

BUSINESS JUDGMENT RULE

AVRAHAMI V. 235 W. 108TH ST. OWNERS CORP. [023 NY SLIP OP 32410\(U\) \(SUP. CT. N.Y. CNTY. JULY 13, 2023\)](#)

Shareholders Must Replace Leaky Jacuzzi with Standard Tub

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OUTCOME: Decided for Co-op Owners Corp.

WHAT HAPPENED: Ram Avrahami and Andrea Gural purchased a cooperative apartment containing a jacuzzi and used it for several years with no complaints. In 2017, though, the building superintendent (who lived below them) noticed that the tub was sinking; a little later, she also notified them that their toilet was leaking into her apartment. The shareholders made arrangements to fix the two conditions, the tub and toilet were duly removed, and the repair work performed. However, before the tub could be reinstalled the board of directors notified them that since the building's rules prohibited whirlpool tubs, the shareholders had to replace the jacuzzi with a standard tub.

IN COURT: The plaintiffs started an action seeking a declaratory judgment that they could reinstall their tub and claiming breach of contract, breach of fiduciary duty, negligent misrepresentation, and unjust enrichment. The defendants

answered and eventually moved for summary judgment to dismiss the complaint, asserting that their decision was protected by the business judgment rule, which bars the court from scrutinizing decisions made in good faith in the interests of the cooperative. In response, the plaintiffs claimed that the board's action was arbitrary and capricious and unfairly singled them out, hence not protected by the business judgment rule.

The court found that because whirlpools were prohibited under the proprietary lease, the tub was in fact sinking, and the board's decision was based on the general policy prohibiting such installations out of concern for the structure of the building and its plumbing and electrical operations, the co-op board had made a "good faith" decision to deny reinstallation of the tub.

The board's decision was supported by language in the proprietary lease that allowed the board to require a shareholder to

cease use of any equipment or appliance that may be creating an objectionable condition. Moreover, the plaintiffs could not show any written consent to the original installation of the whirlpool, so they did not acquire any "vested" right to continue to use it.

The plaintiffs also asserted that they had been deliberately singled out because there was another jacuzzi in the building. However, the court stated that the existence of another tub did not, by itself, show that the board had unfairly singled them out for harmful treatment or selective enforcement, especially when the board could show that it had consistently denied such installations for at least 15 years previously.

Accordingly, the board's determination was protected under the business judgment rule in that it acted in good faith in the interests of the cooperative as a whole and did not unfairly discriminate against the defendants.

TAKEAWAY:

Boards retain broad discretion to enforce the rules and regulations of the building in different ways, as long as they do not single out a shareholder for "harmful or selective enforcement" and otherwise act in what they believe to be the best interests of the cooperative. Special arrangements with shareholders should be memorialized in writing in order to avoid questions from future boards who may not have been parties to the initial agreement.

Another recent case dealt with a claim against a board for failing to respond to noise complaints to the satisfaction of the plaintiff owner ([Bacharach v. Brooks-Van Horn Condo., 76 MISC.3d 1221\(A\)](#)). The board moved to dismiss the case, arguing that it enjoyed sole discretion to determine whether and how to enforce the building's house rules. The court denied the motion to dismiss. It noted that the board could take any action within its power that it "deemed necessary or desirable"

to perform. However, that did not give the board the right to disregard complaints "should the board decide that the complaints do not warrant even informal efforts at dispute resolution." The court stated that the portion of the bylaws giving the board the "power" to enforce the house rules also might impose an affirmative "duty" to enforce the house rules, even if the manner of enforcement might lie within the board's business judgment. Thus, the board's failure to take any action in response to the complaints might not have been taken in the interests of the building, and hence would not be protected by the business judgment rule.

In sum, while the business judgment rule gives board broad enforcement power, it does not necessarily relieve boards of the responsibility to take some action, even if informal, in order to demonstrate that their refusal to take further action was a decision made in good faith in the interests of the building as a whole.