

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34143
Y/kmb

_____AD3d_____

Argued - January 27, 2012

RUTH C. BALKIN, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2010-09461

DECISION & ORDER

Walter P. Carucci, respondent, v Myron Kaplan,
etc., et al., appellants.

(Index No. 34418/08)

Rosenberg Calica & Birney, LLP, Garden City, N.Y. (Ronald J. Rosenberg of counsel), for appellants.

Ellenoff Grossman & Schole, LLP, New York, N.Y. (Ted Poretz of counsel), for respondent.

In an action, inter alia, to recover damages for breach of fiduciary duty, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Emerson, J.), dated July 13, 2010, as granted the plaintiff's motion for summary judgment dismissing their counterclaim and denied that branch of their cross motion which was for summary judgment on the counterclaim.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the plaintiff's motion for summary judgment dismissing the defendants' counterclaim and substituting therefor a provision denying the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court properly determined that the doctrine of res judicata does not bar litigation of the validity of the plaintiff's resignation of his membership in the defendant North Fork Preserve, Inc. (hereinafter North Fork) (*see Employers' Fire Ins. Co. v Brookner*, 47 AD3d 754, 756; *Mosello v First Union Bank*, 258 AD2d 631, 632). The plaintiff asserts that he resigned his

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membership in North Fork in January 2005, pursuant to Article IV, § 2 of its by-laws and, thus, was not obligated to pay membership dues after that date. A plain reading of Article IV, § 2 supports the plaintiff's position, but that section should not be read in isolation; rather, the parties' agreement must be considered as a whole (*see Brad H. v City of New York*, 17 NY3d 180, 185-186; *Scotto v Georgoulis*, 89 AD3d 717). Article IV, § 4 obligates the owner of a dues-paying share, like the plaintiff, to pay membership dues. Read as a whole, the by-laws are ambiguous as to whether the owner of a dues-paying share may resign from membership pursuant to Article IV § 2 and, thus, remove the obligation to pay membership dues. This ambiguity was not resolved by the parol evidence submitted by the defendants (*see Anita Babikian, Inc. v TMA Realty, LLC*, 78 AD3d 1088, 1091). Under the circumstances of this case, while the Supreme Court properly denied that branch of the defendants' cross motion which was for summary judgment on their counterclaim, it should have also denied the plaintiff's motion for summary judgment dismissing the counterclaim.

BALKIN, J.P., DICKERSON, BELEN and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court