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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. PART 54
Justice

Olympic Tower Condo

INDEX NO. 121411-02

MOTION DATE 8/14/03

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-3
Replying Affidavits	4-5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order

SCANNED NOV 24 2003

ON/CASE IS RESPECTFULLY REFERRED TO
ICE

ed: 11/18/03

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

heck one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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OLYMPIC TOWER CONDOMINIUM,
By Its Board of Managers,

Plaintiffs,

Index No.:121411/02

-against-

DECISION and ORDER

ALEX COCOZIELLO, SUSAN COCOZIELLO, FOWNES BROTHERS & CO., INC., THOMAS GLUCKMAN and ROBY GLUCKMAN,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action brought by the Board of Managers of Olympic Tower Condominium at 641 Fifth Avenue in New York City ("Board") against Alex and Susan Cocoziello, the owners of unit 24E therein ("the Cocoziellos"), and their lessees, Thomas and Roby Gluckman ("the Gluckmans").' The Cocoziellos leased their Unit to the Gluckmans for **a** one year term from September 1", 2001 to August 31st, 2002. Citing problems with the Gluckmans' three dogs, the Board notified the Cocoziellos in April 2002 that it would not approve any extension of the Gluckmans' lease. Without the Board's approval, the Gluckmans remained in possession of the

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[1]Defendant Fownes Brothers & Co., Inc. ("Fownes"), a corporation of which defendant Thomas Gluckman is the president, is the Lessee of record, and apparently has paid the $10,000-per-month rent for the Gluckmans to reside in the within Unit throughout the course of the instant leasehold. Fownes and the Gluckmans are represented by the same counsel, and references herein to "the Gluckmans" and "the Gluckman defendants" are intended to include Fownes.

unit after their lease expired. The Board brought this action for a declaratory judgment declaring invalid the Cocoziellos' extension of the Gluckmans' lease, for a judgment of ejectment, for a preliminary and permanent injunction prohibiting the Gluckmans from harboring dogs in the Unit, and for damages, including legal expenses, associated with an alleged nuisance caused by the dogs. On or around March 26,2003, the Gluckmans moved out of the Unit, taking their dogs with them. Plaintiff now moves for summary judgment on its fourth cause of action against the Cocoziello defendants (only), specifically demanding that the Cocoziellos reimburse it for the attorney's fees and litigation costs generated by the defendants' alleged non-conipliance with the condominium rules.

I. FACTUAL AND PROCEDURAL BACKGROUND:

A. Facts:

The following facts are undisputed:

Under Article VIII, section 1(b) of the Olympic Tower Condominium by-laws,

> No Residential Unit Owner other than the Sponsor or its designee may sell or lease his Residential Unit except by complying with the following provisions:
>
> Any Residential Unit Owner who receives a bona fide offer to ... (b) lease his Residential Unit ... which he intends to accept shall give notice by certified or registered mail to the Board of Managers .... The giving of such notice to the Board of Managers shall constitute an offer by such Unit Owner to ...lease his Residential Unit to the Board of Managers ...upon the same terms and conditions as contained in such [lease].... Not later than twenty (20) days after receipt of such notice ...the Board of Managers may elect, by sending written notice to such Offeree Unit Owner, before the expiration of said twenty (20) day period, by certified or registered mail, to ...lease such Residential Unit ...on behalf of all Unit Owners upon the same terms and conditions as contained in the ... notice from the Offeree Unit Owner.

Article VIII, Section 1 of the By-laws further provides that "any lease ... shall provide that it may not be modified, amended, extended or assigned without the prior consent in writing of the Board of Managers." This condition is incorporated into Paragraphs H and I in the First Rider, and paragraphs 4 to 6 in the Second Rider to the Gluckmans' lease.

Finally, Article VIII, Section 1 of the By-laws additionally provides:

> Any purported sale or lease of a Residential Unit in violation of this Section shall be voidable at the election of the Board of Managers and if the Board of Manager shall so elect, the Unit Owner shall be deemed to have authorized and empowered the Board of Managers to institute legal proceedings to evict the purported tenant (in the case of an unauthorized leasing), in the name of said Unit Owner as the purported landlord. Said Unit Owner shall reimburse the Board of Managers for all expenses (including attorneys' fees and disbursements) incurred in connection with such proceedings.

In addition, the building imposed certain restrictions on pet ownership. For example, Paragraph 12 of the Condominium's Rules and Regulations permitted pet ownership only with the express written consent of the Board. Moreover, on July 31, 2001, prior to Lessee's occupancy, the Board unanimously passed a resolution which provided that "residents of Olympic Tower shall not be permitted to ..have a dog living in a unit, unless the dog was living in the unit prior to the enactment of this Resolution." On their initial rental application form dated August 23rd, 2001, the Gluckkmans left blank the space for a response to Question #12, which asked "Does Tenant wish to maintain any pets, and if so, please specify."[2]

On September 17, 2001, the Board sent a letter to Ms. Sandy Neuringer, the Cocoziellos'

'The Gluckmans claim that they subsequently submitted a "corrected" application in which they disclosed that they had "[a] dog." See Exhibit E to the Gluckman defendants' cross-motion.

real estate broker, dated September 17,2001, referencing unit 24E and stating "[p]lease be advised that the Board of Managers of the Olympic Tower Condominium have waived their Right of First Refusal on the lease of the above captioned unit." Some time in September, the Gluckmans and their three large dogs moved into unit 24E.

In a letter dated April 1st, 2002, the Condominium complained to the Cocoziellos that the Gluckmans had not disclosed that they would be moving into the building with three dogs, and that other residents had been complaining of the animals, particularly of their being washed in a public hallway. In a subsequent letter dated April 26th, 2002, the Board notified the Cocoziellos that it would not approve any renewal of the one-year lease agreement between them and their lessees due to the Gluckmans' "serious misrepresentation" on their lease application "regarding pets" (i.e., in leaving the line blank, which had led the Board to believe that the Gluckmans had no pets). According to the allegations in the Complaint, the other residents in the building had complained that the Gluclunans permitted their dogs "to walk in the common areas unleashed, thereby impeding residents from walking freely in and around the Premises, transported the dogs in the passenger elevators, permitted the dogs to defecate in and otherwise soil the common areas and on one occasion the dogs were washed in one of the common hallways." Notwithstanding this communication from the Board, the Cocoziellos sent the Board two letters – one dated July 22, 2002 and the other undated – infonning the Board of their intention to extend the Gluckmans' lease for another year.[3] There is no indication that these missives were sent by

[3]The July 22nd letter accuses the Board of unfairly harassing the Gluckmans, who are alleged to be following the building's rules regarding dogs more carefully than other tenants. Alex Cocoziello expressly concludes: "we welcome [the Gluckmans] to remain in our apartment for another year." The second letter accompanied a recently executed lease extension for the Gluclunans' occupancy of the Cocoziellos' Unit from September 2002 to August 2003.

registered or certified mail, and at least one of them was mis-addressed. The Board at length received them, however, and in response wrote to the Cocoziellos on August 13th, 2002 that so long as the Gluckmans continued to house their dogs in the Unit, it would not approve any lease renewal. Notwithstanding the Board's position, the Cocoziellos entered into a Renewal Lease with the Gluckmans on August 13, 2002. See Exhibit H to plaintiffs motion papers; Exhibits A-F to the Cocoziello defendants' Opposition papers.

Plaintiff commenced the within action on October 1, 2002.

B. Motions

(1) In a prior application, plaintiff Board moved by order to show cause for a preliminary injunction prohibiting the Gluckmans from continuing to house their dogs in the unit, and the Gluckmans cross-moved to dismiss plaintiffs complaint. By Order dated November 22,2002, this Court granted plaintiffs' application for a preliminary injunction, and denied defendants' cross-motion in its entirety. In a Decision and Order dated June 19, 2003, the Appellate Division, First Department reversed so much of this Court's order as had granted the preliminary injunction, ruling that there was "no evidence that the condominium [would] be irreparably harmed by allowing the tenants' dogs to remain in their apartment pending the resolution of the action." Olympic Tower Condominium v. Cocoziello, 306 A.D.2d 159 (1st Dept. 2003).

(2) In this application, plaintiff moves for summary judgment on its fourth cause of action, for legal expenses and attorney's fees, against defendants Alex and Susan Cocoziello. The Cocoziello defendants oppose the motion, arguing that (i) there are issues of fact requiring a trial (e.g., as to whether the Board had had advance notice that the Gluclunans had three large dogs), (ii) plaintiffs motion is insufficient on its face because it is unaccompanied by an affidavit

by a person with personal knowledge of the facts, and (iii) the plaintiffs motion was made in bad faith, after the Cocoziellos had made a "good faith settlement offer." The Gluckmans and Fownes have also opposed the motion, and have in addition cross-moved to dismiss the complaint in its entirety in that (i) the first three causes of action were rendered moot when the Gluclunans and their dogs moved out of the Unit, and (ii) the fourth cause of action, for legal fees, should be denied because plaintiff "did not prevail on its claim for an injunction" on appeal, as well as because there has otherwise been no determination on the merits of the Board's allegation that the Gluckmans ever violated the Condominium's rules.

II. CONCLUSIONS OF LAW:

It is not disputed that several months before the Gluckmans' lease was due to expire, the Board notified the Cocoziellos that it would not approve any lease extensions. Notwithstanding this advance disapproval, the Cocoziellos entered into a renewal lease with the Fownes/ Gluclunan defendants without obtaining the prior written approval of the Board. The Cocoziellos are therefore bound under Article VIII, Section 1 of the By-laws of the Condominium to "reimburse the Board of Managers for all expenses (including attorneys' fees and disbursements) incurred in connection with" the proceedings undertaken to evict the Gluckmans.

Contrary to the Cocoziellos' opposing arguments, there are no issues of fact regarding the renewal lease requiring a trial. The Cocoziellos' other "issues of fact" – e.g., as to whether the Board had learned prior to the Gluckmans' first lease that they had three large dogs – are irrelevant to the factors relied upon by plaintiff on this application. Moreover, plaintiffs motion is adequately presented in an attorney's affirmation, without an "affidavit of merit" from a person

with first-hand knowledge of the facts, as it is based upon a verified complaint and sworn deposition testimony. Finally, plaintiffs motion is not made in bad faith, where it is claiming that, before the making of the instant motion, it had expended some $52,000 on legal proceedings to eject the Gluckmans, while the Cocoziellos have so far offered no more than $6,700 in settlement of plaintiffs legal fees.

Insofar as the Gluckmans oppose plaintiffs motion and seek, in their cross-motion, to dismiss plaintiffs fourth cause of action, they lack standing to do so. In its fourth cause of action, the Board seeks to hold the Cocoziellos (only) responsible for the costs it has incurred in ejecting the Gluckmans, under Article VIII of the By-laws. In any event, the Gluckmans' argument that plaintiff failed to "prevail" on appeal is incorrect, since only the preliminary injunction was vacated by the Appellate Division, while the action itself was allowed to go forward, notwithstanding defendants' motion to dismiss. **As** for a determination on the merits, as indicated above, there is no question of fact regarding the Cocoziellos' failure to follow the lease renewal procedures set out in the By-laws, and so no question as to the applicability of the legal-fee reimbursement provision in Article VIII.

Insofar as the Gluckmans' cross-motion seeks to dismiss plaintiffs first through third causes of action, plaintiff has articulated no objection to the application, having itself admitted that these claims are now moot.

Finally, while the Court agrees with plaintiff that the Cocoziellos' affirmative defenses provide no basis upon which to deny the Board's application for summary judgment, the Court finds that the Board has no standing to seek dismissal of the Cocoziellos' cross-claim against Fownes for, e.g., rent, costs and attorney's fees. Accordingly it is

ORDERED that that branch of plaintiffs motion which seeks summary judgment on its fourth cause of action against the Cocoziellos is granted; and it is further

ORDERED that that branch of the plaintiffs motion which seeks to dismiss the Cocoziellos' cross-claim against defendant Fownes is denied; and it is further

ORDERED that that branch of the Gluckmans' cross-motion which seeks to dismiss plaintiffs first through third causes of action is granted, on consent; and it is further

ORDERED that that branch of the Gluckmans' cross-motion which seeks to dismiss plaintiffs fourth cause of action is denied; and it is further

ORDERED that counsel shall serve and file a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) for the purpose of arranging a calendar date for hearing and assignment of the sums due in litigation costs and lawyers' fees to plaintiff from the Cocoziellos by a Special Referee for determination; and it is further

ORDERED that the Cocoziellos' cross-claim against defendant Fownes is severed and continued.

The foregoing constitutes the Decision and Order of the Court.

Date: November 18, 2003
New York, New York

SHIRLEY WERNER KORNREICH