On July 3, 2020, Fitterman submitted a separate application to the board for permission to add his son, Joshua Fitterman, to both the stock certificate and the proprietary lease for unit L902. *See* NYSCEF document 1 (verified petition), ¶ 20. Fitterman alleges that the board reviewed the application, sought additional documents, and conducted an interview with himself and his son. *Id*., ¶¶ 21-23. Nevertheless, at its August 5, 2020 scheduled meeting, the board

rejected Fitterman's application. *Id*., ¶ 24; exhibit B. He states that he received a notice from the board dated August 13, 2020 which stated that it had "declined consent to the above referenced transfer." *Id*., ¶ 26.

Fitterman states that he was advised by Seward Park's non-party managing agent that he could appeal the board's denials of his two applications by submitting a written appeal request to the board's counsel. *See* NYSCEF document 1 (verified petition), ¶¶ 28-31. Fitterman also states that he submitted an "appeal letter" to the board's counsel on August 20, 2020, but that counsel never responded to it. *Id*.; exhibit C.

Fitterman later commenced this Article 78 proceeding via order to show cause on February 16, 2021. *See* NYSCEF document (order to show cause, admission of service). After the parties had agreed to several extensions of time to respond, Seward Park eventually filed an answer with affirmative defenses based on CPLR 3211 (a) (1) and (a) (7) on March 29, 2021. *See* NYSCEF document 19 (verified answer).

The court initially dismissed Fitterman's petition on statute of limitations grounds in a decision dated May 26, 2021. *See* NYSCEF document 31. However, it later vacated that decision in response to Fitterman's motion for leave to reargue (motion sequence number 002). *Id*., NYSCEF document 43. This matter is now fully submitted and before the court on its merits (motion sequence number 001).

DISCUSSION

Fitterman's petition request judgments:

> "a. Pursuant to CPLR Art. 78, reversing and annulling [Seward Park's] determination refusing to permit Petitioner to purchase [apartment] L104, and upon reversal, compelling Respondent to permit the sale of [apartment] L104;
> "b. Pursuant to CPLR Art. 78, reversing and annulling [Seward Park's] determination refusing to allow Petitioner to add his son to the proprietary lease and stock certificate,

> and upon reversal, compelling Respondent to add Joshua Fitterman to the proprietary lease and stock certificate appurtenant with the Studio;
> "c. Compelling Respondent to respond to, and provide a reasonably detailed decision addressing Petitioner's appeals pertaining to the Board's refusal to approve the sale of L104 and its refusal to add Joshua Fetterman's name to the stock certificate and proprietary lease appurtenant to the Studio; and
> "d. Granting Petitioner attorney's fees and disbursements in connection with this proceeding and such other further and different relief as this Court may deem just and proper."

See NYSCEF document 1 (verified petition) at 8-9. A trial court's usual function in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). Here, however, Seward Park is a private cooperative corporation rather than an administrative agency of the government. The Court of Appeals explained the standard of review which governs Article 78 challenges to private co-op board decisions as follows:

> "*Levandusky* [i.e., *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990)] established a standard of review analogous to the corporate business judgment rule for a shareholder-tenant challenge to a decision of a residential cooperative corporation. The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings (*see generally* Davis, Once More, The Business Judgment Rule, 2000 Wis L Rev 573 [2000]). The rule has been long recognized in New York (*see e.g. Flynn v Brooklyn City R.R. Co.*, 158 NY 493, 507 [1899]; *Pollitz v Wabash R.R. Co.*, 207 NY 113, 124 [1912]). In *Levandusky*, the cooperative board issued a stop work order for a shareholder-tenant's renovations that violated the proprietary lease. The shareholder-tenant brought a CPLR article 78 proceeding to set aside the stop work order. The Court upheld the Board's action, and concluded that the business judgment rule 'best balances the individual and collective interests at stake' in the residential cooperative setting (*Levandusky*, 75 NY2d at 537).
>
> "In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination "[s]o long as the board acts for the purposes' of the cooperative, within the scope of its authority and in good faith' (*id*. at 538). In adopting this rule, we recognized that a cooperative board's broad powers could lead to abuse through arbitrary or malicious decision making, unlawful

> discrimination or the like. However, we also aimed to avoid impairing 'the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit' (*id*. at 537). The Court concluded that the business judgment rule best balances these competing interests and also noted that the limited judicial review afforded by the rule protects the cooperative's decisions against 'undue court involvement and judicial second guessing' (*id*. at 540)."

40 W. 67th St. v Pullman, 100 NY2d 147, 153-154 (2003), quoting *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990). This decision will evaluate each of Fitterman's requests for relief pursuant to the Court of Appeals' standard.

Fitterman first argues that "[t]he Board's refusal to permit the conveyance of L104 . . . was arbitrary, capricious and a breach of the Board's obligation to its shareholders," and that it is therefore not protected by the business judgment rule. *See* NYSCEF document 1 (verified petition), ¶¶ 36-40. Seward Park responds that its determination was "not contrary to procedure or law, arbitrary and capricious, an abuse of discretion, or bad faith, because the Lease and By-Laws expressly condition purchase and assignment requests on the Coop's approval." *See* respondent's mem of law at 13-15. Seward Park specifically asserts that Fitterman's claim is barred by subparagraphs 7 (g) of his proprietary lease for apartment L902 and Article VI, § 5 of the building's bylaws, which respectively provide as follows:

> "(7) Assignment or Transfer of Lease and Shares of Stock
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> * * *
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> "(g) Except in the case of an assignment, transfer or bequest to the Lessee's spouse of the shares and this lease, consents to such assignment shall have been authorized by resolution of the Board of Directors.
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> "If the Lessee shall die, consent shall not be unreasonably withheld to an assignment of the lease and the shares to a financially responsible member of the Lessee's immediate family (as such term is hereinafter defined), other than the Lessee's spouse as to whom no consent shall be required, provided all other conditions hereof are complied with. As used in this Paragraph, the Lessee's 'immediate family' shall consist of the Lessee's spouse (which term includes any person entitled by law to be treated as a spouse), their children, grandchildren, parents, grandparents, brothers and sisters.
>
> "There shall be no limitation, except as specifically provided herein, on the right of the Board of Directors to grant or withhold consent to an assignment, for any reason or for no reason.

> "If the lease shall be assigned in compliance herewith, the Lessee-assignor shall have no further liability under any of the covenants and conditions of this lease to be thereafter performed.
>
> "Regardless of any prior consent theretofore given, neither the Lessee nor the Lessee's executor, nor administrator, nor any trustee or receiver of the property of the Lessee, nor anyone to whom the interests of the Lessee shall pass by law, shall be entitled further to assign this lease, or to sublet the Apartment, or any part thereof except upon compliance with the requirements of this lease.
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> "For purposes of this Paragraph, the addition of one or more names to a lease and the stock certificate representing the shares to which it is appurtenant shall be deemed an 'assignment,' but a separate fee (rather than a transfer fee) shall be payable upon such addition as provided in the Bylaws. A lessee who adds a name to this lease and the shares appurtenant to it shall be required to remain on this lease as a co-lessee. In the event such lessee's name is removed from the lease for any reason other than the death of said lessee, said lessee shall be required to pay the full applicable transfer fee (in addition to any fee previously paid for adding a name to the lease) in the manner set forth in the Bylaws.
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> "ARTICLE VI - CAPITAL STOCK
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> "SECTION 5. The Corporation's Right of First Refusal.
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> "(a) No shares of stock of the Corporation shall at any time be sold, assigned, alienated or transferred in any respect whatsoever (excluding bequests and bona fide gifts) by any Stockholder (the "Stockholder") to any person or corporation so long as the Corporation is willing to purchase such shares of stock (the "Shares") at the price for which the Stockholder proposes to sell the Shares.
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> * * *
>
> "(e) There shall be no limitation, except as provided by law or the provisions of the proprietary lease of the Corporation, on the right of the Board of Directors to grant or withhold consent to an assignment of the shares and lease allocated to an apartment for any reason or for no reason."

See NYSCEF document 19 (verified answer), exhibits 1-D, 3. After reviewing these documents and the applicable law, the court finds for Seward Park.

The Appellate Division, First Department, has long recognized the rule that "[i]n general, and in the absence of illegal discrimination, a cooperative corporation is not restricted in withholding its consent to the transfer to an apartment." *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d 486, 488 (1st Dept 2016), *affd* 28 NY3d 1114 (2016), citing *Fletcher v Dakota, Inc.*, 99 AD3d 43, 48, 50 (1st Dept 2012); *see also Singh v Turtle Bay Towers Corp.*, 74 AD3d 568 (1st Dept 2010); *Bresnick v Farquahar*, 151 AD2d 390 (1st Dept 1989); *Rossi v*

Simms, 119 AD2d 137 (1st Dept 1986), citing *Weisner v 791 Park Ave. Corp.*, 6 NY2d 426 (1959); *Bachman v State Div. of Human Rights*, 104 AD2d 111 (1st Dept 1984); *Goldstone v Constable*, 84 AD2d 519 (1st Dept 1981). The documents reproduced above confirm that Seward Park's board has reserved that right with respect to all apartment transfers. *See* NYSCEF document 19 (verified answer), exhibits 1-D, 3. Fitterman nevertheless argues that the business judgment rule is not an "insuperable barrier" or a "rubber stamp for cooperative board actions," and that it "permits review of improper decisions as when the board's action deliberately singles out individuals for harmful treatment." *See* NYSCEF document 1 (verified petition), ¶ 36. On the issue of board discrimination, the First Department has long adhered to the rule that:

> "Under the business judgment rule, which applies to the directors of residential cooperative corporations . . ., absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting 'in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' Thus, without a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though 'the results show that what [the directors] did was unwise or inexpedient.' Inquiry into claims of fraud and self-dealing is permitted only where a factual basis exists to support such a claim."

Jones v Surrey Coop. Apts., 263 AD2d 33, 36 (1st Dept 1999) (internal citations omitted). The party seeking to negate a co-op board's reliance on the business judgment rule bears the burden of raising a triable issue of fact by submitting evidence that the board acted in bad faith. *See e.g.*, *Gonzalez v Been*, 145 AD3d 434 (1st Dept 2016); *Carroll v Radoniqi*, 105 AD3d 493 (1st Dept 2013). Here, Fitterman has failed to meet that burden. The petition asserts that Seward Park's refusal to provide him with a written explanation of the reason it denied his request to purchase apartment L104 "leads Petitioner to the inevitable conclusion that said denials were arbitrary and capricious and based upon some personal animus towards Petitioner." *See* NYSCEF document 1 (verified petition), ¶ 31. This assertion puts forth an inference of "personal animus," not evidence of it. In addition, Fitterman's reply papers argue that Seward Park "does not offer

testimony which argues how the denial of the application [to purchase apartment L104] . . . furthers the 'lawful and legitimate furtherance [of] corporate purposes,' [and] as such, there remains a question of fact as to whether the Board is entitled to the presumption that it has acted in good faith." *See* petitioner's mem of law in opposition at 3. This argument improperly seeks to shift Fitterman's burden of proof to Seward Park. Because both of these arguments are unfounded, the court finds that Seward Park is entitled to rely on the business judgment rule's presumption that its decision to deny Fitterman's application to purchase apartment L104 was made in good faith. As a result, the court denies so much of Fitterman's petition as seeks to vacate that decision pursuant to CPLR 7801 et seq. Because the provisions of Fitterman's lease and bylaws plainly confirm Seward Park's discretion regarding such transfers (and do not require it to entertain appeals or provide explanations for its decisions), the court also grants Seward Park's application to dismiss Fitterman's first cause of action pursuant to CPLR 3211 (a) (1).

Fitterman next seeks relief pursuant to CPLR Article 78 with respect to Seward Park's decision to deny his application to place his son Joshua Fitterman's name on apartment L902's proprietary lease and stock certificates. *See* NYSCEF document 1 (verified petition) at 8-9. Fitterman argues that this decision, too, was arbitrary and capricious because Seward Park did not provide him with an explanation for the denial. *Id*., ¶ 41. Seward Park again responds that Fitterman's claim is barred by subparagraphs 7 (g) of his lease 5 (e) of the bylaws because those provisions also entitle it to the protection of the business judgment rule with respect to share transfers. *See* respondent's mem of law at 13-21. Because Fitterman relies largely on the same arguments as he did in support of his first cause of action, and the court has rejected those arguments, it also rejects Fitterman's arguments with respect to his second cause of action for the reasons discussed *supra*. Fitterman raises the additional legal argument that "[w]here a

proprietary lease provides for succession rights, a challenge as to an assignment or transfer of the proprietary lease and appurtenant stock have required a 'heightened standard of reasonableness on the board.'" *See* NYSCEF document 1 (verified petition), ¶ 39. This is an accurate statement of the law as regards "succession rights" provisions in co-op proprietary leases. *See e.g., Olcott v 308 Owners Corp.*, 189 AD3d 687 (1st Dept 2020); *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d at 488. However, the succession rights provisions reviewed in the appellate case law, like the one contained in subparagraph 7 (g) of Fitterman's lease, only come into play upon the tenant/lessor's death. *See* NYSCEF document 19 (verified answer), exhibits 1-D. The "heightened standard of reasonableness" only pertains to co-op board denials of share transfer applications that were submitted by family members *after* the tenant/lessor has died. *Olcott v 308 Owners Corp.*, 189 AD3d at 687; *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d at 488. A share transfer application submitted while a tenant/lessor is still living is not governed by the lease's succession rights provision. Because Fitterman is clearly still alive, his application to add his son to apartment L902's lease and stock certificates is not subject to the "heightened standard of reasonableness" recognized in the case law. Instead, the court finds that Seward Park is entitled to rely on the business judgment rule's presumption that its decision to deny Fitterman's application was made in good faith. As a result, the court denies so much of Fitterman's petition as seeks to vacate Seward Park's decision pursuant to CPLR 7801 et seq. Because the provisions of Fitterman's lease and bylaws plainly confirm Seward Park's discretion regarding share transfers (and do not require it to entertain appeals or provide explanations for its decisions), the court also grants Seward Park's application to dismiss Fitterman's second cause of action pursuant to CPLR 3211 (a) (1).

Fitterman next seeks an order in the nature of mandamus (pursuant to CPLR 7801) "[c]ompelling [Seward Park] to respond to, and provide a reasonably detailed decision addressing Petitioner's appeals pertaining to the Board's refusal to approve the sale of L104 and its refusal to add Joshua Fetterman's name to the stock certificate and proprietary lease appurtenant to the Studio." *See* NYSCEF document 1 (verified petition) at 8-9. However, Seward Park correctly notes that the remedy of mandamus to compel does not lie with respect to a co-op's discretionary (as opposed to ministerial) actions. *See* respondent's mem of law at 21-22; *see e.g., Committee for Maintenance & Privatization Fair Play at Rivercross v Jones (Vink v New York State Div. of Hous. & Community Renewal)* 285 AD2d 203 (1st Dept 2001). Here, the acts of reviewing an apartment purchase contract or a share transfer application clearly involve the exercise of the co-op board's discretion since they necessarily involve the investigation of evidence prior to the issuance of a decision based thereon. As a result, the court concludes that the remedy of mandamus to compel is not available to Fitterman with respect to the two board actions challenged herein, as a matter of law. The court consequently grants Seward Park's application to dismiss the portion of Fitterman's petition setting forth his third claim for relief pursuant to CPLR 3211 (a) (7).

The final portion of the instant petition seeks an award of attorney's fees. *See* NYSCEF document 1 (verified petition) at 8-9. "Under the general rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989); *see also Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007). Here, subparagraph (2) of Article 6 of Fitterman's lease contains a clause permitting him to recover attorney's fees in the event of a "default" by Seward Park relating to

its obligations as lessor. *See* NYSCEF document 19 (verified answer), exhibit 1-D. However, as Seward Park points out, Fitterman cannot invoke this clause because he has not established that either of its decisions challenged in this proceeding constitutes a "default." *See* respondent's mem of law at 23-23. The court also observes that Fitterman cannot be deemed the "prevailing party" herein because all of his claims for relief have been denied. As a result, the court concludes that Fitterman is not entitled to an award of attorney's fees as a matter of law. the court consequently grants Seward Park's application to dismiss the portion of Fitterman's petition setting forth his third claim for relief pursuant to CPLR 3211 (a) (7).

Accordingly, the court finds that this Article 78 petition should be denied and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Gary Fitterman (motion sequence number 001) is denied, and it is further

ORDERED AND ADJUDGED that the cross-application of respondent Seward Park Housing Corporation to dismiss the petition is granted, and this proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

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6/17/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**