SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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390 RIVERSIDE OWNERS CORP.,
Plaintiff,

- v -

ARTHUR STOUT and SUSAN STOUT,
Defendants.

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INDEX NO. 654980/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for **SUMMARY JUDGMENT**.

The relevant facts in this case are set forth in detail in the court's decision and order dated March 31, 2023 (NYSCEF Doc. No. 24, *decision and order*). For the sake of brevity, the salient facts are as follows. Defendants — tenants of apartment 5E within the building owned by plaintiff and located at 390 Riverside Drive, New York, New York ("Building") — have refused to allow plaintiff access to their apartment to repair a purported leak in the pipe underneath the floor and behind the wall of tenants' master bathroom. Plaintiff claims that the ceiling of the apartment directly beneath the subject apartment, apartment 4E, has been damaged by a water leak emanating from apartment 5E.

Plaintiff now moves, pursuant to CPLR 3212, for an order granting summary judgment in plaintiff's favor on its claims and dismissing the affirmative defenses and counterclaims asserted in defendants' answer. Plaintiff also seeks an order directing defendants to promptly provide plaintiff access to apartment 5E to make repairs, including beneath-the-floor and through-the-wall repairs to the building plumbing system pursuant to the proprietary lease, at plaintiff's expense. Additionally, plaintiff seeks an order awarding plaintiff reasonable costs and attorneys' fees pursuant to paragraph 28 of the proprietary lease (NYSCEF Doc. No. 35, *notice of motion*). Plaintiff argues that as a threshold matter, paragraphs 2, 18(a), and 25 of the proprietary lease are unambiguous in that they expressly require the Corporation to maintain and repair the Building's pipe system, and likewise require tenants to allow the Corporation access into their apartment to effectuate such repairs. Furthermore, plaintiff articulates that it relied on the professional opinion of licensed master plumber, Agim Kelmendi ("Kelmendi"), who tested the water leak and advised the Corporation that there was a leaking pipe in tenants' master bathroom that could be repaired only by accessing tenants' apartment (NYSCEF Doc. No. 46, *plaintiff's memo of law*, pg 11). Plaintiff submits Kelmendi's affidavit wherein he avers that in 2018, he observed evidence of an active water leak into the ceiling and walls of the living room and bathroom of apartment 4E. He claims that as "the water faucet for the sink in the apartment 5E master bathroom was open and the water was running down the sink drain, water appeared in and dripped from the damaged ceiling area of Apartment 4E". He asserts that based on this test, he

concluded and advised plaintiff that the water found on apartment 4E's ceiling was as a result of a cracked or leaking waste line pipe servicing the apartment 5E master bathroom. As a temporary measure to avoid further water damage, Kelmendi posits that he recommended to defendants not to use their master bathroom sink until the plumbing repair work could be completed. He also avers that he repeated this test in 2020 and witnessed the same results (NYSCEF Doc. No. 41, *Kelmendi affidavit*). According to Kelmendi, the plumbing of apartment 5E's master bathroom is approximately 100 years old, and the leaking pipe should be replaced as soon as possible to avoid additional leakage, additional damage to apartment 4E or the Building, and potential mold growth.

Plaintiff sets forth that the business judgment rule allows it to rely on Kelmendi's professional opinions pursuant to Business Corporation Law § 717(a)(2) which provides that "[i]n performing his duties, a director shall be entitled to rely on information, opinions, reports or statements including financial statements or other financial data, in each case prepared or presented by . . . persons as to matters which the director believes to be within such person's professional or expert competence." According to plaintiff, it is well-settled that board decisions concerning repairs are presumptively valid under the business judgment rule absent a showing of prejudice or bad faith. Plaintiff seeks an injunction enjoining and restraining tenants from prohibiting the Corporation from accessing apartment 5E to repair the defective pipe (first cause of action), and a declaratory judgment declaring that, under the terms of the proprietary lease, defendants are required to provide access to their apartment for the necessary repairs to the leaking pipe (second cause of action). It also urges the court to make a finding that defendants have breached paragraph 25 of the proprietary lease by refusing to provide access to their apartment for repairs (third cause of action), in addition to an entitlement of attorneys' fees and costs pursuant to paragraph 28 of the lease (fourth cause of action). Lastly, plaintiff urges that defendants' affirmative defenses and counterclaims be dismissed as being either not supported by documentary evidence or barred by the business judgment rule.

Defendants oppose plaintiff's motion for summary judgment and cross-move, pursuant to CPLR 3124 and 3126 for an order directing plaintiff to respond to previously served discovery demands and that, should plaintiff fail to timely respond to the discovery demands, the complaint be stricken. They also seek an order directing plaintiff, subpoenaed non-parties Nancy Goldfarb and Mark Bulger, the owners of apartment 4E, and Juan Marte to appear for noticed depositions (NYSCEF Doc. No. 53, *notice of cross-motion to compel discovery*). Defendants argue that plaintiff's application of the business judgment rule is misguided because it does not apply where, as here, there is a dispute about whether the repairs are required. Furthermore, defendants dispute the version of the facts averred by Kelmendi, arguing that when Kelmendi visited defendants' apartment on February 3, 2020, he neither turned on the water in the 5E master bathroom nor performed any water or moisture testing therein (NYSCEF Doc. No. 80, *opposition, pg 3*). Defendants submit their own affidavits wherein they dispute Kelmendi's claim that he performed a water/moisture test when he visited defendants' apartment in February 2020 (NYSCEF Doc. Nos. 54; 55, *Stout affidavits*). Defendants assert that since plaintiff has not definitively identified the source of the alleged leak, it cannot rely on the business judgment rule to engage in construction repairs that it has not shown to be necessary. They further maintain that plaintiff's motion lacks an affidavit from the owner of apartment 4E, photographs of the purported leak or other indicia that plaintiff has made real efforts to identify the source of the

leak. Defendants claim that they have requested a report or evidentiary basis for plaintiff's insistence that the leak is caused by plumbing pipe running between apartments 5E and 4E, but plaintiff has not provided any such information in response. In support of their position, defendants also submit the affidavit of Don Erwin, a registered architect licensed in the State of New York, who avers that, contrary to Kelmendi's assertion, there is no evidence that the pipping associated with the tub in the master bathroom has contributed to the alleged leak (NYSCEF Doc. No. 57, *Erwin affidavit in opposition*). Lastly, defendants assert that should they prevail on the instant motion, the court should direct a hearing on their legal fees.

In reply, plaintiff argues that since the lease gives the Corporation the right to access defendants' apartment to make repairs, it is not required to prove to defendants' personal satisfaction, that the proposed repairs are necessary. According to plaintiff, the business judgment rule protects the cooperative board's decisions as to the means and methods of maintaining and repairing its building, in the absence of self-dealing, fraud, or breach of fiduciary duty. Lastly, plaintiff sets forth that outstanding discovery, as claimed by defendants, cannot yield any evidence that would raise an issue of fact since the Corporation has an undisputed right of access as set forth in the lease, and the Board is exercising its business judgment based on the advice of its plumber (NYSCEF Doc. No. 84, *reply*).

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

The business judgment rule, applicable to residential cooperative corporations, and relied upon by plaintiff, "prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient" (*Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]; *Parker v Marglin*, 56 AD3d 374, 374 [1st Dept2008]).

Despite courts are general reluctance towards granting mandatory preliminary injunctions, "such relief will be granted only where the right thereto is clearly established, cases do arise where a provisional remedy of this nature is appropriate (*Second on Second Café v Hing Sing Trading*, 66 AD3d 255, 265 [1st Dept 2009]). "[A] mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the *status quo* pending trial of the action." (*Jones v Park Front Apts., LLC*, 73 AD3d 612, 612 [1st Dept 2010] [internal quotation marks and citations omitted]; see *Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 617 [1st Dept 2018]). Courts

have analyzed motions seeking mandatory injunctive relief under a preliminary injunction standard (see *East 54th Operating LLC v Brevard Owners, Inc.*, 223 AD3d 407, 408 [1st Dept 2024]; *St. Paul Fire & Marine Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 349 [1st Dept 2003]). Moreover, "[m]andatory injunctions have been issued where the structural integrity of a building has been compromised" (*City of New York v Goldman*, 2024 NY Slip Op 30492[U], **14 [Sup Ct, NY County 2024]).

According to CPLR 3212(f): "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

CPLR 3124 holds that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." "CPLR 3126, in turn, governs discovery penalties and applies where a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010]).

Here, plaintiff has met its *prima facie* entitlement to summary judgment by submitting an affidavit from the plumber who conducted the test in defendants' apartment. There is no dispute that there is a leak affecting apartment 4E, and pursuant to the business judgment rule, plaintiff may rely on the plumber's advice to undertake remedial construction work. Although the burden shifts, defendants fail to raise a triable issue of fact precluding summary judgment. Defendants have not demonstrated that plaintiff failed to make a good faith effort in identifying the source of the leak before seeking permission to enter tenants' apartment to make the suggested repairs (see *Board of Mgrs. of the Apthorp Condominium v Apthorp Garage LLC*, 187 AD3d 632, 633 [1st Dept 2020]). Moreover, defendants fail to suggest that the Cooperative engaged in fraud or self-dealing that would render the business judgment rule inapplicable to the decision to initiate repairs (see *Domingo v C. True Bldg. Corp.*, 246 AD2d 337, 337 [1st Dept 1998]). Therefore, defendants are in breach of the lease by denying plaintiff access to their apartment (third cause of action). Given the above, the court grants that branch of plaintiff's motion seeking a judgment declaring that under the terms of the proprietary lease, defendants are required to provide the Corporation with access to their apartment in order to perform necessary repairs to the leaking pipe (second cause of action). Pursuant to paragraph 25 of the proprietary lease, plaintiff and its agents are authorized to visit, examine, and facilitate repairs in any part of the building.

Turning next to that branch of plaintiff's motion seeking an injunctive relief (first cause of action), the court finds that plaintiff has established its entitlement to such relief. Plaintiff has satisfied the higher burden required for a mandatory injunction and has shown by clear and convincing evidence that it has met all of the elements required to secure same. The Corporation has demonstrated a likelihood of success on the merits. It is well-settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive (see *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]; *Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4, 5 [1st Dept 2003].) Here, plaintiff has submitted a copy of the proprietary lease which, at paragraph 25, grants the

Corporation and its agents access to enter any apartment to identify and effectuate repairs. Defendants cannot deny plaintiff access to their apartment merely because they disagree about the cause of the identified leak and the Corporation's repair plans.

The proponent of a preliminary injunction must show that there is irreparable injury if the requested relief is not granted. Irreparable injury must be any injury or loss incurred that cannot be compensated with money damages (see *Non-Emergency Transporters of N.Y., Inc. v Hammons*, 249 AD2d 124, 127 [1st Dept 1998]). Plaintiff has convincingly argued that defendants' continual denial of access to their apartment for the identified repairs compromises the aged pipes in the building and threatens the health of the tenants residing in apartment 4E.

Lastly, "[t]he balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or denial of the requested relief" (*ASRR Suzer*, 140 AD3d at 432; *Sau Thi Ma v Xaun T. Lien*, 198 AD2d 186, 186-187 [1st Dept 1993]). Here, the court finds that the balance of the equities tips in favor of the moving party. With no other practical method of gaining access to the pipe underneath the floor and behind the wall of defendants' master bathroom, the potential for great harm to apartment 4E tenants, outweighs the inconvenience defendants will experience as a result of the repairs. Therefore, defendants are restrained from prohibiting plaintiff access to their apartment to undertake the identified repairs.

Plaintiff also seeks dismissal of defendants' affirmative defenses and counterclaims, arguing they are all barred by either the proprietary lease or the business judgment rule. This court agrees that defendants' affirmative defenses and counterclaims are barred by either the proprietary lease and/or the business judgment rule. Plaintiff asserts numerous affirmative defenses and four counterclaims, namely, breach of the warranty of habitability (first counterclaim); breach of the proprietary lease (second counterclaim); negligence (third counterclaim); and private nuisance (fourth counterclaim). Insofar as defendants have not addressed that branch of plaintiff's motion seeking dismissal of those affirmative defenses, they are deemed abandoned (see *Chelsea 8th Ave. LLC v Chelseamilk LLC*, 220 AD3d 565, 566 [1st Dept 2023]; *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 538 [1st Dept 2023]). The counterclaims are likewise dismissed as defendants do not discuss same in their opposition papers (see *Jamie Ng v NYU Langone Med. Ctr.*, 157 AD3d 549, 550 [1st Dept 2018]; *Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 [1st Dept 2012]; *Town of N. Elba v Grimditch*, 131 AD3d 150, 159 n 4 [3d Dept 2015] ["To the extent that defendants have not briefed any issues with respect to their remaining affirmative defenses and counterclaims, we deem any arguments related thereto to be abandoned"]). Based on the foregoing, defendants' affirmative defenses and counterclaims are dismissed.

Turning next to that branch of the motion seeking attorneys' fees and expenses (fourth cause of action), "[u]nder 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" (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022], quoting *Hooper Assoc. v AGS Computers.*, 74 NY2d 487, 491 [1989]). Here, paragraph 28 of the proprietary lease provides recovery of reasonable attorney fees. Hence, that branch of the motion seeking attorneys' fees and expenses is granted and shall be referred to a special referee to hear and determine.

Given the findings above, defendants' cross-motion is denied as moot. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants ARTHUR STOUT and SUSAN STOUT is granted as to the first, second, and third causes of action, and as to the fourth cause of action, with attorneys' fees and costs to be determined at a hearing; and it is further

ADJUDGED AND DECLARED that defendants ARTHUR STOUT and SUSAN STOUT shall promptly provide plaintiff with access to apartment 5E to make repairs, including beneath-the-floor and through-the-wall repairs to the building plumbing system, at plaintiff's expense; and it is further

ORDERED that the affirmative defenses and counterclaims asserted in the answer of defendants ARTHUR STOUT and SUSAN STOUT are dismissed; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that that branch of plaintiff's motion seeking attorney fees shall be referred to a special referee to hear and determine; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

February 29, 2024

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE