

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

	x	
BOARD OF MANAGERS OF THE PARK REGENT CONDOMINIUM,		Index Number <u>14404</u> 2006
Plaintiff,		Motion Date <u>February 3,</u> 2009
-against-		Motion Cal. Number <u>1</u>
PARK REGENT ASSOCIATES, a/k/a PARK REGENT UNIT OWNERS ASSOCIATION, DAVID DOO, JULIA KUO, DIMITRI LAFORTUNE, MARK MA, DONALD MAI, RICHARD PON, MAJE TSAO, DAPHNE WU and MAN KI YEUNG,		Motion Seq. No. <u>14</u>
Defendants.		

x

The following papers numbered 1 to 3 read on this motion by plaintiff Board of Managers of the Park Regent Condominium for, inter alia, an order permitting it to serve an amended complaint asserting a new cause of action seeking to recover attorney's fees.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3

Upon the foregoing papers it is ordered that the motion is disposed of as follows:

The Park Regent Condominium, a large commercial and residential complex, is located at 41-25 Kissena Boulevard, Flushing, New York. Two factions fought for control of the Board of Managers, the first largely comprised of the sponsor, the commercial unit owners, and the professional unit owners (in command of the plaintiff Board in this action), and the second comprised of the residential unit owners, allegedly represented by

the defendant unit owners. The Board of Managers sent notice to the unit owners of a meeting to be held on June 26, 2006 for the purpose of electing members to the Board, but because of a dispute concerning whether commercial, professional, and garage unit owners should be allowed to vote for six "at large" seats, the Board adjourned the June 26, 2006 annual meeting by sending another notice to unit owners. The defendants, a dissident group of unit owners unhappy with the postponement, sent their own notice of meeting for June 26, 2006 and prepared their own ballot and proxy forms. On June 26, 2006, the defendants purportedly held a meeting of unit owners at which they were purportedly elected to the Board of Managers. On June 28, 2006, the plaintiff Board, comprised of members elected before June 26, 2006, brought this action for, inter alia, a judgment declaring that the individual defendants are not members of the Board. The first, second, and third causes of action sought a judgment declaring, inter alia, that the purported election of a new Board on June 26, 2006 was null and void and the fourth cause of action sought a permanent injunction, inter alia, prohibiting the defendants from conducting business of the condominium. The defendants answered the complaint, but did not assert a counterclaim.

The plaintiff Board of Managers moved for partial summary judgment, and the defendants cross-moved for an order, inter alia, disqualifying the law firm of Schechter & Brucker, P.C. from representing any party to this action. By decision dated August 27, 2007 and order and judgment (one paper) dated October 17, 2007, this court granted the plaintiff's motion and declared that, inter alia, the June 26, 2006 election was not valid and that the defendants did not comprise a new board. The court also denied the cross motion for disqualification. By decision and order dated August 27, 2007 (one paper), this court also denied a motion by the defendants for an order permitting defendant David Doo to inspect the books and records of the condominium.

By decision and order (one paper) dated August 17, 2007 of the Honorable Valerie Brathwaite Nelson, a hybrid Article 78 proceeding and action for a declaratory judgment brought by petitioner David Doo, among others, challenging the results of the annual election of the directors and officers of the Park Regent Condominium held on October 4, 2006 was dismissed upon a finding that "the October 4, 2006 election was properly conducted pursuant to the Condominium's bylaws." (Doo v Board of Managers of the Park Regent Condominium, Sup Ct, Queens County, Index No. 28395/06.)

Defendant Doo took three unsuccessful appeals from the orders and judgments of the IAS courts: (1) Doo v Board of Managers of

Park Regent Condominium (58 AD3d 627); (2) Board of Managers of Park Regent Condominium v Park Regent Unit Owners Associates (___ AD3d ___, 871 NYS2d 373); (3) Board of Managers of Park Regent Condominium v Park Regent Unit Owners Associates (___ AD3d ___, 871 NYS2d 375). The Appellate Division has held that the condominium's "bylaws do not prevent the professional and commercial unit owners from voting their shares for the six positions on the board that are not designated by the sponsor or by the commercial and professional unit owners***." (Doo v Board of Managers of Park Regent Condominium, 58 AD3d 627.)

That branch of the motion which is for an order permitting the plaintiff board to serve an amended complaint asserting a new, eighth cause of action is granted. The plaintiff shall serve its amended complaint within 20 days after the service of a copy of this order with notice of entry. The defendants shall serve their amended answer within 20 days after the service of the amended complaint. The plaintiff proposes to add a new cause of action for the purpose of recovering attorney's fees and expenses. In determining whether to permit a party to amend a complaint to add a cause of action, the court must examine the merits of the proposed cause of action. (See, Morgan v Prospect Park Associates Holdings, LP, 251 AD2d 306; McKiernan v McKiernan, 207 AD2d 825.) "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 Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491; see, No. 1 Funding Center, Inc. v H & G Operating Corp., 48 AD3d 908.) The by-laws of a condominium amount to a contract between the unit owner and the condominium. (See, Schoninger v Yardarm Beach Homeowners Assn., Inc., 134 AD2d 1; Procopio v Fisher, 83 AD2d 757.) The by-laws of the Park Regent Condominium provide in relevant part: "Section 9.2 Abatement and Enjoinment. (A) If any unit owner shall violate or breach any of the provisions of the Condominium Documents [the Declaration, By-laws, and Rules and Regulations], on his part to be observed or performed, the Condominium Board shall have the right to enjoin, abate, or remedy the continuance or repetition of any such violation or breach by appropriate proceedings brought either at law or equity.***Section 9.4 Costs and Expenses. All sums of money expended, and all costs and expenses incurred by (i) the Condominium Board in connection with the abatement, enjoinment, removal or cure of any violation, breach, or default committed by a Unit Owner pursuant to***paragraph (A) of Section 9.2 hereof***shall be immediately payable by (a) in the event set forth in subparagraph (i) such Unit Owner to the Condominium Board***. All sums payable by a Unit Owner to the Condominium Board pursuant to the terms of this section 9.3 [sic: 9.4] shall, for all purposes

hereunder, constitute Common Charges payable by such Unit Owner." "A promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is so contrary to the well-understood rule that parties are responsible for their own attorney's fees, that a court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." (Hooper Assocs. Ltd. v AGS Computers, Inc., *supra*; *see*, Bonnie & Co. Fashions, Inc. v Bankers Trust Co., 281 AD2d 223.) In the case at bar, the unit owner clearly agreed in section 9.4 to reimburse the condominium for litigation expenses incurred by the latter in "enjoin[ing]" and "remov[ing]" a violation of the Declaration, By-laws, and Rules and Regulations. The court notes that the clause converting the sums due under section 9.4 into common charges "for all purposes" does not create an ambiguity concerning whether other enforcement mechanisms are available to the condominium. The phrase "for all purposes" merely means that the sums become common charges which can be treated the same as other common charges, including under the default provisions of section 6.4. Finally, the court also notes the defendants failed to adequately demonstrate that they will be prejudiced or surprised by an amendment of the complaint. (*See*, Edenwald Contr. Co. v City of New York, 60 NY2d 957; Holchendler v We Transport, Inc., 292 AD2d 568; Dal Youn Chung v Farberov, 285 AD2d 524; Aetna Cas. & Sur. Co. v Hambly, 51 AD2d 790 [attorney's fees].) Section 9.4 of the by-laws provided notice to the defendants from even before the inception of the instant lawsuit that they were at risk of paying the legal expenses of the condominium caused by their actions.

That branch of the motion which seeks leave to reargue and renew the plaintiff's motion for summary judgment on its fifth cause of action is denied. (*See*, N.A.S. Partnership v Kligerman, 271 AD2d 922; Schneider v Solowey, 141 AD2d 813.)

That branch of the motion which seeks, inter alia, an order pursuant to Judiciary Law §§ 478 and 484 prohibiting defendant David Doo from representing other pro se defendants in this action is granted. Judiciary Law § 478, "Practicing or appearing as attorney-at-law without being admitted and registered," provides in relevant part: "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state***without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath." (*See*, In re Peluso, 43 AD3d 155.) Judiciary Law § 484, "None but attorneys to practice in the state," provides in relevant part: "No

natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate***unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state***." (See, In re Peluso, supra.) This court notes that in another action brought in the New York State Supreme Court, County of Queens (Chang v Chen, Index No. 5268/08), the Honorable Howard G. Lane previously advised David Doo about the unlicensed practice of law. (See orders dated July 28, 2008 and October 1, 2008.) "New York law prohibits the practice of law in this state on behalf of anyone other than himself or herself by a person who is not an admitted member of the bar, regardless of the authority purportedly conferred by execution of a power of attorney***." (People ex rel. Field on Behalf of Field v Cronshaw, 138 AD2d 765; see, In re Welsh, 51 AD3d 1351.)

The remaining branches of the motion are denied.

Dated: March 13, 2009

J.S.C.