

**Board of Mgrs. of Kings Hwy. Luxury  
Condominiums v Gershkovich**

2007 NY Slip Op 31591(U)

June 4, 2007

Supreme Court, Kings County

Docket Number: 0030390/2006

Judge: Bruce M. Balter

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SUPREME COURT : KINGS COUNTY

(Civil Part, Part 9)

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THE BOARD OF MANAGERS OF THE KINGS HIGHWAY  
LUXURY CONDOMINIUMS, SUING ON BEHALF OF THE  
UNIT OWNERS

BY: JUSTICE BALTER

Plaintiff,

- against -

Dated: June 4, 2007

TIBOR GERSHKOVICH, et ano.,

Index No.: 30390/06

Defendants.

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Plaintiff Board of Managers of the Kings Highway Luxury Condominiums sues on behalf of the unit owners of a condominium building (the Condominium) at 105 Kings Highway in Brooklyn. Defendants Tibor Gershkovich and Galina Gershkovich are the owners of commercial units designated as M-1 and M-2 at the Condominium. According to the complaint herein, dated October 6, 2006, and the affidavit of Michael Fainberg, plaintiff's president, which is offered in support of the instant motion, defendants have violated the Condominium's Bylaws in the following respects:

1. in violation of Section 1(b) of Article VII thereof, defendants leased the commercial units without first giving notice to the Board of Managers of their intent to do so,<sup>1</sup>
2. in violation of Section 15 of Article V, defendants made structural additions, alterations or improvements in or to their units or alterations and additions

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<sup>1</sup> Unit M-1 has been leased to a child care facility and unit M-2 has been leased to a medical testing establishment.

which may affect the value of other units without the prior written consent of the Board of Managers;

3. in violation of said Section 15, defendants made an application to a governmental authority (the New York City Department of Buildings) in their own names, rather than in the name of the Board of Managers,<sup>2</sup> and
4. in violation of Section 16(b) of Article V, defendants altered the common elements of the Condominium without the prior written consent of the Board of Managers.<sup>3</sup>

Plaintiff contends that the structural work that defendants performed or allowed to be performed “may affect the value of the other condominium units,” that other unit owners “are fearful of the health and safety of the medical diagnostic equipment” in unit M-2 and that “the building’s structure is insufficient to accommodate the extremely heavy weight of the medical [MRI] equipment.”<sup>4</sup> Therefore, plaintiff requests that, pursuant to CPLR 6301, the court preliminarily enjoin defendants from operating a medical testing establishment, a child

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<sup>2</sup> The application sought to change the permitted use under the Certificate of Occupancy for unit M-1 from a community facility medical office to a daycare center.

<sup>3</sup> In particular, defendants added a bracket below the floor of the medical facility into the Condominium’s common element wall, placed ventilation ducts on the roof, altered the awnings in front of the subject units, and performed plumbing and electrical work that allegedly affect the Condominium’s systems.

<sup>4</sup> Plaintiff submits the report of a civil engineer, Leonid Bukhgalter, who stated that three brackets were needed to support the first floor steel beams beneath the MRI equipment. It is undisputed that, at present, only one bracket has been installed.

care facility or any other business in the subject units unless and until plaintiff approves of same in writing.

In opposition to the motion, defendants point out that they are the lessors of the subject units and do not own or manage the facilities which have operated there with plaintiff's knowledge since August 2006. Defendants contend that, as owners of commercial units, they are not subject to the requirements of the Bylaws regarding leasing and alterations, that the operation of the facilities pose no danger to the building or its residents and that plaintiff has an adequate remedy at law. Defendants maintain that Section 1(b) of Article VII, upon which plaintiff relies, is modified by Schedule "A" of the Bylaws "which demonstrates that the Bylaws apply to residential units, not the commercial units." Defendants point out that Section 15 of Article V of the Bylaws specifically states that non-structural alterations and improvements to units that do not affect the exterior of the building or the value of other units may be made without the prior approval of the Board of Managers and, in this case, "[a]ll improvements . . . were internal" and have not decreased the value of the premises. With respect to the safety of the building and residents, defendants challenge plaintiff's assertion that the MRI establishment poses a health danger. Defendants submit a copy of a report from Petrone Associates which conducted a radiation survey at the medical establishment and found that all measurements were within acceptable limits. Insofar as plaintiff suggests that the building's structure is insufficient to accommodate the weight of the medical equipment, defendants contend that the MRI facility complied with all of the

recommendations of Michael Megalla, the engineer recommended by the Condominium. Moreover, defendants submit the report of Lev Tsukerman, P.E., who concluded that “the existing floor construction is more than capable of supporting safely the new loads without brackets or any other type of beam reinforcement.” Defendants also proffer the report of Klein, Levin Associates to demonstrate that the water supply for the residential part of the building is separate from the water supplied to the commercial units and, therefore, any argument that the child care facility’s use of water negatively impacts upon the rest of the Condominium is “specious at best.” Since the facilities have been operating without incident since August 2006 (two months after this action was commenced and four months before the instant application was made), defendants maintain that there is “no imminent threat” and that injunctive relief is unnecessary, especially since plaintiff has an adequate remedy at law.

In reply, plaintiff claims that “there are no material issues of fact in dispute” since defendants do not challenge the actions cited by plaintiff as breaches of the Condominium’s Declaration and Bylaws. According to plaintiff, the only issue is whether the subject units are bound by the relevant provisions of the Declaration and Bylaws. If so, then plaintiff should be permitted to void the leases to the subject units and defendants should be required to undo all of the alterations to their units and the common elements. With respect to Schedule “A” of the Bylaws, plaintiff asserts that there is no statement therein that the Bylaws are inapplicable to the subject units and, in fact, “reading Article VII, Section 1 of

the Bylaws as a whole leads to the unmistakable conclusion that Section 1(b) does apply to the subject units.” Plaintiff accuses defendants of “blatantly misrepresent [ing] the truth by stating that the MRI establishment complied with all recommendations as set forth by Michael Megalla” since defendants’ engineer admits that only one steel bracket has been installed, rather than the three recommended by Mr. Megalla. Therefore, plaintiff argues that defendants should be required to remove the CT scan machine at the MRI facility and cease operating until the recommendations of Mr. Megalla are followed.

The provisions of plaintiff’s Bylaws are applicable to the property of the Condominium and to the use and occupancy thereof (Article 1, Section 2). All present and future owners, mortgagees, lessees, sublessees and occupants of units and their employees are subject to the Bylaws, the Declaration establishing a plan of condominium ownership and the Rules and Regulations attached thereto (Article I, Section 3). Defendants contend that “the Bylaws . . . exclude commercial units by virtue of the language used,” “that commercial and residential units are to be treated differently” and that the applicability of the Bylaws to the commercial units owned by defendants is “somewhat ambiguous”. The court’s review of the Bylaws reveals clear references to the rights and responsibilities of “Unit Owners” insofar as subjects such as common charges, repairs, leases and alterations are concerned. While “apartments are sometimes called ‘the units’” (Article 1, Section 1) (emphasis added), the Bylaws also cite differences between owners of commercial and residential condominium units. For example, indoor parking spaces are unavailable to commercial units, unit M-1 has

a rear yard and commercial units are not required to pay or contribute any money toward common charges (*see* article V, Sections 7 and 11). Although resolution of the issue of the applicability of the Bylaws to the commercial units could have been made simpler by more precise language, Article XIII of the Bylaws defers to the Declaration (as well as to article 9-B of the Real Property Law) in resolving conflicts regarding interpretation. In this case, the Declaration expressly indicates that the subject building contains commercial units on the first floor (Article 3), that a “Unit Owner” - - - the elusive term frequently utilized in the Bylaws - - - is the “owner of each Unit” (Article 6) and that a list of all units, which includes the commercial units, is to be found in Exhibit B of the Declaration. In light of the language of the Declaration, this court finds that defendants are “Unit Owners” within the meaning of the Bylaws and, as such, subject to its provisions relating to, among other things, leases, alterations and improvements. As such, defendants should have complied with article VII, Section 1 (b) of the Bylaws regarding the proposed tenancies at the Condominium. Since plaintiff had and still has, essentially, a right of first refusal to lease the subject units, the parties are, by the terms hereof, to be placed in the position of the status quo ante as of the date of purchase of the units by defendants. Further, because the continued tenancies of units M-1 and M-2 are in jeopardy, plaintiff shall join the tenants as defendants in any renewed application for injunctive relief (*see Wasus v Young Sun Oh*, 86 AD2d TS3 [1982]).<sup>5</sup> Given

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<sup>5</sup> There is no claim by plaintiff that the tenants are servants or agents of the defendants or act in collusion or combination with them (*see Ricatto v Ricatto*, 4 AD3d 514 [2004]). Therefore, in order for any injunction to bind the tenants, they should be joined as parties if plaintiff seeks their removal under the terms of this order.

the substantial investment of defendants and their tenants at the premises and the relatively modest use that they may have made of the common elements and areas of the Condominium, rather than permit plaintiff to render the tenancies valueless by withholding consent to alterations which are necessary to the proper functioning of the commercial units, it is appropriate that the value of such usage be fixed and paid periodically by defendants as a condition thereof, or, alternatively, that defendants be given an opportunity to remove the infringements. The court notes that, to the extent that plaintiff alleges that the other units at the Condominium have diminished in value by virtue of the commercial tenancies, plaintiff has offered nothing but speculation to support that contention.

In order to be entitled to temporary injunctive relief, a party must demonstrate: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities (*see, e.g., W. T. Grant Co. v Srogi*, 52 NY2d 496 [1981]). Since the court finds that the Condominium's Bylaws and Declaration apply to the commercial units and that defendants did not comply with the provisions thereof, plaintiff has established the likelihood of its success on the merits. Moreover, because the Condominium's opportunity to lease the units or to find alternative tenants has been abrogated by defendants, money damages would be inadequate to vindicate that right, although they may suffice as a remedy for defendants' ancillary use of the Condominium's common areas.

Accordingly, the motion by plaintiff for a preliminary injunction is granted only to the extent of directing the following:

1. Within 30 days after entry of this order, defendants shall provide plaintiff with a copy of the leases to units M-1 and M-2;
2. Within 60 days thereafter, plaintiff shall indicate, in writing, pursuant to Article VII, Section 1 (b) of its Bylaws, whether it shall lease the units on behalf of all unit owners or produce a lessee or lessees on substantially similar terms and conditions as set forth in the lease(s);
3. Should plaintiff indicate that it intends to lease one or both of the subject units or that it has located a lessee or lessees for such unit(s), it shall renew the instant application for injunctive relief; however, in any renewed application, plaintiff shall seek leave to add the subject tenants as defendants herein and give notice accordingly;
4. Should plaintiff indicate that it is either unable or unwilling to lease one or both of the subject units or produce another tenant or tenants on substantially similar terms or should plaintiff offer no response to defendants' proffer of the subject leases, then the parties are directed to appear at IAS Part 9 of this Courthouse at 10:00 a.m. on Tuesday, September 18, 2007 for a hearing to determine the extent of defendants' use of the common areas and elements of the Condominium, including, but not limited to, uses pertaining to the roof, exterior wall, first floor supporting beams, plumbing and electrical systems and water supply. At the hearing, the parties may produce whatever experts they may deem appropriate; however, since it is the extent of defendants' alleged use (and the value thereof) that is to be determined, the parties may stipulate to the nature of defendants' use, including the use, if any, of the plumbing and electrical systems, which use cannot now be determined from the submissions

of the parties. Moreover, the tenants of units M-1 and M-2 may be called to testify. Following the hearing, the Court will determine the value of defendants' use of the common elements and areas from the date of its inception, whatever that might be. The parties may, of course, stipulate to an agreed upon amount and/or duration of use. Prior to the hearing, defendants may, at their option, remove or limit any use which impacts upon the common areas or elements of the Condominium so as to mitigate the value of such use.

5. As a condition of extending the unimpeded use and occupancy of the commercial units by the tenants pending the hearing or the renewal of plaintiff's further application for injunctive relief, defendants are directed to comply with the recommendations of Michael Megalla, P. E. in his letter of May 18, 2006 within 60 days after entry of this order.

The foregoing constitutes the decision and order of this court.

ENTER



J. S.C.

**Bruce M. Balter**