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KAREN C. LUSTIG, *Plaintiff* v. REGENCY Co-Op, Inc., *Defendant.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-C-167-10 CIVIL ACTION OPINION

Argued: May 27, 2011
Decided: May 31, 2011

Honorable Peter E. Doyne, A.J.S.C.

Ian J. Hirsch on behalf of the Plaintiff, Dr. Karen C. Lustig (Law Offices of Ian J. Hirsch & Associates, LLC, attorneys; Roman V. Gambourg, on the brief).[1]

Vicki Shea Connolly and Siobhan McGowan on behalf of the Defendant, Regency Co-Op, Inc. (Bolan Jahnsen Dacey, attorneys; Verde, Steinberg & Pontel, attorneys)

Introduction

Before the court is a motion filed on behalf of Regency Co-Op, Inc. ("Regency" or "defendant"), for summary judgment seeking the dismissal of the three-count verified complaint filed on behalf of Dr. Karen C. Lustig ("Lustig" or "plaintiff") in its entirety. The action arose out of a denial by Regency's board of directors (the "board") of a

[1] Ian J. Hirsch, Esq. ("Hirsch") asserted he was appearing on behalf of the plaintiff, as co-counsel, however, he admitted no notice of appearance was filed. As defendant's counsel provided she did not oppose the appearance, Hirsch was permitted to argue.

request made by the plaintiff for permission to enclose her balcony. Specifically, count-one alleged the plaintiff was an oppressed minority shareholder as defined by N.J.S.A. 14A, count-two alleged the defendant and, particularly, the board's president, Michael Nigris ("Nigris"), breached their fiduciary duty by scheming to actively prevent the plaintiff from enclosing her balcony, and, lastly, count-three alleged civil conspiracy by the defendant in either committing an unlawful act or committing a lawful act by unlawful means. Counsel on behalf of the plaintiff opposes the motion.

Oral argument was entertained on May 27, 2011.

The motion is granted.

Facts and Procedural History

The plaintiff is an individual residing in an apartment on the 7th floor of a high-rise cooperative apartment building owned by Regency located in Fort Lee, New Jersey with over 160 apartment units (the "building"). Each unit lessee in the building constitutes a shareholder and is apportioned a number of shares based upon the size of his or her apartment. The plaintiff has been a resident for over twenty (20) years and is currently living in the apartment with her husband, Roni Giladi ("Giladi"), and their two children. The unit occupied by the plaintiff is subject to a long-term proprietary lease agreement (the "lease") dated August 26, 1994 between her and the defendant. The building is internally managed by the board, which performs various duties including overseeing building maintenance and repairs, and reviewing requests for any alterations from the residents.

The lease provides, in relevant part, "the Lessee shall have and enjoy the exclusive use of the terrace or balcony . . . . subject to such regulations as may, from time

to time, be prescribed by the Directors." [Dfs.' Br., Mar. 29, 2011, Ex. B.] It further provides "[n]o planting, fences, structures or lattices shall be erected or installed on the terrace, balconies, or roof of the building without the prior written approval of the Lessor." [Ibid.] With regard to alterations, the lease specifically provides the "Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld, make in the . . . balcony appurtenant thereto, any alteration, enclosure or addition." [Ibid.]

Although an exact date was not provided, it appears sometime in the beginning of 2009, the plaintiff's husband approached the Regency's former Resident Manager, John Cooney ("Cooney") and was purportedly advised balcony enclosures are permitted and authorized by the board as "a matter of due course." [Plf.'s Br. 3, May 6, 2011.] Apparently, the plaintiff was concerned with the safety of her then two-year old active child as he could fall off the balcony and, as such, the balcony enclosure was envisioned to prevent such a calamity. As a result of Cooney's advice, the plaintiff engaged the services of Accurate Glass and Mirror, Inc. ("Accurate Glass"), for the enclosure installation. It appears from an invoice dated February 2, 2009 the plaintiff paid $2,645, a one-third deposit of the total $7,935, to Accurate Glass.

On May 29, 2009, the building's new Resident Manager, Larry Cappelli ("Cappelli"), purportedly informed the plaintiff's husband that Accurate Glass' representative had advised the enclosure was ready for installation. The plaintiff's husband obtained an alteration request form from Cappelli which was then submitted by the plaintiff under cover of June 26, 2009 enclosing a completed alteration request form,

a photocopy of a certificate of liability insurance, a photocopy of a "proposed jobs' drawing," a copy of the contractor's license/registration and a $500 deposit check.

On June 30, 2009, by way of a telephone conversation with Cappelli, the plaintiff was informed her request was denied by the board. In response, on July 10, 2009, the plaintiff authored a letter to the board seeking an explanation for the denial and reconsideration of the request. By letter dated August 19, 2009, the plaintiff was advised by the Administrative Agent for the Community Services Group, Brigid Ruvolo ("Ruvolo"), all considerations for balcony alterations were suspended while the board continued to evaluate the structural, aesthetic and utility cost impact existing balcony enclosures had on the building.

Thereafter, a memorandum dated October 7, 2009 was provided from Nigris to the building residents. The memorandum advised, in an effort to "preserve the integrity of the recently completed repairs," all carpeting should be removed from the balconies, existing tiles on balconies should be repaired, and balcony floors should be coated with waterproof paint. [Plf.'s Br., Ex. H.]

It appears, on November 3, 2009, the plaintiff requested the board to reconsider its denial in light of the October 7th memorandum as there was no indication existing enclosures have a negative impact on the structural integrity of the building. A copy of the request was not provided to the court.

By way of a letter dated April 5, 2010 to the board, the plaintiff asserted upon her review of the October 7th memorandum and of the minutes from the board's open sessions she could not find any support for the board's denial of her application. As such, the plaintiff urged the denial was not due to the board's concern the existing structures

have a negative impact on the structural integrity of the building, but was the result of a "malicious campaign of abuse and harassment," considering the board apparently could not provide written evidence to support its decision. The plaintiff also indicated keeping the balcony door locked at all times until her toddler son grows up, in lieu of the enclosure, was not a solution to her problem and again requested reconsideration of her application for an alteration.

On June 3, 2010, a three-count verified complaint was filed on behalf of the plaintiff alleging she was an oppressed minority shareholder, the defendant breached its fiduciary duty and the defendant engaged in civil conspiracy to prevent the plaintiff from enclosing her balcony. By way of the same, the plaintiff requested the defendant be directed to (i) permit the plaintiff to install a balcony enclosure, (ii) terminate all collection arising out of another action between the plaintiff and defendant,[2] (iii) pay attorneys fees and costs, and (iv) any other relief deemed appropriate.

On July 2, 2010, an answer was filed on behalf of the defendant and, thereafter, on July 20, 2010, a counterclaim was filed seeking an award of attorney's fees for the Law Division action. Neither pleading is provided in the parties' submissions.

On March 29, 2011, defendant's counsel filed the instant notice of motion for summary judgment with a brief and appended exhibits. By way of the brief, counsel argues the plaintiff is not an oppressed minority shareholder as defined by N.J.S.A. 14A:12-7, the board's determination should be protected by the business judgment rule as

[2] It should be noted for purposes of completeness, on July 22, 2009, a verified complaint was filed on behalf of Regency against Lustig in the Law Division alleging Lustig had refused to allow an exterminator to inspect and treat her apartment for bed-bugs. The relief sought by Regency was for Lustig to provide proof the unit had been exterminated and for attorney's fees. Lustig asserts she was never served with the complaint, order to show cause or other submissions filed on behalf of Regency. Default was entered against Lustig on December 28, 2009. Upon the filing of the verified complaint in the instant action concerning the balcony enclosures, a counterclaim was filed on behalf of Regency seeking an award of attorney's fees in connection with the aforementioned Law Division action.

the decision was supported by engineers' reports, and, lastly, the plaintiff has not demonstrated a civil conspiracy by failing to show the defendant committed either an unlawful act or a lawful act committed by unlawful means. In further support, counsel appended copies of correspondence and invoices from the Falcon Group ("Falcon Group"), an engineering firm hired by the board in 2007, and a copy of a report dated December 15, 2010 prepared by Lawless & Mangione Architects & Engineers, LLP ("Lawless"), discussed herein.

The defendant's submissions suggest it utilized the services of the two aforementioned engineering firms for inspections and performance of remedial work on the balconies. On February 5, 2007, Falcon Group provided a letter report concerning their visual inspection of the balconies for visible signs of deterioration. The report provided there was "spalling," cracking and moisture staining on some of the balconies and recommended repairs, coating and a comprehensive chemical and/or physical investigation of the balconies.

Subsequently, on May 23, 2008, another letter report was issued by the Falcon Group. It provided inspections of the balconies resulted in finding them to be "relatively sound with localized spalling and cracking" and three remedial repair options were offered; emergent, basic and recommended. The invoices suggest the defendant chose to implement the emergent repairs option and it appears final payment for the work was rendered on December 23, 2008. By letter dated February 18, 2009, the Falcon Group indicated all contracted work was complete. It also appears from the invoices the total amount paid for the repair work was $81,563.

An engineering report dated December 15, 2010 was also prepared by Lawless following their evaluation of the balconies, which consisted of a visual inspection, "hammer soundings," a review of the original construction drawings, structural calculations and "probes" performed at two rail post pocket locations. The report indicated there were 31 enclosed balconies and provided the balcony enclosures "prevent access for repairs and will make it difficult to repair the rail post pockets" as the concrete in which the rail post sits extends underneath the enclosure. [Df.'s Br., Ex. F at 9.] The report noted the enclosures made evaluating the condition of the balcony concrete and its repairs "impractical." Lawless concluded water was seeping into the concrete through the top side of the balconies and the railings, but a full examination and comprehensive repairs could not be performed as a result of the existing enclosures and tiles. The report recommended "the enclosures should be removed," but if the same was not reasonable then the board should adopt a policy prohibiting new balcony enclosures and requiring removal of tiles from all balconies as they posed a safety risk. [Df.'s Br., Ex. F at 15.]

On January 26, 2011, Lawless authored a letter to Siobhan McGowan, Esq. ("McGowan"), counsel for the defendant on the counterclaim, asserting the "access panels" suggested by a shareholder seeking permission from the Board for an enclosure as a solution to access and repair the rail posts was not advisable as the panels would provide only limited access while the frame of the enclosure would still block full access to the concrete surrounding the posts. The letter further noted the existing posts, railings and their anchorage were in good condition and were in compliance with the New Jersey Building Code.

By way of an order dated April 20, 2011, any and all expert reports were to have been submitted by April 15, 2011, and a schedule for summary judgment submissions was set forth.

Under cover of May 4, 2011, plaintiff's counsel requested permission to utilize a report from Bertin Engineering ("Bertin") dated May 3, 2011 in his opposition to the defendant's motion. In response, under cover of May 6, 2011, the court advised while the plaintiff may attempt to use the report for purposes of a complete record, the defendant may oppose its utilization of the same as untimely and in violation of the aforementioned order.

On May 6, 2011, opposition was filed on behalf of the plaintiff. First, counsel argues the defendant breached its fiduciary duty to the plaintiff as the board's denial of the request for alterations without an explanation was the result of the board members' caprice, dishonesty, bad faith and malevolence towards the plaintiff and her family, and not the result of rational business judgment. He asserts the board members dislike the plaintiff's husband and her children thereby singling her family out while approving the requests for alterations from other shareholders.[3] Counsel notes since the building was first occupied by tenant-shareholders in 1971 there had been 31 approvals for balcony enclosures with the most recent construction permit for a balcony enclosure being granted on August 8, 2006.

Second, counsel maintains the plaintiff has demonstrated a cause of action for civil conspiracy. Specifically, counsel argues the defendant has conspired to refuse the

[3] No information as to the identities of the other shareholders or the alterations which were purportedly approved is provided in support of the plaintiff's assertions. More importantly, no chronology is offered and therefore no determination can be made whether approval for enclosures pre or post dated plaintiff's request. As indicated hereinafter, it appears the former applies.

plaintiff's request for an enclosure by pursuing the aforementioned "frivolous litigation" against the plaintiff premised upon her and or her husband's alleged refusal to permit entry to the exterminator. Plaintiff's counsel also urges the defendant conspired with Lawless to fabricate reasons for denying the plaintiff's alteration request by providing a lawful document, the report, to support the board's unlawful act. In further support of this allegation, counsel provided a report by Bertin dated May 3, 2011 concerning the plaintiff's balcony, apparently prepared at the request of the plaintiff and her husband.[4] The report provided a site visit was performed with a review of the other reports, correspondence and photographs, and concluded the balcony is structurally sound allowing for an enclosure to be constructed with access panels to permit inspection and maintenance of the railings.

On May 11, 2011, a reply letter brief was filed on behalf of the defendant. By way of the same, counsel first urges as the plaintiff failed to provide opposition to summary judgment concerning the first count the motion as to count-one should be granted and the count dismissed. Second, counsel asserts the plaintiff has not demonstrated fraud or a lack of good faith which would allow the court to substitute its judgment for the judgment of the board. Plaintiff's allegations a permit was purportedly issued in 2006 are inapposite as the defendant asserts there are no records indicating an approval was provided for a balcony enclosure at that time and, furthermore, the permit is dated three years prior to the time the balcony repair issues arose. Finally, counsel argues even if the Law Division action was determined to be frivolous, the same does not constitute an unlawful act which could form the basis of a civil conspiracy. Accordingly,

[4] As aforementioned, the report is untimely pursuant to the April 20, 2011 order.

counsel submits the motion for summary judgment should be granted and the complaint dismissed.

Law

A. Oppression of Minority Shareholder

The New Jersey Business Corporation Act (BCA), N.J.S.A. 14A:1-1 to -16-2, provides shareholders of corporations having twenty-five (25) or fewer shareholders with certain remedies for the misconduct of the directors in control of the corporation. See N.J.S.A. 14A:12-7(1)(c). Specifically, N.J.S.A. 14A:12-7(1)(c) provides:

> (1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that
>
> > (c) In the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

Pursuant to the BCA, a shareholder is "a holder of record of shares in a corporation" with shares being "the units into which the proprietary interests in a corporation are divided." N.J.S.A. 14A:1-2.1. Accordingly, the provision applies only to corporations having 25 or fewer holders of record shares of stock.

B. Business Judgment Rule

A cooperative, or co-op, is a unique corporate form, where a cooperative sponsor who typically owns the building creates a cooperative entity, usually organized in the

form of a corporation. See Drew Assocs. of NJ, LP v. Travisano, 122 N.J. 249, 255 (1991); see also N.J.S.A. 46:8D-1 et seq. The cooperative corporation then purchases the building from the sponsor and issues stock with "'a total par value equal to the purchase price.'" Drew Assocs., supra, 122 N.J. at 255 (quoting 15A Am. Jur. 2d Condominiums and Cooperative Apartments §62 at 893 (1976)). The stock is allocated among the apartment units "according to their estimated relative value." Ibid. Individual apartments are acquired by purchasing shares in the cooperative corporation giving the purchaser the exclusive right, usually in the form of a proprietary lease, to occupy the co-op apartment. Ibid. Accordingly, the cooperative corporation is the "titleholder" of the property and the stock-purchaser is the "tenant-shareholder." Ibid.

A cooperative's internal management is governed by corporate law. See Plaza Rd. Coop., Inc. v. Finn, 201 N.J. Super. 174, 180 (App. Div. 1985) (internal citations omitted); see also Smith, Current N.J. Condominium & Community Association Law at 2 (GANN) ("Drafters of cooperative documents ... rely heavily on general corporate principles and experience in establishing rights and responsibilities vis-a-vis cooperative owners and their cooperative corporations."). The officers, managers and directors of a common interest facility have a fiduciary obligation to the entity itself and to the individual residents. See Thanasoulis v. Winston Towers 200 Ass'n, Inc., 110 N.J. 650, 657 (1988). The "board of directors, trustees or other governing body have a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders." Siller v. Hartz Mountain Assocs., 93 N.J. 370, 382 (1983), cert. denied, 464 U.S. 961 (1983).

The business judgment rule bars judicial inquiry into the decisions made in good faith by a corporation's board of directors. See Maul v. Kirkman, 270 N.J. Super. 569, 614 (App. Div. 1994). The rule "contrasts sharply with the 'reasonableness' standard and with rule-making according to constitutional or administrative agency standards . . . . by requiring the claimant to show the action was "fraudulent, self-dealing or unconscionable." Chin v. Coventry Square Condo. Ass'n, 270 N.J. Super. 323, 329 (App. Div. 1994).

Under the business judgment rule, there is a rebuttable presumption good faith decisions based on reasonable business knowledge by a board of directors are not actionable by those who have an interest in the business entity. See e.g., Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 166 (2011); In re PSE & G S'holder Litig., 173 N.J. 258, 276–77 (2002). In other words, a board of directors' decisions will be presumed proper and in the best interest of the corporation, unless the challenging shareholder(s) can show a breach of the board's fiduciary duty of good faith. See In re PSE & G S'holder Litig., 315 N.J. Super. 323, 327 (Ch. Div. 1998), aff'd 173 N.J. 258 (2002) (internal citations omitted) (noting directors are presumed to act "on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest").

"Although directors of a corporation have a fiduciary relationship to the shareholders, they are not expected to be incapable of error." Papalexiou v. Tower West Condo., 167 N.J. Super. 516, 527 (Ch. Div. 1979). The business judgment rule "'protects a board of directors from being questioned or second-guessed on conduct of corporate affairs, except in instances of fraud, self-dealing, or unconscionable conduct.'" PSE & G,

supra, 173 N.J. at 277 (quoting Maul, supra, 270 N.J. Super. at 614); see also Papalexiou, supra, 167 N.J. Super. at 527 (citing Sarner v. Sarner, 62 N.J. Super. 41, 60 (App. Div. 1960)) ("Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence.") Stated differently, "bad judgment, without bad faith, does not ordinarily make officers individually liable." Maul, supra, 270 N.J. Super. at 614 (citing 3A William M. Fletcher, Fletcher Cyclopedia of Law of Private Corporations § 1039 at 46 (perm. ed. rev. vol. 1986)).

To overcome the presumption, the rule places the initial burden on the person challenging a corporate decision to demonstrate self-dealing on the part of the decision-maker(s), or any "other disabling factor." Maul, supra, 270 N.J. Super. at 614. If the "challenger sustains the initial burden, then the 'presumption of the rule is [ ] rebutted, and the burden of proof shifts to the defendant or defendant to show that the transaction was, in fact, fair to the corporation.'" PSE & G, supra, 173 N.J. at 277 (quoting Stuart L. Pachman, Title 14A-Corporations at 228 (2000)). Courts will not enforce arbitrary and capricious rules promulgated by governing boards. See Papalexiou, supra, 167 N.J. Super. at 527 (citing Henn, Law of Corporations § 242 at 482–83 (2d ed. 1970)). To defeat the presumption, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review. See Ibid.

C. Civil Conspiracy

Civil conspiracy is the "'combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.'" Banco Popular North American

v. Gandy, 184 N.J. 161, 177 (2005) (quoting Morgan v. Union Cnty Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994)). To be liable, it is sufficient "'if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them.'" Banco Popular, supra, 184 N.J. at 177 (quoting Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988)).

However, most importantly, the substance of the claim is not the unlawful agreement, but the "'underlying wrong which, absent the conspiracy, would give a right of action.'" Morgan, supra, 268 N.J. Super. at 364 (quoting Bd. of Educ. v. Hoek, 38 N.J. 213, 238 (1962)) (finding combination of defendant' acts to make plaintiff's working conditions so intolerable as to force plaintiff to involuntarily resign constituted a civil conspiracy to deprive plaintiff of his civil rights); see also Weil v. Express Container Corp., 360 N.J. Super. 599, 614 (App. Div.), certif. denied, 177 N.J. 574 (2003) (establishing failure to identify any act or behavior to support allegation of participation in conspiracy is fatal to conspiracy claim). To prove the existence of a conspiracy, the claimant is not required to provide direct evidence of the agreement as the nature of a conspiracy, absent direct testimony from a co-conspirator, generally yields only circumstantial evidence. Morgan, supra, 268 N.J. Super. at 365 (quoting Hoek, supra, 38 N.J. at 238–39). The question of whether an agreement exists should be presented to a fact-finder in a civil conspiracy action as it could be inferred from the circumstantial evidence the alleged conspirators had a "meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives." Morgan, supra, 268 N.J. Super. at

365 (quoting Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd on other grounds, 446 U.S. 754 (1980)).

The claimant also need not prove each participant in the conspiracy knew the "exact limits" of the unlawful plan or the identity of the other participants. Ibid. (quoting Hampton, supra, 600 F.2d at 621). As the participants in a civil conspiracy "must share the general conspiratorial objective, but . . . need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result," the claimant is generally only required to show "there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.'" Ibid. (quoting Hampton, supra, 600 F.2d at 621).

D. Summary Judgment

Motions for summary judgment are controlled by R. 4:46-2, which states in pertinent part:

> [t]he judgment or order sought shall be rendered forthwith if the pleadings… together with the affidavits…show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require the submission of the issue to the trier of fact. R. 4:46-2.

The seminal New Jersey case interpreting R. 4:46-2 is Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). In Brill, the Supreme Court of New Jersey held when deciding a motion for summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in a light most favorable to the

non-moving party and considering the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party. See id. at 523.

As such, the court must first interpret the facts in the light most favorable to the non-petitioner. Second, should operative facts come into question, the motion must be denied.

Legal Analysis

1. Oppression of Minority Shareholder

Defendant asserted the plaintiff does not fall within the definition of a minority shareholder pursuant to N.J.S.A. 14A: 12-7(1)(c) as the apartment building has over 160 apartment units, with each unit lessee constituting a shareholder, while the statute requires there be no more than 25 shareholders. The plaintiff neither opposes the motion for summary judgment on this issue nor contests any of the relevant facts with respect to the same. Thus, as the plaintiff has not opposed the dismissal of count one, and given the aforementioned statute, the defendant's request for summary judgment is granted as to this count.

2. Business Judgment Rule

The defendant asserts there is no genuine issue of material fact as to the good faith of the board's decision to refuse the plaintiff's request for a balcony enclosure and, thus, summary judgment should be granted. To defeat summary judgment the plaintiff has to establish a genuine issue of material fact exists as to the good faith of the board's decision, or in other words, has to show there was fraudulent, self-dealing or unconscionable conduct in rendering the decision in order to defeat the defendant's

motion for summary judgment under the business judgment rule.[5] Even though the facts were viewed in the light most favorable to the plaintiff, nonetheless the plaintiff has failed to defeat the presumption of the business judgment rule for several reasons discussed herein.

First, it is revealing the prominent case plaintiff's counsel relies upon for why summary judgment should be denied holds for the proposition contrary to the plaintiff's and in full support of the defendant's application. Counsel relies on an unpublished opinion, Valle v. Lake End Corp., 2008 N.J. Super. Unpub. LEXIS 1886, 21-22 (App. Div. Nov. 25, 2008), as precedent for the proposition a showing of "singling out" for enforcement of rules by a board is sufficient to demonstrate improper action by that board amounting to a breach of their fiduciary duty to the plaintiff. But see R. 1:36-3. Even in a light most favorable to the plaintiff, counsel's reliance on Valle is unconvincing and lends little support for the plaintiff's position. There the claimants brought an action premised upon a board's denial of their application to construct alterations on their property even though the board approved other alterations to their property within the prior year. Valle, supra, 2008 N.J. Super. Unpub. LEXIS at 1–2. In support of their action, the claimants argued the board violated its fiduciary duty by singling out the claimants for denial while approving other projects which violated the restrictive lease provisions. Id. at 21–22. The court found the board's denial of approval for alterations was not a breach of its fiduciary duty as the claimants failed to prove the board singled

[5] At oral argument, plaintiff's counsel's argument was as follows: as there was disagreement between the experts and as there are no contentions the building and the balconies are in general disrepair, this, in and of itself, creates a factual question requiring the matter to proceed to trial. The same is illustrative of the plaintiff's difficult position. The question presented is not whether the balconies are in such poor condition as to require immediate attention thereby necessitating denial of enclosures, but rather whether the board's decision to suspend further approvals pending their investigation into the effects of the enclosures and the overall conditions of the balconies was made in good faith or, more particularly, was not made in bad faith.

them out for enforcement of the lease or took either fraudulent or improper action concerning the claimant's application as they "failed to prove that the interests of the unit owners as a whole were not 'served, advanced or protected by the board's action.'" Ibid. (citing Billing v. Buckingham Towers Condo. Ass'n, 287 N.J. Super. 551, 563 (App. Div. 1996)). Furthermore, the court determined the claimants did not rebut the respondent's argument the prior violations of the lease occurred before the board's by-laws and rules restricting use were enacted. Id. at 21–22.

Similar to Valle, the plaintiff here failed to demonstrate the board singled her out for enforcement of its rules. While the plaintiff asserts the board approved other enclosures as recently as 2006, apparently evidenced by a copy of the construction permit, there is no evidence presented suggesting an enclosure was in fact built. Even if an enclosure was approved in 2006, the balcony inspections commenced only in 2007. Following the inspections, the board implemented rules requiring all residents to remove carpeting from their balconies, to repair all tiles and suspended approvals for balcony enclosures as to all residents of the building.

Plaintiff's counsel asserts the board members' dislike of the plaintiff's family resulted in the family being singled out. In support, counsel provides depositions of the plaintiff's husband and the building's former Resident Manager, Luis Torres ("Torres") suggesting the board's actions were aimed specifically at the plaintiff's family. However, counsel has not provided any indication other residents applied for and were able to obtain approvals for balcony alterations following the rejection of her application, and, as such, the plaintiff failed to marshal sufficient evidence showing she was singled out for enforcement of the rules. The depositions purportedly showing evidence of a

discourteous relationship between the plaintiff's husband and several board members is patently insufficient to demonstrate the board spent time, money and other resources of the co-op to first deny the plaintiff's application for alterations and then proceed to suspend applications for all residents of the building, hire an additional engineering firm, and have the firm perform an inspection for the sole purpose of a malicious campaign to target the plaintiff and her family.

Second, plaintiff's counsel argues the defendant's initial lack of an explanation for the denial of the plaintiff's application and their subsequent reliance on engineers' reports prepared after the denial evidences the board's dishonest and malicious conduct towards the plaintiff amounting to a breach of its fiduciary duty. Counsel's assertions are not sufficient to overcome the presumption required to "second-guess" the board's decision where the board has the discretionary authority to make the decision. See Courts at Beachgate v. Bird, 226 N.J. Super. 631, 640–41 (Ch. Div. 1988) (finding board's decision requiring condominium unit owners to remove and replace windows installed in unit without permission of board and in contravention of master deed required prior written approval for alterations was protected by business judgment rule); see also PSE & G, supra, 173 N.J. at 277; see also Reilly v. Riviera Towers Corp., 310 N.J. Super. 265, 271 (App. Div. 1998) (finding board could not impose sublet privilege fee where lease did not provide board with complete discretion over subletting); Sulcov v. 2100 Linwood Owners, 303 N.J. Super. 13, 21 (App.Div. 1997) (establishing business judgment rule did not protect board's decision to implement transfer fees where such decision was beyond authority granted in by-laws).

Preliminarily, the lease provides the board with the discretionary authority to make decisions regarding applications for enclosures and nothing therein indicates the board is required to provide a written explanation, or any explanation, for the denial of a request for an alteration provided the consent was not unreasonably withheld. Even so, the plaintiff was provided with an explanation as to the reason for denying her application in the aforementioned letter dated August 19, 2009. The letter clearly provided approvals were suspended pending further review by the board of the enclosures' effects on the balconies. Thus, as the plaintiff has not demonstrated fraudulent, self-dealing or unconscionable conduct on the part of the board in connection with its decision, the decision was not made in bad faith, nor was it malicious. In fact, one might even find the decision was reasonable and credibly substantiated.

Moreover, defendant's counsel urges consent for the alteration was withheld based upon the engineers' reports, which provided the balconies required repairs. Although plaintiff's counsel argues the reports were issued by Lawless after the plaintiff's application was denied, and, as such, the defendant could not have relied on them in making the decision, the reports issued by the Falcon Group were rendered in 2007 and 2008, prior to the denial. Defendant's counsel asserts damage to the balconies was found by Falcon Group and, thereafter, Lawless was hired to "address an overall repair protocol for the balconies in the building." Plaintiff's counsel has not provided evidence to show withholding approvals for enclosures pending further investigations into overall building maintenance and repairs constitutes fraud, self-dealing or unconscionable conduct. See PSE & G, supra, 173 N.J. at 277 (quoting Maul, supra, 270 N.J. Super. at 614). Accordingly, as counsel neither contests the evaluations in the

reports issued by the Falcon Group nor the board's authority under the proprietary lease to approve or deny applications for balcony alterations, the plaintiff has not overcome the presumption imposed by the business judgment rule. Given the aforementioned rules, the defendant's request for summary judgment is granted as to count two.

3. Civil Conspiracy

Defendant's counsel correctly argued the plaintiff has failed to present a prima facie case for civil conspiracy as the plaintiff has not demonstrated any unlawful act committed by the board or any lawful act committed by unlawful means. Counsel asserts the board had discretion pursuant to the proprietary lease to approve or deny requests for balcony enclosures. In its exercise of discretion the board denied the request for an enclosure. In response, plaintiff's counsel argues the defendant conspired to refuse the plaintiff's request to install an enclosure by instituting a "frivolous litigation" concerning the exterminator in order to divert attention. By way of their reply, defendant's counsel submits even if the litigation was determined to be frivolous, the same does not constitute an unlawful act.

Plaintiff's counsel further asserts the circumstantial evidence presented concerning the recommendations in the reports by Lawless, the misrepresentations to the shareholders and the bad faith in targeting the plaintiff would allow a fact-finder to infer the defendant's actions amounted to a conspiracy to prevent the plaintiff from enclosing her balcony. Specifically, counsel argues Lawless' recommendations in the reports concerning the enclosures evidences the board conspired with Lawless to prevent the plaintiff from enclosing her balcony.

Plaintiff's allegations do not demonstrate the defendant has committed any unlawful act or a lawful act by unlawful means.[6] As previously noted, to maintain an action in civil conspiracy there must be showing of an underlying wrong which could be actionable even absent the conspiracy. See Morgan, supra, 268 N.J. Super. at 364. In the instant matter, the defendant has correctly asserted even if the litigation was determined to be frivolous it does not constitute an unlawful act. Furthermore, although circumstantial evidence may be sufficient to prove a conspiracy, the evidence offered by the plaintiff is speculative at best. Counsel's indication of the variations in the reports and the recommendations against enclosure by Lawless do not sufficiently demonstrate a "meeting of the minds" between the defendant and Lawless to prevent the plaintiff from enclosing her balcony. Furthermore, pursuant to plaintiff's own argument, the report was issued after the request was denied and, as such, there could have been no meeting of the minds between Lawless and the defendant at the time of the denial.

Accordingly, as plaintiff's counsel has failed to show the defendant committed any unlawful act or a lawful act by unlawful means, the defendant's request for summary judgment is granted as to count three.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment is granted with respect to all three counts.

The case is dismissed with prejudice as set forth in the order executed on May 31, 2011.

[6] Counsel's argument at oral argument the unlawful act is the potential death of a child does not warrant further comment.