[*1] SCANNED ON 8/6/2007

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

PRESENT: _____ PART _____

Justice

Index Number : 600536/2005

DEMILIA, ROBERT F.

VS

SANDRA GREER RE-MANAGEMENT

Sequence Number : 010

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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 is Consolidated for disposition with motion Seqs. 11, 12, 13, 14, 15 & 16 and decided with the accompanying Memorandum decision

FILED
AUG - 6 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/31/07

_____ J.S.C.

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 IAS PART 15

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ROBERT F. D'EMILIA,

Plaintiff, DECISION and JUDGMENT

v. Index. No. 600536/05

SANDRA GREER R.E. MANAGEMENT CORP. A/K/A SANDRA GREER REAL ESTATE, INCORPORATED; SANDRA GREER WACHSBERGER A/K/A SANDRA GREER; SUSAN SALTMAN, THE ATRIUM AT CHELSEA CONDOMINIUM; THE BOARD OF MANAGERS OF THE ATRIUM AT CHELSEA CONDOMINIUM; ROSEMARY PONZO; MARVIN CHRISTIAN; JOHANNA BARRETT; TERRI COLLINS; RISE KERN; DAVID SPIERER; AND JVL REALTY ASSOCIATES, INC.,

Defendants.

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TOLUB, WALTER, J.S.C.

Motion sequence numbers 010 through 016 are consolidated for disposition.[1]

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[1] Motion 010 plaintiff moves pursuant to CPLR 3212 for partial summary judgment on the first cause of action in the complaint; Motion 011 defendants The Atrium at Chelsea Condominium ("the Atrium"); The Board of Managers of the Atrium at Chelsea Condominium ("Board of Managers"); Rosemary Ponzo ("Ponzo"); Marvin Christian ("Christian"); Johanna Barrett ("Barrett"); Teri Collins ("Collins"); Rise Kern ("Kern"); and David Spierer ("Spierer") (collectively "the Board and it's individual members") move pursuant to CPLR 3212 for summary judgment dismissing the complaint; Motion 012 defendant JVL Realty Associates, Inc. ("JVL") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. Motion 013 JVL moves to strike plaintiff's notice to admit; Motion 014 and Motion 0015 are summary judgment motions by the defendants that are duplicative of Motions 011 and 012. Defendants' requests to withdraw Motions 014 and 015 are granted. In response to Motions 014 and 015, plaintiff cross moves pursuant to CPLR 3212 for summary judgment on the 2nd, 3rd and 4th causes of action in the complaint and for recusal; Motion 016 the Atrium and the Board of Managers and its individual members move to strike plaintiff's notice to admit.

In this bitterly contentious dispute between a condominium unit owner and the Atrium at Chelsea Condominium and its Board of Managers and the Board's individual members, all the remaining parties move and cross move for summary judgment.[2] In addition, plaintiff cross moves for recusal on the ground that the court has demonstrated bias against him.

BACKGROUND

In 1987, plaintiff *pro se*, Robert D'Emilia, an attorney, purchased apartment 12A in The Atrium at Chelsea Condominium, a mixed use building located at 181 Seventh Avenue in Manhattan ("The Atrium"). The building is operated by defendant Board of Managers, which is comprised of a combination of residential and commercial managers. Defendant JVL is the sole commercial manager and defendants Ponzo, Christian, Barrett, Collins, Kern and Spierer, were, at one time or another relevant to this litigation, residential managers. Sandra Greer R.E. Management Corp ("Sandra Greer R.E.") is The Atrium's managing agent and Sandra Greer ("Greer") and Susan Saltman ("Saltman") are employees of Sandra Greer R.E. The managing agent is hired by The Board, to conduct the day to day operations of the building.

Prior Litigation

A. 1988 Litigation

In 1988, the Board, with D'Emilia as Board president, instituted a lawsuit against JVL. At that time, JVL was The Atrium's commercial sponsor. In that litigation, the Board claimed, *inter alia,* that JVL rented a unit in the Atrium to a dry cleaning establishment in contravention of the Atrium's certificate of occupancy and New York City zoning laws. (4/27/07 Weller Aff.,

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[2] By decision dated April 21, 2006 this court granted summary judgment in favor of Sandra Greer R.E. Management Corp. a/k/a Sandra Greer Real Estate, Incorporated; Sandra Greer Wachsberger a/k/a Sandra Greer and Susan Saltman dismissing the complaint as to those defendants.

Ex. G) The litigation also involved a dispute between the Board and JVL regarding the maintenance charges assessed against the commercial tenants. In July, 1990, the parties executed a Settlement Agreement, that permitted the dry cleaner to remain on the premises, defined the relative obligations of the commercial unit owners and set forth a corrected formula that the Board would use, going forward, to assess maintenance charges against the commercial tenants. (4/27/07 McCarthy Aff., Ex. H) D'Emilia was one of several residential managers who signed the settlement agreement on behalf of The Atrium.

B. 1992 Litigation

Thereafter, in 1992, D'Emilia, as an individual unit owner, commenced a lawsuit against JVL alleging, among other things, that he was induced to purchase his apartment based on the sponsor's false representation that it was a two bedroom unit. In that lawsuit, D'Emilia filed a motion to compel the production of documents (Motion Sequence 007) and on March 18, 1994, Justice Ramos decided that motion, finding, in part, that "[p]laintiff has right to examine records at office of managing agent . . . by giving 3 business day notice to Edward Dorney, Esq. by facsimile." (4/27/07 Weller Aff., Ex. K)

Thereafter, in 1998, the parties executed a Memorandum Agreement settling the 1992 litigation. (4/27/07 Weller Aff., Ex. F) Pursuant to that agreement, the Board agreed:

> a. To observe all applicable zoning laws and clauses in the Declaration and By-Laws of the Atrium at Chelsea Condominium, including those applicable to home occupations;

In addition, D'Emilia agreed, "[T]o continue to abide by the Declaration and By-Laws of the Atrium at Chelsea Condominium."

Current Litigation

In February, 2005, D'Emilia commenced this lawsuit. The complaint states four causes

of action. In the first cause of action, D'Emilia alleges that the Board denied his requests in June and July, 2001 and November and December, 2004, to examine The Atrium's books and records. D'Emilia claims that this denial violates New York Real Property Law, Sections 339-q and 339-w; Article XV, Section 5 of the By-Laws and Justice Ramos's April, 1994 order.

In the second cause of action, D'Emilia contends that the Atrium breached the 1998 Memorandum Agreement in that the Board of Manager's have failed to enforce by-laws regarding home occupations, dog breeding, noxious odors, payments to officers, improper voting procedures at the 2004 annual meeting, zoning and occupancy restrictions and allocation of costs and expenses between commercial and residential units. D'Emilia also claims that the Board failed to obtain property appraisals prior to renewing fire insurance policies.[3]

The third cause of action alleges that, based on the alleged breaches recited in the second cause of action, the defendants have violated the declaration and by-laws of The Atrium and that they failed to act in good faith and engaged in self dealing by selectively enforcing the By-Laws and House Rules and failing to assess penalties against themselves for their alleged violations of the By-Laws and House Rules.

In the fourth cause of action, D'Emilia seeks the imposition of a constructive trust and/or damages based on unjust enrichment.

ARGUMENTS

Plaintiff's Arguments

a. Books and Records

In support of his motion for summary judgment, plaintiff argues that Article XV, Section

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[3] Plaintiff has withdrawn his claim that defendants breached their obligation under the 1998 Settlement Agreement to obtain an independent inspection of the water metering system.

5 of the by-laws, Real Property Law Sections 339-q and 339-w and Judge Ramos April, 1994 order give him the right to examine The Atrium's books and records on a monthly basis. In addition, D'Emilia states that defendants affirmatively agreed to give him monthly access to the Atrium's books and records in exchange for his settlement of the 1992 lawsuit. (3/16/07 D'Emilia Aff., Para. 11)

Real Property Law Section 339-q states:

> True copies of the floor plans, the declaration, the by-laws and any rules and regulations shall be kept on file in the office of the board of managers and shall be available for inspection at convenient hours of weekdays by persons having an interest.

Real Property Law Section 339-w states:

> The manager, or the board of managers, as the case may, be shall keep detailed accurate records, in chronological order, of the receipts and expenditures arising from the operation of property. Such records and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays. . . .

Moreover, Article XV, Section 5 of the By-Laws states that the unit owners are entitled to examine the books and records of the condominium on reasonable notice to the Board, but not more often than once a month.

b. Assessment of Costs–Commercial Units

As to the assessment of costs and expenses against the commercial units, D'Emilia relies on Article III, Section 5(a)(1) of the By-Laws which gives the Board of Managers the power to determine and levy monthly common charges and Article VI, Section 2 of the By-Laws which empowers the Board of Managers to establish an annual budget for the condominium and to assess the total annual requirement "as a single sum against all units and pro-rated against each

of said Units according to the respective common interests appurtenant to such units." Here it appears that D'Emilia claims that defendants are using an improper method to assess common charges and that they have failed to amend the By-laws to reflect the terms of the 1990 Settlement Agreement regarding the formula and method used to apportion common expenses among the commercial and residential unit owners. D'Emilia contends that by using the 1990 formula, the Board is violating the express terms of the By-Laws.

c. Home Occupation

In support of the allegation that defendants have ignored the by-laws regarding home occupations, D'Emilia cites Article 5 of the Declaration which states:

> [U]pon the prior written consent of the Board. . . any Residential Unit may be used for any home occupation permitted by law which does not violate the certificate of occupancy covering such Unit.

D'Emilia also attaches 2 documents, one from 1991 and the other without a date that show that Ponzo uses the Atrium as the address for her design business. (D'Emilia Aff., Ex. K) In addition, D'Emilia relies on a 1991 Attorney Opinion Letter that discusses "home occupations" at the Atrium and cites several units that the attorney believed were being used for home occupations. He claims that the Board failed to investigate whether the units were, in fact, being used for home occupation, and if so, the Board failed to properly assess the unit owners for such use.

d. Pets

D'Emilia's supports his allegations that the Board ignored his complaints concerning defendant Spierer's alleged violation of the by-laws regarding harboring pets by citing Article IX, Section 5 of the By-Laws which states that no animal shall be raised, bred or kept in any

units, except dogs, cats or other household pets, not to exceed two per unit. D'Emilia also cites Spierer's deposition testimony wherein Speirer admits to having kept a third dog in his apartment for about 6 months while the dog's owner, a friend, was undergoing chemotherapy.

e. Nuisance

In support of his nuisance allegations, D'Emilia points to Article Eighteen of the Declaration that prohibits nuisances that are a source of annoyance to the building occupants and cites his October, 2001 letter to the management company regarding the noxious odor of marijuana in the ninth floor corridor. D'Emilia alleges that the Board failed to take any action to investigate or stop the illegal activity.

f. Fire Insurance Appraisal

As to the Board's alleged failure to obtain an appraisal prior to renewal of the Atrium's fire insurance policy, D'Emilia states that Article VII, Section 1 (paragraph 3) of the By-Laws requires the Board to obtain an appraisal from a fire insurance company of the full replacement value of the building in connection with the placement of fire insurance. D'Emilia cites Barrett's testimony (4/5/07 D'Emilia Aff., Ex. J) wherein she states that she can't remember if she got a written appraisal from the insurance agent who provided the Atrium with the fire insurance policy renewal and the Board's failure to produce the appraisal in response to his demand.

g. Payment of Compensation

D'Emilia states that Article III, Section 7 of the By-Laws forbids the payment of compensation to any manager and officer and produces documentary evidence that the Board pays a year end bonus to Greer and Saltman, employees of the managing agent.

h. Voting

D'Emilia also states that the election of managers at the 2004 annual meeting violated the

declaration and By-Laws because, among other things, commercial unit owners were permitted to vote for residential managers, the proxies were not properly authenticated and there was no election of election inspectors.

i. Zoning

D'Emilia states that the Declaration and By-Laws require that each unit be in compliance with zoning ordinances for proper use under the law (Declaration, para. 18(e); Article IX, Section 1, para. 38 By-Laws) and that the commercial dry cleaning establishment that occupies the area in The Atrium designated as a community facility violates the applicable zoning laws and the declaration and the certificate of occupancy.

j. Penalties

D'Emilia argues also, that the Board has adopted house rules which, among other things, require payment of a $100 application fee any time a unit owner submits an application/registration or requests the Board consent to a request made by the unit owner. Another house rule establishes a $50 fee or penalty per day for any violation of the Declaration, By-Laws or House Rule by a unit owner. He claims that the Board has engaged in self dealing by failing to impose penalties against individual board members for their alleged violations of the Declaration, By-Laws and House Rules.

Defendants" Arguments

In opposition to plaintiff's motion and cross motion for summary judgment and in support of their motions for summary judgment, the defendants argue that the complaint must be dismissed because their actions and decisions, which were made in good faith for the benefit of the condominium, are protected by the business judgment rule. They also claim that they have

cooperated with D'Emilia regarding his demands to inspect books and records; that the evidence demonstrates that his breach of contract allegations are without merit; that he does not have standing to bring a claim for violation of the zoning laws and, in any case, the issue of the dry cleaning store was resolved in the 1988 litigation as was D'Emilia's claims regarding the proper assessment of common charges against the commercial tenants. Defendants also argue that many of D'Emilia's contract claims are precluded by the statute of limitation and/or laches.

RECUSAL

Absent a legal disqualification under Section 14 of the Judiciary Law[4], a trial judge is the sole arbiter of recusal. *(People v. Moreno,* 70 N.Y.2d 403 [1987]). This discretionary determination is a matter of personal conscience, (*See, Moreno, supra at* 405; *In the Matter of Murphy,* 82 N.Y.2d 491 [1993]).

In order for an alleged bias or prejudice to disqualify a judge resulting in his or her removal from the case, it must be based on something other than rulings in the case. (*People v. Moreno,* 70 N.Y.2d at 407 [*citing Berger v. United States,* 255 U.S. 22, 31 (1921)])

Here, D'Emilia bases his request for recusal on the court's ruling on discovery motions and "looks" and a "lecture" from the court during a compliance conference. I find that D'Emilia has failed to demonstrate any bias or prejudice against him based upon this court's rulings or his perceptions at a compliance conferences, and his conclusory allegations of prejudice are

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[4]Under Section 14 of the Judiciary law, a judge shall be disqualified from presiding over a proceeding to which (1) he or she is a party; (2) he or she has been attorney or counsel; (3) he or she is interested; (4) he or she is related by consanguinity or affinity to the controversy within the sixth degree. Plaintiff has not alleged a violation of Judiciary Law, Section 14, accordingly the recusal motion is directed solely to this court's discretion. (*Ogust v. 451 Broome St. Corp.,* 4 A.D.3d 109 [1st Dept 2004])

insufficient to require that I recuse myself. Accordingly, the branch of D'Emilia's motion seeking recusal is denied.

SUMMARY JUDGMENT

In order to prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating that there are no triable issues of fact and he or she is entitled to judgment as a matter of law. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; *Prince v. DiBenedetto,* 189 A.D.2d 757, 759 [1993]) Once the movant has established a *prima facie* case, the party opposing the motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980])

A. **Access to Books and Records**

Defendants have made a prima facie showing that they provided plaintiff with reasonable access to the books and records of the Atrium. Indeed, documents produced by D'Emilia, himself, demonstrate that the Board attempted to accommodate his requests. By letter dated June 22, 2001, D'Emilia requested an opportunity to review enumerated books and records on June 27. He further stated, "[i]f this time or place is inconvenient for you, then could you mail me copies of the requested documents." (3/16/07 D'Emilia Aff, Ex. D, doc. 0060). By letter dated June 25, 2001, the management company responded by mailing D'Emilia copies of the documents in their possession. (3/16/07 D'Emilia Aff, Ex. D, doc. 0061) One document, an

arbitration decision, was not produced[5] and efforts to schedule a convenient time for D'Emilia's review of the document during the July 4th holiday week were unsuccessful. (3/16/07 D'Emilia Aff, Ex. D, docs. 0066, 0069, 0070 and 0074

Thereafter, by letter dated November 8, 2004, D'Emilia requested inspection of, "the Sponsor Settlement Agreement, the annual commercial meter readings for water usage. . . and as the 'As Built' Plans. . .and all documentation . . . regarding the basis for the statements or advice given and repeated by the Managing Agent at the recent Annual Meeting." (Complaint, Ex. C) By letter dated November 17, 2004, the Atrium's attorney responded to to D'Emilia's request providing him with some information and, where appropriate, directing him to public records. The Board then attempted to schedule an inspection date for the remaining documents for December, 2004, but, because of the holidays, was unable to do so. The earliest date, convenient for all, was in early January, 2005 and the Board suggested several alternative dates in January for D'Emilia's consideration. (4/27/07 Weller Aff, Ex. O, 3/16/07 D'Emilia Aff., Ex. H) D'Emilia rejected the Board's offer and commenced this litigation.

D'Emilia has failed to come forward with admissible evidence sufficient to overcome defendants' *prima facie* case regarding his access to books and records. Initially, the court notes that the March 18, 1994 decision (Ramos, J.), upon which D'Emilia relies, was issued in connection with D'Emilia's motion to compel discovery in *D'Emilia v. JVL Realty Assoc.,* Index 028483/92, a prior litigation that the parties settled in 1998. Accordingly, the court's 1994 ruling in a discovery dispute in a prior litigation which gave D'Emilia the right to examine

[5] According to the management company the document was in the possession of The Atrium's attorney.

records at the office of the managing agent upon three days notice was specific to the discovery issues in that litigation and has no application here.

Moreover, neither the 1998 Settlement Agreement, the By-Laws nor the Real Property Law give plaintiff the inviolable right to monthly inspection of the Atrium's books and records. In the 1998 settlement agreement, the Board simply agreed to observe all clauses in the By-Laws. The settlement agreement does not contain language granting D'Emilia the right to monthly inspections.

The applicable By-Law gives D'Emilia the right to inspect the books and records on reasonable notice and states that the unit owner's access is limited to not more than once a month. However, the By-Law does not say that the Board must provide monthly access to the unit owner.

In addition, the portions of the Real Property Law that D'Emilia cites apply to the documents expressly enumerated in those sections of the law and have no application to the documents plaintiff requested in this litigation ("Inclusio unis est exclusio alterius"). However, even if they did apply to D'Emilia's document requests, neither section of the Real Property law supports D'Emilia's contention that he has an unfettered right to monthly inspection of the condominium's books and records.

Here, the record is replete with documents evidencing the Board's attempt to provide D'Emilia with reasonable access to documents and responses to his inquiries and D'Emilia has failed to come forward with any evidence to the contrary. Accordingly, defendants' motion for summary judgment dismissing the first cause of action is granted and D'Emilia's motion for summary judgment on the first cause of action is denied.

B. **The Business Judgment Rule**

Under the business judgment rule, which applies to the Board of a condominium, so long as the board acts for the benefit of the residents collectively, within the scope of its authority and in good faith, courts will not substitute their judgment for that of the board. "Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available." (*Matter of Levandusky v. One Fifth Avenue Corp.*, 75 N.Y.2d 530, 538 [1990]) The burden is on the owner seeking review of the board's action to demonstrate a breach of fiduciary duty, not on the board to demonstrate that its decision was reasonable. (*Id* at 539; *Mariaux v. Turrtle Bay Towers, Corp.*, 2002 WL 31989348 [Sup. Ct. N.Y. County 2002]) Absent a specific factual showing of fraud, or self dealing or unconscionability, the court will not inquire into the wisdom or soundness of a business decision. (*Allen v. Murray House Owners Corp.*, 174 A.D.2d 400 [1st Dept 1991])

Recognizing the competing interests among unit owners that are often at issue in board decisions, the *Levandusky* court cautioned:

> A ... condominium is by nature a myriad of often competing views regarding personal living space, and decisions taken to benefit the collective interest may be unpalatable to one resident or another, creating the prospect that board decisions will be subjected to undue court involvement and judicial second-guessing. Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court, which--generally without knowing the property --may or may not agree with the reasonableness of the board's determination, threatens the stability of the common living arrangement.

(*Levandusky v. One Fifth Avenue Corp.*, 75 N.Y.2d at 539-540)

However, the business judgment rule permits a court to review improper decisions, as when the plaintiff demonstrates that the board's action has no legitimate relationship to the welfare of the condominium, deliberately singles out individuals for unequal treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority. (*Id* at 540; *Quinones v. Board of Managers of Regalwalk Condominium I,* 242 A.D.2d 52 [2nd Dept 1998])

Here, D'Emilia has failed to come forward with any evidence to establish that the Board acted in its own self interest, or beyond the scope of its authority and he has failed to overcome the Board's evidence that demonstrates that they acted in good faith in furtherance of proper corporate purposes in responding to and addressing plaintiff's complaints regarding home occupations, harboring animals, nuisances, fire insurance appraisals, payment of compensation, assessment of maintenance charges, self dealing and the conduct of the 2004 Annual Meeting. The fact that plaintiff may disagree or be dissatisfied with the board's actions is not sufficient to overcome the business judgment rule.

1. Home Occupations

The evidence establishes that in 1991 Board requested an opinion letter from its then attorney regarding "home occupations" (4/27/07 McCarthy Aff, Ex. K) . The letter contained information about how some unit owners may have been using their apartments, 16 years ago. In that 1991 letter, the attorney notes that defendant Ponzo states that she works out of a different production office but, that she has 181 Seventh Avenue on her business letterhead and if she does use her apartment for "costume design", it is a permitted use. In her deposition , in this

litigation, Ponzo testified that she does not perform administrative duties or paperwork activities in her apartment, that she does not see clients in her apartment, that she does not maintain any office equipment in her apartment and that she does not maintain any identifiable space in her apartment for business purposes. In addition, Saltman avers that she investigated D'Emilia's complaints regarding Ponzo's home occupation and found then to be without merit. (4/27/07 Weller Aff., Ex. M, para. 14) Indeed, the court notes that a search of The Office of Court Administration website for attorney registration reveals that D'Emilia lists 181 Seventh Avenue Unit 12A as his business address and the 2005 New York Lawyers Diary and Manual lists D'Emilia's address as 181 Seventh Ave. However, D'Emilia does not claim that the Board has imposed special assessments against him for a home occupation.

Apart form D'Emilia's conclusory allegations that individuals are currently engaged in home occupations and that the Board has failed to act in good faith, he has not come forward with evidence in admissible form to demonstrate that the individual defendants are using their homes to conduct businesses and that they have engaged in self dealing and acted in bad faith by failing to impose assessments against themselves.

2. Harboring Pets

The evidence demonstrates that the Board investigated D'Emilia's complaints regarding a third dog in Spierer's apartment. Saltman avers that she spoke to Spierer and discovered that in 2001, Spierer was keeping the dog for a friend while the friend underwent chemotherapy and that the dog would be gone by the end of the week. Saltman took no action regarding the third pet in Spierer's apartment because the pet was merely "visiting". However, because the By-Law at issue does not address the issue of visiting pets, the Board amended the house rules to

allow for a visiting pet for up to two weeks.[6]

D'Emilia fails to come forward with evidence to demonstrate that The Atrium had a policy regarding visiting pets and that Spierer violated that policy. Indeed, the evidence shows that the Board addressed D'Emilia's complaint and that, based on that complaint, it established a house rule, in April 2001, to cover the "visiting pet" contingency.

3. Nuisance

The evidence demonstrates that the Board addressed D'Emilia's 2001 complaint regarding "the stench of illegal drugs" coming from an apartment on the ninth floor by explaining that the Board did not regulate private conduct within an individual's home and suggesting that he report the suspected activity to the authorities. (5/17/07 D'Emilia Aff, Ex. O) D'Emilia did not report the activity to the police. (4/27/07 McCarthy Aff, Ex. O)

Moreover, at the time that D'Emilia brought this action, the allegedly offending 9th floor unit owner no longer resided in the building.

D'Emilia's uncorroborated allegations of suspected criminal activity, without more, are insufficient to establish bad faith on the part of the Board. He fails to produce affidavits, or other proof from other residents who were allegedly disturbed or outraged by the odors. Nor does he attach affidavits from the doormen who allegedly noticed the odors. Defendants explained why they would not act on his complaint and invited D'Emilia report the activity to the authorities. He, alone, chose not to take any further action regarding the alleged nuisance.

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[6] Section IV(a)(9) of the By-Laws explicitly permits the Board to amend or promulgate rules from time to time.

4. Fire Insurance Appraisals

The By-Law at issue requires the Board to obtain an appraisal of the full replacement value of the condominium prior to the purchase or renewal of a fire insurance policy. The By-Law does not require that the appraisal be in writing. Defendant Barrett, the Board member responsible for obtaining the appraisals, testified that she obtained a comparison quote from an agent as well as a quote from the existing insurer. She also testified that the management company presented the quotes to the Board in a verbal report. And, thereafter, based on the report, the Board decided to renew their policy with the existing insurer. Moreover, in her October 14, 2005 affidavit, Barrett states that she, "obtained the necessary appraisals for insurance while acting as a Board member." (See, 4/05/05 D'Emilia Reply Aff, Ex. J)

D'Emilia's conclusory allegations that the Board has failed to obtain the proper appraisals is without merit. He has not come forward with any evidence to demonstrate that the fire insurance, in place, is not equal to 80% of the replacement value of the building or that the insurance appraisals are not routinely performed by the insurance agent and communicated to the managing agent, prior to policy renewal. Nor has he attached evidence to establish that the Atrium requires a written appraisal, or has, in fact, ever received a written appraisal prior to placement or renewal of fire insurance.

5. Payment of Compensation to Officers

D'Emilia's conclusory allegations that the Atrium is paying certain officers for their services is wholly unsupported by any evidence of such payments. Contrary to D'Emilia's allegations, there is nothing in the By-Laws that prohibits The Atrium from paying a year end bonus to employees of its managing agent because the managing agent's employees are not

managers or officers of the condominium and the Management Agreement between The Atrium and Sandra Greer Real Estate, Inc. clearly states that the managing agent shall receive compensation for its services. (10/18/05 Greer Aff, Ex. A, p. 7, para. 2)

6. Improper Voting At the Annual Meeting

D'Emilia's allegations that the Commercial Manager is not permitted to cast votes in matters solely concerning the residential section of the Atrium is without merit. In a letter dated November 17, 2004, The Atrium's attorney explained that The Atrium's By-Laws, Article II, Section 2, provide that all unit owners, including the commercial units are allowed to vote. (4/27/07 McCarthy Aff, Ex. I) Indeed, there is no restriction in The Atrium's By-Laws to the effect that only residential unit owners can vote for residential managers. Moreover, D'Emilia has not presented any evidence to demonstrate that the defendants failed to follow By-Laws with regard to the vote for managers at the 2004 annual meeting.

7. Zoning and Assessment of Common Charges against Commercial Units

In 1988, the Board of Managers, and D'Emilia as president of the Board, filed a complaint against JVL that contained the following allegations:

> ELEVENTH: JVL has rented the commercial unit
> Located at the south side of the building (ground level)
> And a portion of the cellar level to Mr. Dry Clean in
> Contravention of the permissible use of the space as set
> Forth in the Building's certificate of occupancy and the
> Applicable portions of the New York City Zoning Resolution.

By settlement agreement, dated February 22 1990, signed by D'Emilia, the parties resolved their dispute by permitting Mr. Dry Clean to remain on the premises, but requiring other accommodations, including a revamped formula to compute commercial common charges, a formula which the Board follows to this day. The parties

discontinued the 1988 lawsuit, with prejudice and D'Emilia as Board President signed a settlement agreement and a release, releasing JVL and its principals from, among other things, all claims asserted in the 1988 action. (4/27/07 Weller Aff., Ex. F) The fact that D'Emilia is now attempting to re-litigate this issue[7] as an individual unit owner, after signing the settlement agreement and the release is, at best, disingenuous and a waste of judicial resources.

Moreover, the 1990 settlement agreement set forth a formula that The Atrium would use, going forward, to assess maintenance charges against commercial tenants based on the corrected proportional interest of the commercial units in the common elements . In a letter to the Board dated November 18, 1991 (McCarthy Aff, Ex. M), D'Emilia stated that while he was a member of the Board of Managers he, "single-handedly obtained an increase in Commercial Common Charges of over $3,5000 a year based on my discovery that the square footage for the Commercial Unit was incorrectly stated in the Offering Plan." (emphasis in the original) The Board has consistently followed the corrected formula set forth in the 1990 Settlement Agreement to assess commercial unit maintenance charges.[8] The fact that the Board may not have amended the By-laws to incorporate the 1990 corrected formula is *de minimus* and does not amount to bad faith since there is no dispute that Commercial Common Charges are calculated and assessed using the corrected formula.

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[7] The complaint does not allege that Mr. Dry Clean or JVL breached the terms of its continued tenancy embodied in the 1990 agreement settling that lawsuit.

[8] Jeff Israel, The Atrium's accountant since December, 2000 states, in his affidavit, that he uses the formula set forth in the 1990 settlement agreement to calculate the Commercial maintenance charges. (McCarthy Aff., Ex. N)

8. Self-Dealing

D'Emilia has presented no evidence that the Board is ignoring their own alleged violations of the home occupations by-law or the nuisance by-law or the pet by-law while enforcing those by-laws and the associated fines and assessments against other unit owners. Since plaintiff has not demonstrated selective enforcement, he is unable to establish bad faith or self dealing.

Accordingly, D'Emilia has failed to meet his burden, under the business judgment rule, of demonstrating that the Atrium and/or its Board of Managers breached their fiduciary duty or engaged in self dealing or that they breached the 1990 and 1998 settlement agreements or the Declaration and By-Laws. Moreover, plaintiff has failed to come forward with proof, in admissible form, sufficient to overcome the Board's evidence that demonstrates that they acted in good faith for the common benefit of all the unit owners.

In addition, D'Emilia has failed to demonstrate that the individual board members are liable to him under any of the four causes of action on the complaint. In order to maintain a cause of action against an individual board member, plaintiff must have sufficient reason to go beyond the corporate structure and pierce the corporate veil. (*See, Williams Oil Company, Inc. v. Randy Luce E-Z Mart One, LLC*, 302 A.D.2d 736 [3rd Dept 2003]; *In the Matter of Morris v. New York State Department of Taxation and Finance,* 82 N.Y.2d 135 [1993]) Personal liability will only be imposed if the plaintiff can show that the individual "exercised complete domination of the corporation in respect to the transaction attacked; and that such domination was used to commit a fraud or a wrong against the plaintiff that resulted in plaintiff's injury." (*Williams Oil Company, Inc.*, 302 A.D.2d at 739 [quoting *In the Matter of Morris,* 82 N.Y.2d at 141])

D'Emilia has presented no evidence that any of the individual Board members exercised complete domination over the entire Board or that any one of them engaged in willful misconduct, bad faith or fraud.

Because the court finds that summary judgment is warranted in favor of defendants based on the business judgment rule, it does not reach defendant's alternative arguments.

Accordingly, it is ORDERED that Motions 011 and 012, wherein all of the remaining defendants seek summary judgment dismissing the complaint, are granted and the complaint is dismissed, and it is further

ORDERED that Motion 010 and plaintiff's cross motion seeing summary judgment on the complaint and recusal are denied, and it is further

ORDERED that Motions 13 and 16 seeking to strike plaintiff's notice to admit are denied as moot, and it is further

ORDERED that Motions 14 and 15, which are duplicative of Motions 011 and 012, are permitted to be withdrawn, and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

DATE 7/31/07

J.S.C.