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COMMENTS

CRACKING DOWN ON COOPERATIVE BOARD DECISIONS THAT REJECT APPLICANTS BASED ON RACE: *BROOME V. BIONDI*

INTRODUCTION

Cooperative boards generally enjoy broad discretion in their decisions to accept or reject applicants.¹ Although cooperative boards can deny an application for any reason they choose or for no reason at all, they are prohibited from violating a person's civil rights.² An applicant who is rejected based on race can

¹ See *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317, 1322 (N.Y. 1990) (concluding that "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's"); *infra* Part I.A (discussing the broad discretion granted to cooperative boards); see also Rosemarie Maldonado & Robert D. Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community-Based Living?*, 23 *FORDHAM URB. L.J.* 1245, 1245 (1996) (explaining that "courts grant cooperative boards great discretion in the management of their affairs and usually defer to their decisions when challenged").

The cooperative's bylaws and proprietary lease usually grant the board of directors the power to accept or reject applicants. See *Murphy v. 253 Garth Tenants Corp.*, 579 F. Supp. 1150, 1153 (S.D.N.Y. 1983) (providing an example of a lease which stated that the board's consent could not be unreasonably withheld). See generally 2 PATRICK J. ROHAN & MELVIN A. RESKIN, *REAL ESTATE TRANSACTIONS: COOPERATIVE HOUSING LAW AND PRACTICE* § 7.02[2], at 7-9 (1998) (discussing the sale and transfer of a cooperative's shares).

² See *Weisner v. 791 Park Ave. Corp.*, 160 N.E.2d 720, 724 (N.Y. 1959) (stating that unless the reason violates a statute that prohibits discrimination, "there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes"); 2 ROHAN & RESKIN, *supra* note 1, § 7.02[2], at 7-9 to 7-10 (stating that a cooperative board may "grant or withhold consent, for any reason or

bring a claim of discrimination under the Federal Fair Housing Act.³ In New York, applicants who believe they have been discriminated against can also bring a claim under section 296(5) of the New York Human Rights Law.⁴ Recently, in *Broome v. Biondi*,⁵ the United States District Court for the Southern District of New York upheld a jury award of \$640,000 for race discrimination in favor of an interracial married couple against a Manhattan cooperative and its board.⁶

In *Broome*, Gregory and Shannon Broome,⁷ the plaintiffs, submitted an application to sublet a cooperative apartment which was rejected.⁸ They subsequently filed race discrimination

for no reason," however, "civil rights laws that prohibit discrimination in housing must be complied with"); see also *Maldonado & Rose*, *supra* note 1, at 1248-49 (noting that the discretion of cooperative boards is "not absolute" because "courts draw the line at civil rights violations").

³ 42 U.S.C. §§ 3601-19 (1994). Section 3604(a) makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin." For an example of a court applying the Act, see *Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F. Supp. 79, 80 (E.D.N.Y. 1984) (sustaining a jury verdict against a cooperative for violations of the Fair Housing Act). See generally 2 ROHAN & RESKIN, *supra* note 1, § 7.02[5], at 7-17 to 7-18 (describing the effect of the Act on cooperatives).

⁴ Section 296(5)(a)(1) of the New York Human Rights Law makes it unlawful "[t]o refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race . . . of such person or persons." N.Y. EXEC. LAW § 296(5)(a)(1) (McKinney 1993); see also *Bachman v. State Div. of Human Rights*, 481 N.Y.S.2d 858, 860 (App. Div. 1984) (applying this statute to housing cooperatives). See generally ROHAN & RESKIN, *supra* note 1, § 7.02[5], at 7-18 to 7-19 (discussing the New York Human Rights Law and a New York City law prohibiting housing discrimination).

⁵ 17 F. Supp. 2d 211 (S.D.N.Y. 1997).

⁶ See *id.* at 223, 228-29.

⁷ Gregory Broome, an attorney with Skadden, Arps, Slate, Meagher & Flom, is African-American. Shannon Broome, his wife, is Caucasian and is an attorney with General Electric. See Bill Alden, *\$640,000 Housing Bias Award Upheld*, N.Y. L.J., Nov. 7, 1997, at 1.

⁸ See *Broome*, 17 F. Supp. 2d at 215. The cooperative apartment was in the Beekman Hill House, located at 425 East 51st Street in New York City. See *id.* When the Broomes discussed the application process with Simone Demou, the owner of the apartment they wanted to sublet, she explained that prior subtenants simply completed some paperwork and met with the board's president, Nicholas Biondi. See *Broome v. Biondi*, No. 96 CIV. 0805 RLC, 1997 WL 83295, at *1 (S.D.N.Y. Feb. 10, 1997). Gregory Broome even spoke to Biondi over the telephone, and Biondi confirmed that the process merely entailed briefly meeting with him. See *id.* However, once Biondi saw Gregory Broome in person and learned that he was African-American, Biondi required the Broomes to meet with the board of directors prior to granting approval. See *id.* The day after meeting with the board, the Broomes' ap-

claims against the cooperative and its board of directors, the defendants, under 42 U.S.C. §§ 1981, 1982, and 3601 to 3619, and under section 296(5) of the New York Human Rights Law.⁹ A jury awarded the Broomes \$230,000 in compensatory damages and \$410,000 in punitive damages.¹⁰ The defendants moved for judgment as a matter of law, a new trial, and, alternatively, for remittitur of the compensatory and punitive damages.¹¹ These motions were all denied.¹²

The defendants argued that they were entitled to judgment as a matter of law because the Broomes failed to show they were "qualified" to sublet the cooperative, which is one of the elements of a prima facie case of race discrimination in housing.¹³ The court found that the Broomes had satisfied this requirement by demonstrating their financial capability to rent the apartment.¹⁴ In addition, the defendants claimed that the Broomes did not establish "circumstances giving rise to an inference of discrimina-

plication was unanimously rejected. *See id.*

⁹ *See Broome*, 17 F. Supp. 2d at 215; *supra* notes 3-4 (discussing the Federal Fair Housing Act and the New York Human Rights Law). Section 1981 states that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981 (1994). Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1994).

The Broomes also alleged intentional infliction of emotional distress by the board, but the jury found the defendants not liable for this claim. *See Broome*, 17 F. Supp. 2d at 215-16. The defendants in turn filed a counterclaim for defamation, but the trial judge dismissed it at the close of evidence. *See id.* at 215. Related third party claims and counterclaims were also filed involving Demou and the cooperative board. *See id.*

¹⁰ *Broome*, 17 F. Supp. 2d at 215.

¹¹ *See id.* at 216, 223.

¹² *See id.* at 218-20, 222, 229.

¹³ *Id.* at 216. *See infra* Part I.B, for a discussion of the elements of a prima facie case of race discrimination. One of the individual defendants, board member Richard Appleby, also made a motion for judgment as a matter of law against the jury's finding that he was personally liable for race discrimination. *See Broome*, 17 F. Supp. 2d at 218 n.5. The court denied Appleby's motion. *See id.*

¹⁴ *See Broome*, 17 F. Supp. 2d at 217. To determine whether the Broomes were qualified, the court relied on *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979), and *Jiminez v. Southridge Cooperative, Section I, Inc.*, 626 F. Supp. 732, 734-35 (E.D.N.Y. 1985), where the courts found that the plaintiffs were "qualified" if they were "financially able to rent or buy such housing." *Broome*, 17 F. Supp. 2d at 217.

tion."¹⁵ However, the court concluded that such an inference is created by showing a prima facie case of discrimination.¹⁶ Finally, the defendants asserted that their motion for judgment as a matter of law should be granted because the Broomes failed to prove that the board's stated reasons for the rejection were "pretextual."¹⁷ The court reasoned that the Broomes successfully demonstrated that the defendants' proffered reasons were not the "actual" reasons and, therefore, they were pretextual.¹⁸ Furthermore, the court stated that the defendants were not entitled to a new trial because the evidence sufficiently supported the jury's verdict.¹⁹ Also, the defendants' motion for remittitur of the jury verdict was denied because the compensatory and punitive damages were not found by the court to be excessive or unreasonable.²⁰

¹⁵ *Broome*, 17 F. Supp. 2d at 217.

¹⁶ *See id.* The court noted that in the second circuit, "a housing discrimination plaintiff raises an inference of discrimination when he establishes a prima facie case." *Id.* (citing *United States v. Town Hall Terrace Ass'n*, No. 95 CIV 0533E(H), 1997 WL 128353, at *3 (W.D.N.Y. Mar. 14, 1997)).

¹⁷ *Broome*, 17 F. Supp. 2d at 217. See *infra* notes 31-34 and accompanying text, for a discussion of how the burden of proof shifts between plaintiffs and defendants.

¹⁸ *Broome*, 17 F. Supp. 2d at 217-18; see also *infra* Part II.A (discussing the standard and rationale the court used to determine that the plaintiffs proved that the defendants' proffered reasons were pretextual).

¹⁹ *See Broome*, 17 F. Supp. 2d at 222. The defendants argued that their motion for a new trial should be granted because the evidence did not support the jury's verdict. *See id.* at 221. The court denied this motion. It concluded that "the jury's verdict on liability was supported by a fair interpretation of the evidence" and therefore, that it could not "find that the verdict on liability [was] a miscarriage of justice." *Id.* at 222 (citing *Bevevino v. Saydjari*, 574 F.2d 676, 683 (2d Cir. 1978)). In addition, board member Richard Appleby argued that he was entitled to a new trial because character testimony that would have shown he was not racially prejudiced was "improperly excluded." *Id.* The court denied this motion as well. *Id.* at 223.

²⁰ *Broome*, 17 F. Supp. 2d at 223-26, 228-29. In reviewing the compensatory damages, the court examined evidence of the Broomes' emotional distress and compared their circumstances to those in analogous discrimination cases. *See id.* at 223-26. It noted that "the genuine emotional pain associated with [race] discrimination should not be devalued by unreasonably low compensatory damage awards." *Id.* at 226. Thus, the court concluded that the emotional damages awarded to the Broomes were not excessive. *See id.* The defendants argued that the imposition of punitive damages was not justified. *See id.* at 228. The court relied on *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993), however, and stated that punitive damages can be granted if the "defendants acted 'wantonly or willfully or were motivated by ill will, malice, or a desire to injure the plaintiffs.'" *Broome*, 17 F. Supp. 2d at 228 (quoting *Ragin*, 6 F.3d at 909 (quoting *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1061 (E.D. Va. 1987))). The court found that the jury could reasonably find that the defendants acted "willfully or maliciously" and that the punitive damages awarded were not excessive based on the defendants' conduct.

The district court properly denied the defendants' motion for judgment as a matter of law. The court correctly found that the Broomes established a prima facie case of housing discrimination which created an inference of discrimination, and that the board's proffered reasons for the rejection were pretextual. It is submitted, however, that a stricter standard of analysis of the board's reasons should have been applied.

Part I of this Comment describes the broad discretion that cooperative boards have historically enjoyed in accepting and rejecting applicants, as well as the limits placed on this discretion in cases of civil rights violations. Part II posits that the court in *Broome* applied an insufficient standard of review to determine whether the board's proffered reasons for rejecting the applicants were pretextual. It concludes that the district court should have adopted a stricter standard of analysis.

I. BROAD DISCRETION OF COOPERATIVE BOARDS

A. *The Case Law*

While cooperative boards have broad powers regarding application decisions, their "discretion is not absolute and unfettered."²¹ In *Levandusky v. One Fifth Avenue Apartment Corp.*,²² the court recognized that "the chosen standard of review [for cooperative board decisions] should not undermine 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."²³ The court held that the standard of review for cooperative board decisions should be similar to the business judgment rule.²⁴ Therefore, it concluded that cooperative board

Broome, 17 F. Supp. 2d at 229. The court came to this conclusion by analyzing the elements set forth by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573-83 (1996), to determine the "reasonableness" of such an award. *Broome*, 17 F. Supp. 2d at 229.

²¹ 2 ROHAN & RESKIN, *supra* note 1, § 7.02[2], at 7-9; see also Maldonado & Rose, *supra* note 1, at 1248-49 ("A cooperative board's sweeping powers, however, are not absolute."); cf. *Cavanagh v. 133-22nd St. Jackson Heights, Inc.*, 666 N.Y.S.2d 702, 703 (App. Div. 1997) (suggesting a situation where an arbitrary exercise of the board's powers could give rise to a cause of action).

²² 553 N.E.2d 1317 (N.Y. 1990).

²³ *Id.* at 1321.

²⁴ See *id.* (stating that the standard of review should be "analogous to the business judgment rule applied by courts to determine challenges to decisions made by

decisions should be accorded deference without judicial intervention provided the board acted "within the scope of its authority and in good faith."²⁵ One limitation on a cooperative board's discretion is that it cannot discriminate against applicants based on race.²⁶

B. *A Prima Facie Case of Housing Discrimination*

To successfully state a claim under the Federal Fair Housing Act and the New York Human Rights Laws, a plaintiff must first establish a prima facie case of housing discrimination.²⁷ The four required elements of a prima facie showing are that "(1) the plaintiff is a member of the class protected by the statute, (2) the plaintiff sought and was qualified for an apartment . . . , (3) the plaintiff was denied the opportunity to rent the apartment . . . , and (4) the apartment . . . remained available thereafter."²⁸ In *Broome*, the issue was whether the plaintiffs were "qualified" to rent the apartment.²⁹ As the court in *Broome* noted, plaintiffs can satisfy this element by demonstrating that they have the financial ability to rent or buy the housing.³⁰

corporate directors").

²⁵ *Id.* at 1322 (explaining that "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's") *Id.*

²⁶ See *Weisner v. 791 Park Ave. Corp.*, 160 N.E.2d 720, 724 (N.Y. 1959) (stating that a cooperative board may not violate a statute prohibiting discrimination); see also 2 ROHAN & RESKIN, *supra* note 1, § 7.02[2], at 7-10 (explaining that "civil rights laws that prohibit discrimination in housing must be complied with"); Maldonado & Rose, *supra* note 1, at 1256 (noting that the court in *Weisner* "enhanced the cooperative board's discretion over share transfers by approving the arbitrary withholding of consent by the board, absent a violation of discrimination laws").

²⁷ See *Cabrera v. Jakobovitz*, 24 F.3d 372, 381 (2d Cir. 1994) (explaining that in order to prevail the plaintiffs must first set forth a prima facie case by establishing four elements); *Broome v. Biondi*, 17 F. Supp. 2d 211, 216 (S.D.N.Y. 1997) (noting that "these laws required the [plaintiffs] to make a prima facie case of housing discrimination").

²⁸ *Cabrera*, 24 F.3d at 381 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)); see also *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979) (comparing housing discrimination suits to employment discrimination suits). In *Robinson*, the court noted that a plaintiff asserting housing discrimination makes a prima facie showing by establishing: "(1) that he is Black; (2) that he applied for and was qualified to rent or purchase the housing; (3) that he was rejected; and (4) that the housing opportunity remained available." *Id.*

²⁹ *Broome*, 17 F. Supp. 2d at 216. See *supra* notes 13-14 and accompanying text.

³⁰ See *Broome*, 17 F. Supp. 2d at 217; see also *Robinson*, 610 F.2d at 1038 (discussing the elements of a prima facie showing of discrimination and noting that it was sufficient that the plaintiff "could afford to purchase the space sought").

In the Second Circuit, a plaintiff raises an inference of discrimination by establishing a prima facie case.³¹ Therefore, once a plaintiff has demonstrated these four elements, the burden of proof shifts to the defendant to rebut the assertion of discrimination.³² To do this, the defendant must give a nondiscriminatory reason for the rejection,³³ at which time the burden shifts back to the plaintiff to prove that the offered reason is "pretextual."³⁴

³¹ See *Broome*, 17 F. Supp. 2d at 217; see also *Soules v. United States Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) (explaining that a housing discrimination plaintiff has to "allege 'only discriminatory effect, and need not show that the decision complained of was made with discriminatory intent.'" (quoting *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987))).

For some courts, a change in procedure in the application process made specifically for the plaintiff may be enough to establish an inference of discrimination. For example, in *Robinson*, the defendant shareholders organized a "screening committee" for the plaintiff who was African-American, and used the "previous informal procedure" for a potential Caucasian purchaser. *Robinson*, 610 F.2d at 1039. The court in *Robinson* determined that this change in procedure created "a conclusion of discriminatory motive well within the realm of legitimate inference." *Id.* at 1039. Furthermore, the court discussed using the "motivation test" to establish a prima facie case as an alternative to showing the four elements, which it referred to as the "effects test." *Id.* at 1038; see also *Huertas v. East River Hous. Corp.*, 674 F. Supp. 440, 456 (S.D.N.Y. 1987) ("[T]he court enjoins defendants from imposing any new requirements . . . upon class member applicants as conditions to their securing apartments."); *Maldonado & Rose*, *supra* note 1, at 1278-81 (analyzing cases where the courts determined that a change in procedure during the application process for a member of a protected class suggested discrimination). In *Broome*, there was a change in procedure. See *supra* note 8 (describing how the president of the board in *Broome* altered the application process for the plaintiffs). In fact, Simone Demou's testimony at trial characterized this change in procedure as an "unprecedented requirement for the approval process." *Broome*, 17 F. Supp. 2d at 219.

³² See *Robinson*, 610 F.2d at 1039; *Huertas*, 674 F. Supp. at 454 (stating that once the plaintiffs meet their burden, the defendant must prove that reasons other than race were involved in turning down the plaintiff's application); *Sassower v. Field*, 752 F. Supp. 1182, 1188 (S.D.N.Y. 1990) (describing the shifting of the burden of proof).

³³ See *Robinson*, 610 F.2d at 1039 ("The burden shifts to the defendant to come forward with evidence to show that his actions were not motivated by considerations of race."); *Broome*, 17 F. Supp. 2d at 217 ("At trial, the Beekman defendants had the burden of rebutting any inference of housing discrimination by proffering a legitimate, nondiscriminatory reason for their actions.") (citing *Soules*, 967 F.2d at 822).

³⁴ *Soules*, 967 F.2d at 822 ("If the defendant does come forward with evidence in his defense, we allow a plaintiff an opportunity to show that a defendant's stated reason for denying the plaintiff's application for housing was pretextual."); *Broome*, 17 F. Supp. 2d at 217 ("Once a defendant articulates a reason for his actions, the burden shifts to plaintiff to demonstrate that the articulated reason was a pretext for housing discrimination.") (citing *Soules*, 967 F.2d at 822); *Sassower*, 752 F. Supp. at 1189 (explaining how the "burden shifts back to the plaintiffs to demonstrate that the defendants' stated reasons were not their real reasons but were . . . only a pre-

II. PLAINTIFF'S BURDEN IN PROVING A REASON IS PRETEXTUAL

A. *The Standard Adopted in Broome v. Biondi*

The standard applied by the court in *Broome* to ascertain whether the defendants' proffered reasons for rejecting the applicants were pretextual was merely whether they were the "actual" reasons.³⁵ The only other guideline articulated by the court is that when making this determination " 'a fact-finder need not, and indeed should not evaluate whether a defendant's stated purpose is unwise or unreasonable.' "³⁶ The defendants stated that they declined to accept the Broomes' application because " 'they perceived them as confrontational and litigious,' and believed Demou [the owner of the apartment] was trying to intimidate [the board] into accepting the Broomes as subtenants by raising charges of racism."³⁷ The jury concluded that the defendants' reasons were pretextual, and the court held that the evidence supported this decision.³⁸

text for discrimination"); see also *infra* Part II (describing this shift in the burden of proof back to plaintiff to show a proffered reason is pretextual).

³⁵ See *Broome*, 17 F. Supp. 2d at 217 ("[T]he decision should be based on whether the proffered reason is the actual reason for the challenged action.") (citing *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988)).

³⁶ *Id.* (quoting *DeMarco v. Holy Cross High School*, 4 F.3d 166, 170-71 (2d Cir. 1993)).

³⁷ *Id.* (quoting Defendant's Memorandum of Law at 14-15, *Broome* (No. 96 CIV. 0805RLC)). Simone Demou became a third party defendant when the president of the Beekman Hill House, Biondi, sued her for defamation and injurious falsehood. See *id.* at 215. Demou counterclaimed against the Beekman defendants claiming retaliation under section 3617 of the Federal Fair Housing Act, sections 296(5) and (7) of the New York Human Rights Law, and under the New York City Administrative Code sections 8-107(5) and (7). Demou also counterclaimed for breach of fiduciary duty, breach of contract, and tortious interference with the performance of a contract. See *id.* The court dismissed the retaliation claim under the New York City Administrative Code, but allowed the other claims to stand, for which the jury awarded damages to Demou. See *id.*

³⁸ See *id.* at 217. The evidence cited by the court as supporting the jury finding included that the Broomes denied stating they would sue, and that the board did not check any of their references to discover whether they would make "good tenants." *Id.* Furthermore, the board members discussed race when making their decision. *Id.* at 218. One board member, Lawrence Weiner, noted on the Broomes' application that Gregory Broome was a "black man." *Id.* Another board member, Richard Appleby, actually asked the Broomes whether they would sue or whether they felt discriminated against based on race. See *id.*

B. A Suggested Stricter Standard for Evaluating Proffered Reasons

While the *Broome* court applied the "actual" reasons standard, other courts have held defendants to a stricter standard, making it easier for plaintiffs to prove that the defendants' reasons are pretextual.³⁹ In *Robinson v. 12 Lofts Realty, Inc.*,⁴⁰ the Second Circuit sets forth an alternative standard.⁴¹ First, it distinguishes between objective and subjective reasons.⁴² It entails "carefully scrutiniz[ing]"⁴³ subjective proffered reasons "with considerable skepticism."⁴⁴ Additionally, "racial motivation [must] not play any role in the decision" to reject the applicant.⁴⁵ Furthermore, special attention must be paid "to recognize means that are subtle and explanations that are synthetic."⁴⁶

It is submitted that the court in *Broome* should have used the *Robinson* standard. This standard makes it easier for a plaintiff to prove that the nondiscriminatory reason offered by the defendant is a pretext.⁴⁷ For example, in *Robinson*, the coop-

³⁹ See *Soules*, 967 F.2d at 822 (discussing the importance of "view[ing] skeptically subjective rationales"); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1040 (stating that a careful look into reasons for rejection is required); cf. Stuart S. Moskowitz, *Cooperative Apartments: The Enforceability of Transfer Restrictions and the Impact of Bankruptcy*, 18 REAL EST. L.J. 142 (1989) (giving a general background on how cooperatives function in context of bankruptcy issues). While not specifically discussing the pretext issue, Moskowitz does address how courts are imposing a stricter standard and points out that, "a number of New York courts . . . have begun to scrutinize the actions of cooperative boards." *Id.* at 150.

⁴⁰ 610 F.2d 1032 (2d Cir. 1979).

⁴¹ See *id.* at 1040-43.

⁴² See *id.* at 1039-41; see also Maldonado & Rose, *supra* note 1, at 1256-58 (explaining that objective reasons receive "greater judicial deference" whereas subjective reasons "trigger[] more intense judicial scrutiny and hinder[] the cooperative's chances for success").

⁴³ *Robinson*, 610 F.2d at 1040 ("In evaluating the proposed justifications, the district court must carefully scrutinize suggested reasons that are not objective in nature.")

⁴⁴ *Id.* ("In cases in which discriminatory intent could be inferred from the sequence of events, the courts have generally viewed subjective explanations with considerable skepticism."); see also *Soules*, 967 F.2d at 822 ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members of protected groups.")

⁴⁵ *Robinson*, 610 F.2d at 1043; see also *Irizarry v. 120 West 70th Owners Corp.*, No. 86 CIV. 3503 (JFK), 1986 WL 8073, at *6 (S.D.N.Y. July 15, 1986) ("In order to rule against the plaintiff, the trial court must find a total absence of any racial motivation on the part of the defendants.")

⁴⁶ *Robinson*, 610 F.2d at 1043.

⁴⁷ But see *Murphy v. 253 Garth Tenants Corp.*, 579 F. Supp. 1150, 1154-55 (S.D.N.Y. 1983) (applying the *Robinson* standard, but concluding that, although the

erative board stated that it rejected the plaintiff, who was African American, because he showed "animosity" during the interview and because it had been informed of a rumor about construction he planned to do that would damage another apartment.⁴⁸ The Second Circuit determined that the applicant was denied the apartment based on subjective factors.⁴⁹ The court remanded the case and concluded that unless the board members testified to an "adequate justification" for the rejection, the applicant would be entitled to injunctive relief.⁵⁰

Similarly, the court in *Irizarry v. 120 West 70th Owners Corp.*⁵¹ also concluded that the cooperative board's proffered reasons were pretextual, even though they were objective.⁵² The board claimed that it rejected an interracial couple, a Hispanic man, and a Caucasian woman, because it thought that only his

cooperative board's reasons for rejecting an Irish applicant—that she was "unresponsive" and "vague" during the interview—were subjective, they were not "subtle or synthetic"). In *Murphy*, the cooperative's by-laws provided that it would not unreasonably withhold consent to transfer shares. *See id.* at 1155. The court found that the subjective reasons given by the board were inadequate under this provision, and granted injunctive relief to the applicant. *See id.* at 1156; *see also Smolinsky v. 46 Rampasture Owners, Inc.*, 646 N.Y.S.2d 110 (App. Div. 1996) (affirming a verdict against a cooperative where the proprietary lease stated that the board could not unreasonably withhold consent); 2 ROHAN & RESKIN, *supra* note 1, § 7.02[2], at 7-11 (describing the New York rule that, if a cooperative's proprietary lease specifies that the board cannot "unreasonably" refuse to transfer or assign shares, the courts will "strictly scrutinize" the rejection).

⁴⁸ *Robinson*, 610 F.2d at 1035-36. The rumor was that the applicant wanted to have plumbing put in by placing a waste line through the floor of the apartment and along the ceiling of the apartment below. *See id.* at 1035.

⁴⁹ *See id.* at 1039.

⁵⁰ *Id.* at 1040. This case was before the Second Circuit on plaintiff's appeal from the district court's denial of a preliminary injunction. *See id.*

⁵¹ No. 86 CIV. 3503 (JFK), 1986 WL 8073 (S.D.N.Y. July 15, 1986).

⁵² *See id.* at *6. Usually, if a cooperative board's decision is seemingly based on an objective reason, the board will prevail. *See Maldonado & Rose, supra* note 1, at 1260 (explaining that "the honest assertion of objective factors is the surest defense for cooperatives"). Examples of objective factors include "(a) financial responsibility[,] (b) the 'identity' or 'business character' of the subtenant, including suitability for the particular building[,] (c) legality of the proposed use[, and] (d) nature of the occupancy." *Kruger v. Page Management Co.*, 432 N.Y.S.2d 295, 302 (Sup. Ct. 1980), *quoted in Murphy*, 579 F. Supp. at 1156.

For instance, in *Jiminez v. Southridge Cooperative, Section I, Inc.*, 626 F. Supp. 732 (E.D.N.Y. 1985), the cooperative board rejected a Hispanic man's application because he did not work for the same employer for at least a year and was not financially qualified. *See id.* at 734. The court determined that the cooperative board offered a "legitimate non-discriminatory reason for its action." *Id.* at 735. However, the court concluded that even though the plaintiff did not prove the proffered reason was pretextual, he was nonetheless entitled to a jury trial. *See id.* at 735-36.

name would be on the stock shares, and he did not have sufficient funds.⁶³ The court applied the *Robinson* standard, to find that the board's proffered reasons were "synthetic."⁶⁴

The court in *Broome* did not separate subjective and objective reasons, and thus failed to explain the significance of examining subjective reasons with greater scrutiny. Even though the plaintiffs in this case were able to recover, to prevent cooperative boards from disguising discrimination, it is imperative that courts recognize the importance of carefully reviewing proffered reasons. As another court noted, "clever men may easily conceal their motivations."⁶⁵ By simply stating that the given reasons had to be the "actual" ones, the *Broome* court did not provide sufficient guidelines for future determinations. Had the court properly adopted the *Robinson* standard, the proffered reasons of cooperative boards in later cases would be subject to the stricter standard of review⁶⁶ they deserve.

CONCLUSION

Cooperative boards have enjoyed broad discretion, making it quite difficult for applicants to successfully prove that their housing applications were rejected because of racial discrimination.⁶⁷ The decision in *Broome* is significant because it is "one of

⁶³ See *Irizarry*, 1986 WL 8073, at *3-*4. The board was aware of the male applicant's race because he had noted on his application that he belonged to a Hispanic society. *Id.* at *2.

⁶⁴ *Id.* at *5-*6. The court determined that the evidence showed the board had known that the couple planned to marry, that both names would be on the stock shares, and that the applicants were financially qualified. See *id.* at *3, *6.

⁶⁵ *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (holding, in a racial discrimination case, that local government is not immune to the provisions of the Fair Housing Act and that "[e]ffect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations"); see also *Robinson*, 610 F.2d at 1043 (recognizing that cooperatives are being more discreet in formulating their reasons behind denying applications).

⁶⁶ See 2 ROHAN & RESKIN, *supra* note 1, § 7.02[2], at 7-11.

⁶⁷ See *Maldonado & Rose*, *supra* note 1, at 1282 (noting that it is difficult to prove discrimination because such claims generally rely on circumstantial evidence). It has been observed that:

Critics of co-op boards have long maintained that decisions to accept or reject tenants are often arbitrary and at times based on factors like race. Although race-based rejection is illegal, it has been difficult to prove that such decisions occur since co-op boards have great powers under the law to reject tenants and do not have to explain why they turn someone down.

Benjamin Weiser, *A Co-op Must Pay \$640,000 for Denying Sublet to Black*, N.Y. TIMES, May 14, 1997, at A1.

the few such cases to succeed against a co-op, and it la[ys] bare what some critics of co-op boards say is a common practice."⁵⁸ The court, however, did more than just hold that the applicants established a prima facie showing of housing discrimination and successfully showed that the board's proffered reasons were pretextual. The jury verdict sustained by the court "is thought to be the largest verdict in a racial discrimination case against a Manhattan co-op and its board."⁵⁹

The standard of analysis courts should apply in deciding whether a cooperative board's reasons for rejecting an applicant are pretextual is the standard articulated in *Robinson v. 12 Lofts Realty, Inc.*⁶⁰ Housing discrimination claims are difficult to prove and are easily thwarted by cooperative boards as long as they offer a nondiscriminatory reason for the rejection. Thus, it is important for courts to apply a stricter standard of review than what has been previously used in analyzing a cooperative board's proffered reasons. To ensure that cooperative boards are not hiding behind fabricated subjective reasons to cover up race discrimination, the proffered reasons must be more closely examined than the court did in *Broome*. While awarding substantial money damages assists in compensating victims of housing discrimination, the predominant goal is to prevent the discrimination from occurring. Considerable amounts of punitive damages are one way to hinder future discriminatory acts, and the employment of a stricter standard of review of the proffered reasons for rejections is another.

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⁵⁸ Weiser, *supra* note 56, at A1.

⁵⁹ Alden, *supra* note 7, at 1.

⁶⁰ 610 F.2d 1032 (2d Cir. 1979).

* Candidate for J.D., 2000. This comment is dedicated with admiration and love to my parents and grandmother Maria. I attribute all of my accomplishments to their unconditional love and support.