[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Brasseur, Michel etal.

- v -

Joe Speranza etal.

INDEX NO. 102949/04

MOTION DATE 9/29/06

MOTION SEQ. NO. 005

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 3212(e) for partial summary judgment on their first cause of action for an order declaring and ordering that the Residential Board of Managers (the "Board"): (1) repair the common elements of the Level Club Condominium in accordance with the recommendations of plaintiffs' expert, (2) remediate the mold affecting the subject apartment, (3) pay damages for the cost to repair the subject penthouse interior which has been damaged by moisture and mold, and (4) repair, replace or modify the common elements, which are causing unhealthy levels of noise to penetrate the penthouse, is granted solely to the extent that the Board shall install the necessary equipment in order to comply with NYC Building Code 27-770(b)(10), NYC Building Code 27-770(b)(4), and NYC Building Code 27-770(b)(4) by January 31, 2007; and it is further

Dated: ____

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

ORDERED that plaintiffs' motion pursuant to CPLR 3212(e) for partial summary judgment on their second cause of action for monetary damages equal to the diminution of the fair market value of the penthouse for temporary damage and permanent diminution of fair market value of the subject apartment, is denied; and it is further

ORDERED that plaintiffs' motion pursuant to CPLR 3211 and 3212(e) for dismissal of defendants' counterclaims for failure to state a claim; and it is further

ORDERED that plaintiffs' motion pursuant to CPLR 3025(b) for leave to amend the complaint to add a cause of action for private nuisance and punitive damages is denied; and it is further

ORDERED that the cross-motion by the Board to dismiss the fifth and sixth causes of action is granted; and it is further

ORDERED that plaintiff file the note of issue by October 4, 2006 and that the parties report to Part 40 for trial on October 30, 2006, 9:30 a.m. There shall be no adjournments of the trial date.

This constitutes the decision and order of the Court.

Dated 9/29/06 ENTER: J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

MICHEL BRASSEUR and REBECCA BRASSEUR, individually and in the name and for the benefit of the RESIDENTIAL UNIT OWNERS OF THE LEVEL CLUB CONDOMINIUM,

Index No. 102949/04

Plaintiffs,

-against-

DECISION/ORDER

JOE SPERANZA, DENNIS RUSSO, ANTHONY MICOCCI, FIDELE VERO and HANS FETSCHERIN, individuals constituting the de facto RESIDENTIAL BOARD OF MANAGERS OF THE LEVEL CLUB CONDOMINIUM, the RESIDENTIAL BOARD OF MANAGERS OF THE LEVEL CLUB CONDOMINIUM and ORSID REALTY CORP.,

Defendants.

----------x

CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Michel Brasseur and Rebecca Brasseur ("plaintiffs") move pursuant to CPLR 3212(e) for partial summary judgment on their first cause of action for an order declaring and ordering that the Residential Board of Managers (the "Board"): (1) repair the common elements of the Level Club Condominium in accordance with the recommendations of plaintiffs' expert, (2) remediate the mold affecting the subject apartment, (3) pay damages for the cost to repair the subject penthouse interior which has been damaged by moisture and mold, and (4) repair, replace or modify the common elements, which are causing unhealthy levels of noise to penetrate the penthouse. Plaintiffs also seek summary judgment on their second cause of action for monetary damages equal to the diminution of the fair market value of the penthouse for temporary damage and permanent diminution of fair market value of the subject apartment.

Plaintiffs also move pursuant to CPLR 3211 and 3212(e) for dismissal of defendants' counterclaims for failure to state a claim and pursuant to CPLR 3025(b) for leave to amend the complaint to add a cause of action for private nuisance and punitive damages.

In response, the Board cross moves to dismiss the plaintiffs' fifth cause of action[1] seeking to hold the Board personally liable for plaintiffs' personal injuries resulting from the mold condition, and sixth causes of action for self-dealing and waste of corporate assets.[2]

Factual Background

Plaintiffs reside in the penthouse apartment unit (the "penthouse") of the Level Club Condominium, 253 West 73rd Street, New York, New York 10023 (the "Condominium"), which was formerly owned by their friend, Jacques deRoquancourt. Plaintiffs acquired the penthouse in 1997 at an auction, and commenced occupancy in 1998.

Pursuant to the Declaration and By-Laws recorded with the Declaration (the "By-Laws"), the residential areas of the Condominium have, and continue to be operated by a Residential Board of Managers (the "Residential Board of Managers"). The Board, together with a representative of the Commercial Unit Owner, constitute the Condominium's Board of Managers, making decisions that affect all owners of apartments in the Condominium (the "Unit Owners"), including the owner of the Commercial Unit. The five named individual defendants are members of the Condominium's seven member Residential Board of Managers.

Plaintiffs' penthouse is on the uppermost floor of the Condominium and has exposure on

---

[1] Plaintiffs do not oppose dismissal of their fifth cause of action.

[2] In their sixth cause of action, plaintiffs allege, *inter alia*, that the Board breached its fiduciary duty by paying the superintendent and handyman over $340,000 in addition to their salaries for work characterized as "extra," permitted the superintendent and handyman to operate an illegal workshop in the basement of the building without payment to the Condominium.

four sides. The penthouse is directly beneath a roof (the "penthouse roof") which houses a condenser for the Condominium's air conditioning system. The penthouse is also adjacent to a mechanical room for the Condominium's elevators. A portion of the Condominium's facade envelopes the penthouse. According to the Declaration, the penthouse roof, the condenser, the mechanical room and the Condominium's facade are common elements which the Residential Board of Managers is required to maintain.

After their purchase of the penthouse, plaintiffs retained architects to complete renovations intially started by deRoquancourt. In order to complete the renovations, plaintiffs executed an alteration agreement (the "Alteration Agreement") with the Condominium, dated October 3, 1997. Paragraph 2 of the Alteration Agreement provides that plaintiffs "assume all responsibility for the weather-tightness of any installation affecting the exterior walls, windows and roofs and the water proofing of any portion of the building's structure directly or indirectly affected by the Alterations; . . . ." The Alteration Agreement also contained an indemnification and hold harmless provision in favor of the Board. Plaintiffs commenced renovations in November 1997.

Thereafter, plaintiffs began experiencing water leakage, mold, and noise problems, which the Board made attempts to rectify.

In February 2004, plaintiffs commenced this action alleging, *inter alia*, that that the Board breached its fiduciary duty to the plaintiffs by failing to address various leakage, mold, and noise problems in the penthouse. In plaintiffs' first cause of action, they seek a declaratory judgment and order compelling the Board to repair the common elements, remediate the mold condition, repair the interior walls and ceilings of the penthouse and abate the levels of noise. Plaintiffs'

second cause of action seeks monetary damages equal to the diminution of the fair market value of the penthouse for temporary damage and permanent diminution of fair market value of the subject apartment.

In response, the Board asserted two counterclaims: (1) due to the contractual obligations assumed by plaintiffs in the Alteration Agreement, the Board is entitled to a declaration holding that plaintiffs are obligated to pay for any costs generated as a result of water infiltrating into the penthouse and any other part of the Condominium affected by the Alteration; and (2) recovery of sums expended by the Condominium in connection with its maintenance and repair of those portions of the common elements which were affected by the Alteration Agreement.

Motion

As to the water damage issue, plaintiffs argue that discovery demonstrates that leaks into the penthouse have occurred continuously since the plaintiffs first occupied the penthouse; that the Board failed to take meaningful steps to abate the leaks; that until April 2006, the Board refused to take ameliorative action following the commencement of this litigation and has declined to even review plaintiffs' expert reports. Plaintiffs also contend that the Board's counterclaims are based on an uncertain theory, which in any event, accounts for some of the many leaks into the penthouse; that the Board's architect has not performed tests to confirm his theory in support of the counterclaims; that the Board failed to perform standard water tests to ascertain the cause of many of the leaks and that those which were performed were undocumented. While the Board's architect claims that some portion of the water leaks might originate in spots around the subject apartment windows, for which the Board is not responsible, such position is unsubstantiated, and contradicted by the appearance of numerous moisture signs

in areas far from and high above the windows. Thus, defendants' counterclaims seeking to impose the costs of repair of common elements upon the plaintiffs should be dismissed. Further, the plaintiffs are not responsible for any leaks which originated in the prior apartment owners' renovation efforts. And, upon their purchase of the penthouse, the plaintiffs caused new plans to be drawn, which were approved by the Board's architect.

Further, as to the noise issue, the Board failed to address or investigate the excessive noise emanating from the elevator machinery and air conditioning cooling tower, both proximate to the penthouse, and which derives from the lack of legally required vibration isolator pads supporting those common elements. The Board failed to dispute that the noise reported by the plaintiffs originates in the elevator system and massive air conditioning unit that abut the penthouse. Plaintiffs' expert affidavit establishes that the noise levels exceed acceptable acoustic level from an apartment under New York law.

Therefore, plaintiffs argue, summary relief should be granted on their first and second causes of action for breach of fiduciary duty against the Board, and the Board should be directed to remediate these conditions immediately.

Further, plaintiffs contend that the Board's counterclaims which seek to impose liability upon the plaintiffs for repair of the common elements and to recover costs for past remediation efforts and attorneys' fees fail to state a claim. Plaintiffs contend that the Board's counterclaims are based on the contention that the water leaks were due to deRonqancourt's removal of bricks with a jackhammer in order to create windows in the penthouse; however, spray water testing by the Board's architect indicated that water intrusion occurs upon the spraying of water on a six-foot area over the windows. Further, even if the leaks have their origins in deRonquancourt's

renovation efforts, neither the Alteration Agreement, nor any statute, regulation or principle of law provides a basis for making plaintiffs responsible for deRonquancourt's acts. Moreover, the plans submitted by plaintiffs were approved by the Board's architect.

In addition, the facts of this matter give rise to a cause of action against the Board for private nuisance and punitive damages. Further, a request for punitive damages was set forth in the Second Amended Complain in conjunction with a derivative cause of action, as well as with two causes of action previously dismissed on other grounds. Thus, plaintiffs seek leave to file a Third Amended Complaint to add such matters.

In opposition, the Board contends that summary judgment as to the water damage claim cannot be granted, given that opinion of the plaintiffs' expert for this claim is devoid of any indication as to the cause or origin of the alleged water infiltration. Further, the record demonstrates that the alterations to the penthouse, *i.e.*, vibrations from the jackhammers causing cracks in the terra cotta, and removal of the exterior brickwork which reduced the thickness of the brickwork from 16 inches to four inches, and removal of a lintel over the windows, could have caused the source of water infiltration. Further, the Board did not breach its fiduciary duty to the plaintiffs, in that the Condominium has spent over $100,000.00 over the last several years to stop the alleged water infiltration into the penthouse.

As to the noise issue, the Board contends that the noise enters the penthouse due to the skylights installed in the roof by plaintiffs. The Board points out that the first complaint made with respect to noise came the day after the plaintiffs installed a skylight in the master bedroom. Also, upon inspection by the New York City Department of Buildings in 2000 of a noise related complaint by plaintiffs, no violations were issued and the complaint "was unfounded." Further,

plaintiffs' expert's opinion is fatally flawed, in that it is based upon a New York City Building Code that was superceded by a new regulation which changed the methodologies for measuring noise levels. In any event, the Board engaged a contractor to reduce the noise levels.

Furthermore, as to the mold issues, the Board argues that the unsworn reports are insufficient to support plaintiffs' motion, and that the Board's expert contradicts the plaintiffs' expert's opinions.

Defendants also urge the Court to reject plaintiffs' expert's assertions concerning the steel spandrel beam, which plaintiffs failed to raise in the Second or proposed Third Amended Complaints.

With respect to plaintiffs' second cause of action for diminution in value, plaintiffs have failed to demonstrate that due to the problems complained of, there has been any diminution in value in either the rental or fair market value of the penthouse.

Furthermore, the Board argues, dismissal of its counterclaims are not warranted in light of the documentation dated in 1992 and 1997 showing that the interior water infiltration was caused by the alterations to the penthouse, and that the windows were done poorly.

Nor is plaintiffs' motion to amend the complaint warranted. Adding a claim for nuisance, two and a half years after the action was commenced, with voluminous discovery already completed, and when the note of issue is due to be filed less than a month away, renders the amendment prejudicial. And, the proposed amendment to add punitive damages lacks merit.

The Board also argues that summary judgment is warranted on its counterclaims in light of the Alteration Agreement.

In reply, plaintiffs point out that the City's new noise regulations do not go into effect

until July 2007, the Board's sound expert did not conduct an inspection of the apartment himself, but relied upon another's employee's inspection of the apartment, and the bedroom skylight existed prior to the plaintiffs' acquisition of the penthouse. Further, plaintiffs contend that the Board misrepresented numerous facts concerning, *inter alia*, the number of complaints made by plaintiffs, the lack of documentary support for the Board's purported attempt to remediate the water infiltration issues, that the Board never saw any jackhammering being performed, that the plaintiffs installed lintels in all the windows for structural purposes at the request of the Board. Additionally, the Board's claim of $100,000.00 in expenditures to remediate the water infiltration are vague, duplicative, and overstated, and unsupported by the documentary evidence. The Board failed to specify how many bricks it replaced, the type and how many feet of flashing it installed, the results of the testing for the source of water leakage, and the contract for work included only a reference to penthouse "bulkhead repairs." And, the requisitions for payments and checks do not show with specificity the work performed to the penthouse. Further, the Board's work performed in the pump room was to components that serve the entire building, and were not intended to protect the penthouse.

Plaintiffs also contend that the Board's incompetent handling of the problems over the past eight years provides no basis to delay the grant of partial summary judgment in plaintiffs' favor. Nor does the Alteration Agreement shield the Board from the plaintiffs' claims since the Alteration Agreement does not address renovations prior to the plaintiffs' anticipated work in the penthouse. Further, that the plaintiffs were friends with deRoquancourt, bought the penthouse "as is" without conducting due diligence prior to the purchase, and employed deRoquancourt's design and construction professional poses grounds for relieving the Board of its duty to maintain

the common areas around the penthouse.

With respect to the Board's counterclaims, the Board has not claimed that the leaks at issue were caused by the plaintiffs' own renovations.

Furthermore, the Board's objections to the amendment of the complaint are without merit.

Cross-Motion

The Board argues that as independent litigation committee, which investigated plaintiffs' concerns, and the condominium's unit owners have determined that it is not in the condominium's best interest to continue with the derivative actions, the fifth and sixth causes of action must be dismissed. The independent members of the governing Board, namely, the Special Litigation Committee, concluded that the suit should be dismissed and that the Committee's decision will be protected by the business judgment rule. As to the alleged improper payment to Lejekocevic and Mr. Avgustini, the Committee determined that there were no improper actions taken by the Board member in having Avgustini or Lejekocevic perform these contracting work for the Building. Regarding the illegal workshop, the committee determined that contrary to plaintiffs' contention, Lejekocevic carried substantial insurance that named the condominium as an additional insured, and thus, his work did not pose a Liabilty risk. Further, the electricity consumed by the periodic use of power tools was de minimis. With respect to Avgustini's improper sale of his apartment to Speranza, the committee found that while the price Speranza paid was somewhat lower than the price paid for other apartments sold at around the same time, the price as not radically below the prevailing market price. And, for the Board to have exercised its right of first refusal, as plaintiffs suggest, the Board would have to call a Special Meeting to

obtain the unit owner's consent to borrow the purchase price amount, and close within 15 days, rendering this option imprudent. As to the 2001 financial statement and the overstatement of $12,000.00 in monies paid to Lejekocevic for the construction of the childrens' playroom, this overstatement actually related to a job Lejekocevic performed elsewhere in the building, and the accountant corrected this overstatement in the next financial statement. The committee also found no evidence to support plaintiffs' contention that residents who used Lejekocevic as their contractor received special treatment from Orsid Realty in getting approval for work in their unit. Furthermore, the committee determined that none of the actions taken by the Board and challenged by plaintiffs rose to the level of sel-dealing or corporate waste.

In opposition, plaintiffs argue that the investigators' procedures were so flawed that their decision cannot serve a predicate for dismissal. The committee's investigation was not diligent, performed in good faith, or composed on independent investigators. Further, no evaluation committee was ever constituted, and there were many material facts which the investigators failed to uncover about the sale of Avgustini's unit, and failed to examine the benefit he received in exchange for the discount he provided to Speranza. Plaintiffs also argue that Speranza received contracts from the Condominium and was paid for work he did not perform, and that Lejekocevic could not have functioned as he did without Avgustini' aid. Plaintiffs also maintain that the Condominium violated the Tax Laws by failing to withhold taxes from compensation paid to Avgustini and Lejekocevic and adding sales tax to some of Avgustini's invoices, even though he had no sales tax number. Further, the Board allowed the workshop to operate in violation of the Certificate of Occupancy and Zoning Laws, the $12,000.00 reallocation was an attempt to hide a payment from the owners, and that Board favored its members in applying Condominium rules.

In reply, the Board argues that the Court must defer to the business judgment of independent contractors acting in good faith, and the members of the Committee were sufficiently independent. Further, the disinterested directors formed and acted in concert as a special litigation committee, which was properly formed and conducted a full and thorough investigation of plaintiffs' claims. And, plaintiffs' tax related claims are unpled and in any event, without merit. Finally, the Court should adhere to the Unit owner's desire not to have the derivative claims proceed.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor *(Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce

admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d

347, 668 NYS2d 157 [1st Dept 1998]).

The parties do not dispute that the Board has a duty to maintain the common areas. Plaintiff's water damage expert conducted an inspection of the penthouse in October 2005 and observed several instances of water damage to the penthouse. Said expert also made recommendations to stop the leaks, which included the following: a new roof covering with new pitch pockets and flashings at beam pockets; replace the floor and roof of the mechanical room and install or maintain flashing; replacement of the parapet walls over the penthouse, copper thru-wall flashing with weep holes must be installed; cracked bricks must be replaced; masonry walls repointed; deteriorated caulking must be stripped and replaced; the terra cotta at the parapet level over the penthouse and brick facade around the entire penthouse needs new waterproofing. However, although plaintiffs' water damage expert observed indicia of water damage throughout the penthouse, it cannot be said that plaintiffs' water damage expert ascertained the specific cause or source of the water leak. Further, there is no indication in the affidavit of plaintiffs' water damage expert that any of the recommendations would in fact eliminate the water leaks into the penthouse.

In any event, the Board submits that among other measures taken to address the water leak condition, the Condominium installed a new roof and drain in the pump room; flashing at the bulkhead and counter-flashing at the north and east walls at the penthouse level and performed flashing repairs around the chimney flue; replaced bricks; repointed brickwork at all perimeter walls and windows; pointed a caulked the terra cotta at the penthouse level; and placed an elastomeric protective coating over the terra cotta at the penthouse level, followed by recoating years later. Furthermore, the Board's expert offers alternate sources of the water leak

into the penthouse. Therefore, issues of fact exist as to whether the Board breached its fiduciary duty to the plaintiffs by failing to address the water leaks.

As to the noise issue, however, the submissions establish that the noise levels in the penthouse emanate from the elevator motor and the air conditioning cooling tower. That the noise levels may also emanate from the skylight installed by plaintiffs does not overcome the showing and conclusion by plaintiffs' sound expert that the noises from the elevator machinery and cooling tower exceed the acceptable amounts provided by the Administrative Code. Further, that no violations were issued upon the inspection by the New York City Buildings Department in 2000 create an issue of fact as to the excessive noise levels examined by plaintiffs' expert in 2004, 2005 and 2006. Moreover, the Board's contention that it took steps to reduce the noise generated by the rooftop devices is unsubstantiated. In this regard, the Board cites to the affidavit of defendant Joseph Speranza, who states that the Condominium instructed its air conditioning maintenance contractor to address the plaintiffs' complaints and to make all repairs necessary to minimize any noises. Further, Speranza states that he was "given to understand" that one fan was shut down during the non-peak portions of the cooling season and that he did not recall seeing any written complaints regarding the noise. However, Speranza's affidavit does not indicate the manner in which the work was purportedly performed, whether the work was in fact performed and eliminated the noises.

According to plaintiffs' noise expert, the noise problems can be reduced by reinstalling the elevator and cooling tower so that they rest on appropriate sound and vibration dampering material. Since it is undisputed that there are no vibration isolator pads supporting the elevator machinery in the building, the elevator machinery does not comply with NYC Building Code 27-

770(b)(10), which requires the use of "isolator pads having a minimum thickness of one-half inch." As it is likewise undisputed that there are no vibration isolators on the cooling tower of the building, the cooling tower violates NYC Building Code 27-770(b)(4), which requires that they be installed on vibration isolators providing a "minimum isolation efficiency of eighty-five per cent at fan rotor rpm with a maximum static deflection of four inches." The Court notes that plaintiffs' sound expert also explained the manner in which the absence of fan vibration isolators on the elevator room exhaust fan of the building violates NYC Building Code 27-770(b)(4). Therefore, in light of plaintiffs' showing that the noises from the elevator and cooling tower stem from conditions violative of the NYC Building Code, the Court directs that the Board comply with said NYC Building Code sections noted herein by January 31, 2007.

As to plaintiffs' request in connection with the mold condition, the Court notes that the recommendation of plaintiffs' mold expert cannot be directed until there is a determination of the source of the water damage. Plaintiff's mold expert recommended that the water leak condition be repaired, and that mold abatement procedures be implemented thereafter. Thus, as it is premature to direct mold abatement procedures be performed prior to a determination of the source of water leaks, the branch of plaintiffs' motion related to the mold condition cannot be granted, at this juncture.

Therefore, in light of the issues of fact concerning the sources of the water leak and resulting mold condition, dismissal of the counterclaims, which seek to recover costs expended in repairing the common elements and past remediation efforts and attorneys' fees is unwarranted at this juncture.

Nor is summary relief warranted on plaintiffs' second cause of action for damages arising

from the purported diminution in value of the penthouse. Plaintiffs' submissions contain no basis upon which such an assessment may be made.

Leave to Amend

Although leave to amend should be freely granted (CPLR §3025(b)) the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Ilynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

The elements of a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (Restatement, Torts, s 825; *McKenna v. Allied Chem. & Dye Corp.*, 8 A.D.2d 463, 467, 188 N.Y.S.2d 919, 923; *see* Richardson, Evidence (10 ed.), s 90). The submissions fail to support the contention that the acts undertaken by the Board were done for the purpose of or knowledge that water damage, excessive noise, or mold was substantially certain to result from the Board's conduct.

Nor do the allegations support a claim for punitive damages. "Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate,

and has the character of outrage frequently associated with crime" (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 [1993], *quoting* Prosser and Keeton, Torts § 2, at 9 [5th ed. 1984]). That author also teaches that: "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Prosser and Keeton, Torts § 2, at 9-10 [5th ed.1984]).

Further, it is well settled that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights *(see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]; *RTC Industries, Inc. v Goodtimes Home Video Corp.*, 1997 WL 35524 [SDNY 1997]).

"Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible' and of 'such wanton dishonesty as to imply criminal indifference to civil obligations' " (*New York University v Continental Ins. Co.*, *supra*, at 316.

Such damages, however, may be recovered in addition to compensatory damages upon a showing that conduct complained of was part of a pattern of similar conduct directed at the

public generally, aggravated by evil or a wrongful motive or that there was wilful and intentional misdoing, or a reckless indifference equivalent intentional wrongdoing (*Walker v Sheldon,* 10 N.Y.2d 401, 404-405 [1961]; see, also *Rocanova v Equitable Life Assur. Soc., supra.*)

"Even where there is gross negligence, punitive damages are awarded only in 'singularly rare cases' such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public" (*Karen S. "Anonymous" v Streitferdt,* 172 AD2d 440, 441, *quoting Rand & Paseka Mfg. Co. v Holmes Protection,* 130 AD2d 429, 431, *lv denied* 70 NY2d 615.)

The submissions herein fail to demonstrate that the Board's conduct was "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber,* 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 [1989]). The court cannot conclude that the Board's behavior was "so outrageous as to evince a high degree of moral turpitude" (*see Rosenkrantz v Steinberg,* 13 AD3d 88, 786 NYS2d 35 [1st Dept 2004]; *see also Cohen v Mazoh,* 12 AD3d 296, 784 NYS2d 857 [1st Dept 2004] ["the facts alleged do not establish gross, wanton or willful fraud or other morally culpable conduct to a degree sufficiently warranting punitive damages"]; *Camillo v Geer,* 185 AD2d 192, 587 NYS2d 306 [1st Dept 1992] [record does not support a finding of outrageous conduct warranting award of punitive damages]).

Plaintiffs have also failed to state claims supporting an award of punitive damages, sufficient to overcome the instant motion, through specific evidentiary allegations, that the alleged conduct was of an egregious nature, and aimed not solely at this plaintiff, but at the public, generally (*American Transitions. Co. v Associated International Ins. Co.,* 261 AD2d 251 [1st Dept 1999]).

Cross-Motion

The branch of the Board's cross-motion to dismiss the sixth (derivative) cause of action on the ground that the Board and the majority of the unit owners have decided to dismiss the claims for lack of merit, is granted.

The court may not inquire into the merits of the special committee's final determination, as the "courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments" (*Davidowitz v Edelman*, 153 Misc.2d 853, 583 N.Y.S.2d 340 [Sup. Ct. New York County 1992], *citing Auerbach v Bennett*, 47 NY2d 619, 630). Because derivative claims belong to the corporation, judgments as to which claims to pursue belong specifically to the company's board (*Davidowitz, supra*). However, the courts are not foreclosed from inquiry into the "disinterested independence of those members of the board chosen by it to make the corporate decision on its behalf--here the members of the special litigation committee" and "as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee" (*Davidson, supra*).

The fact that Sperenza introduced the Evaluation Committee members, namely, Jeffrey Jacobson, Robert Aquilina, and Kerry Ann Murphy, to the rest of the Board does not, in and of itself, raise an issue of fact as to whether they were sufficiently independent. Plaintiffs failed to allege any factual basis to support the contention that any of these individuals had a financial or social relationship with the Board members who are alleged to have engaged in improper conduct. As plaintiffs' failed to raise an issue as to the committee members' independence, the Court may defer to the decision of the Board under the business judgment rule (*see e.g. Beam v Martha Stewart*, 845 A2d 1030 [Del. 2004] [the plaintiff has the burden to plead particularized

facts that create a reasonable doubt sufficient to be rebut the presumption that the committee members were independent from defendant Stewart]; *Lichtenberg v Zinn*, 260 AD2d 741 [3d Dept 1999] [prior business dealings between a board member and the special litigation committee members, who were charged to examine said board member's actions, were insufficient to raise a question of fact as to the disinterested independence of the committee members]).

Moreover, it is clear that the beneficiaries of the derivative claim have voiced their decision that the derivative claim should not be pursued. The Evaluation Committee presented the issues before the unit owners, and they decided that it was not in the best interest of their community to pursue the derivative claim. Notwithstanding the absence of any caselaw directly on point, the Court determines that the business judgment rule used by the Court when evaluating decisions made by residential cooperative corporations applies with equal force to the circumstances herein (*see 40 West 67th Street Corp. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 745 [2003]) [holding that the business judgment standard governs a cooperative's decision to terminate a tenancy in accordance with the terms of the parties' agreement]).

Thus, the Board's cross-motion to dismiss the fifth and sixth causes of action is granted.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 3212(e) for partial summary judgment on their first cause of action for an order declaring and ordering that the Residential Board of Managers (the "Board"): (1) repair the common elements of the Level Club Condominium in accordance with the recommendations of plaintiffs' expert, (2) remediate the

mold affecting the subject apartment, (3) pay damages for the cost to repair the subject penthouse interior which has been damaged by moisture and mold, and (4) repair, replace or modify the common elements, which are causing unhealthy levels of noise to penetrate the penthouse, is granted solely to the extent that the Board shall install the necessary equipment in order to comply with NYC Building Code 27-770(b)(10), NYC Building Code 27-770(b)(4), and NYC Building Code 27-770(b)(4) by January 31, 2007; and it is further

ORDERED that plaintiffs' motion pursuant to CPLR 3212(e) for partial summary judgment on their second cause of action for monetary damages equal to the diminution of the fair market value of the penthouse for temporary damage and permanent diminution of fair market value of the subject apartment, is denied; and it is further

ORDERED that plaintiffs' motion pursuant to CPLR 3211 and 3212(e) for dismissal of defendants' counterclaims for failure to state a claim; and it is further

ORDERED that plaintiffs' motion pursuant to CPLR 3025(b) for leave to amend the complaint to add a cause of action for private nuisance and punitive damages is denied; and it is further

ORDERED that the cross-motion by the Board to dismiss the fifth and sixth cause of action is granted; and it is further

ORDERED that plaintiff file the note of issue by October 4, 2006 and that the parties report to Part 40 for trial on October 30, 2006, 9:30 a.m. There shall be no adjournments of the trial date.

This constitutes the decision and order of the Court.

Dated: September 29, 2006

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD