

**Greens at Half Hollow LLC v Greens at Half Hollow Homeowners Assoc. Inc.**

2007 NY Slip Op 32666(U)

August 20, 2007

Supreme Court, Suffolk County

Docket Number: 0007605/2007

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 46 SUFFOLK COUNTY**

**Present:**

**HON. EMILY PINES**  
Justice

\_\_\_\_\_  
GREENS AT HALF HOLLOW LLC, X

**Index # 07605-2007; Action #1**

Plaintiff,  
-against-

GREENS AT HALF HOLLOW HOMEOWNERS ASSOCIATION INC.,  
JOHN DEGREGORIO, JACK SOLOMONS, FRANK RIZZO, ELEANOR  
FALCO, RAY MINCONE, HENRY HASSON, CHARLES MASSARIA,  
MALCOLM L. TILLIM, STEVE KAPLAN, JAMES KAPLAN, JOSEPH  
LAFFERTY and RUSSELL MOHR,

Defendants.

\_\_\_\_\_  
In the Matter of the Petition pursuant to §618 and §623 of the New York State  
Not for Profit Corporation Law to set aside the election for seven members  
of the BOARD OF DIRECTORS OF THE GREENS AT HALF HOLLOW  
HOME OWNERS ASSOCIATION, INC., held on February 15, 2007,

**Index # 07605-2007; Action #2**

Joel Solomon, Howard Schulman, Gary cash and Sherman Rothberg,  
Individually and on behalf of more than five (5%) percent of the home owners  
of the Greens at Half Hollow Home Owners Associations, Inc.,

Petitioners-Plaintiffs,

-against-

JACK SOLOMONS, FRANK J. RIZZO, RAYMOND J. MINCONE and  
CHARLES MASSARIA, MALCOLM TILLIM, ESQ., TILLIM &  
SHEPARDSON, ATTORNEYS AT LAW, MARTIN SPECINER AND  
CAROLE MIRLIS, THE GREENS AT HALF HOLLOW HOME  
OWNERS ASSOCIATION, INC., STEVE KAPLAN, JAMES KAPLAN,  
JOSEPH LAFFERTY, RUSSELL MOHR, JOHN DEGREGORIO,  
ELEANOR FALCO, HANK HASSON, S.B.J. ASSOCIATES, LLC, and  
GREENS AT HALF HOLLOW,

Respondents-Defendants,

\_\_\_\_\_  
X

MOTION DATE: 4-12-07; 6-7-07; 6-14-07  
SUBMITTED: 6-18-07  
MOTION NO'S.: 01- MOTD; CASEDISP  
02- MG; CASEDISP  
03- MOTD; CASEDISP

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**BACKGROUND FACTS**

Two actions, consolidated for joint trial by Order of Justice  
Leonard B. Austin (Order dated June 18, 2007) arise out of a dispute

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between the sponsor/developer of a condominium development and different factions of condominium owners over which group/entity has the right to control the Board of the Homeowners Association, ("HOA"). Action #1 under Index No. 7605/07 was commenced in Suffolk County; Action #2 now also under Index No. 7605/07 commenced in Nassau County and transferred to Suffolk County as set forth below.

### Action #1

This action was brought by Greens at Half Hollow LLC ("Sponsor") the Sponsor-Developer of a four phase senior residential condominium project known as the Greens at Half Hollow LLC (the "Greens"), located in Melville, New York. The Sponsor, in its complaint, seeks a judgment pursuant to **CPLR §3001** declaring that it has a continuing right to designate a majority of the board of directors of the HOA. The Sponsor also seeks an injunction protecting its right to designate the majority of the board of the HOA and to enjoin certain defendants-- John DeGregorio, Jack Solomons, Frank Rizzo, Eleanor Falco, Ray Mincone, Henry Hasson and Charles Massaria ("Tillim Board") from holding out and representing that they comprise the current Board of Directors of the Greens HOA. The plaintiff in "Action #1" also seeks to enjoin co-defendant Malcolm L. Tillim from holding himself out as attorney for the HOA.

In Action #1, the Tillim Board moves (Motion Sequence #001) for Summary Judgment pursuant to **CPLR §3212**. In the same motion they seek Summary Judgment dismissing the Petition in Action #2. The members of the Tillim Board contend that the condominiums consist of 1,044 units built in four separate phases, governed by the same condominium plan and documents. In addition to the four condominium phases, the Sponsor also owns a parcel of land contiguous with the Greens which is zoned for 100 affordable housing units. This phase is proposed as Condo V. The Tillim Board asserts that the Sponsor prepared the by-laws for each of the condominiums and the HOA, all four of which contain the same material provisions. Pursuant to these condominium documents, the Sponsor had the right to designate four HOA directors, who have the majority voting control of the seven member board only so long as the Sponsor owns any homes. The Tillim Board claims that the Sponsor no longer owns "homes" in the Greens and therefore no longer

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has the right to designate four HOA directors. Thus, such defendants in Action #1 assert that control of the board should be turned over, in accordance with the results of the election on February 15, 2007. The Sponsor, disagrees, setting forth that since it is still an owner of 101 units in the Greens, it retains the right under the by-laws to designate 4 members of the HOA Board.

In further support of their motion for Summary Judgment, the Tillim Board contends that the offering plans approved by the NYS Attorney General for condos 1-4 have been terminated or lapsed and that by operation of law, they are no longer in effect. Furthermore, they contend that the offering plan submitted by the Sponsor for Condo V has never been completed and that the Sponsor does not have any building permits issued by the Town of Huntington currently in effect for construction of any home on the Condo V property. In other words, the Tillim Board defendants take the position that the Sponsor is intentionally delaying the construction of Condo V at least in part, to hold on improperly, the control of the HOA Board.

#### Action #2

The Nassau County proceeding was brought by certain HOA members -- Joel Solomon, Howard Schulman, Gary Cash and Sherman Rothberg, individually and on behalf of more than five (5%) percent of the home owners of the Greens HOA (The "5% Plaintiffs"). The 5% Plaintiffs seek to set aside an election of the HOA Board held on February 15, 2007 on the ground that the Sponsor's right to designate four of the board's seven directors was not recognized by a Court appointed monitor who conducted the election. The Petitioners in Action #2 also seek declaratory and injunctive relief. In other words, the petitioners in Action #2 support and seek essentially the same relief as the Plaintiff in Action #1. Petitioners also seek an unspecified amount of damages. In Action #2, four of the purported HOA board members -- Jack Solomons, Frank J. Rizzo, Ray J. Mincone, and Charles Masseria along with their attorney, Malcolm L. Tillim, counterclaim against the Petitioners and Cross-claim against the Sponsor seeking damages for Malicious Prosecution.

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In Action #2, the 5% Plaintiffs move, by Order to Show Cause (Motion Sequence #002) for an Order declaring the February 2007 election invalid; that any actions taken by the Tillim Board are null and void; that the Sponsor's designees are on the true HOA Board, as well as for related injunctive relief. In essence, the 5% Plaintiffs are seeking Summary Judgment in Action #2. In view of Justice Austin's decision, consolidating the two actions, the Court considers the papers submitted by the Plaintiff and Defendants in the motion in Action #1 to be also in response to the motion for Summary Judgment in Action #2.

In addition to the above, in Action #2, the 5% Plaintiffs move (motion sequence #003) to dismiss the counterclaim of the Tillim Board for malicious prosecution pursuant to **CPLR §3211 (a) (7)**. That motion also seeks to hold attorney Malcolm Tillim in contempt, alleging that he continues to hold himself out as attorney for the HOA despite TRO's to the contrary issued by Justice Bucaria (4/9/07); and Justice Austin (6/18/07). Defendant Tillim responds stating that his actions post-TRO's were all in the context of the current Actions which constituted his right to assert this position.

#### PRIOR ACTIONS NOT BEFORE THIS COURT

According to the record, there is a related action pending in the Supreme Court Suffolk County under Index no. 14517-06 brought by the Town of Huntington as plaintiff and the Sponsor as defendant seeking a mandatory injunction compelling the defendant to perform corrective work on the Greens condos I-IV and to proceed with the construction in Condo V. Parties set forth that Condo V is designated for 100 affordable housing units. In that action the sponsor is allegedly disputing the cost to be charged for such units. The 100 units in condo V are in various stages of construction; however, such construction has stalled in light of the Town of Huntington litigation.

Prior to all the above actions, Jack Solomons, an individual defendant in Action #1 before this Court, commenced an action in Suffolk County, Index #20915-06 to challenge an election held on June 24, 2004 wherein, Solomons claimed that the election of three directors (those not designated by the Sponsor) was improper. The Court's order dated November 28, 2006 (Werner, J.) denied the branch of the action seeking

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a declaratory judgment that the Sponsor no longer had the right to designate a majority of the directors on the HOA board. The Order stated that in accordance with the by-laws of the HOA, the Sponsor may retain control over the Board of Directors of the Association for as long as the Sponsor continues to own even one home in the Greens. However, the Order did set aside the 2004 election on the grounds that the notice of the election had been improper. The order also appointed the Honest Ballot Association ("HBA") to act as election inspectors for the election to be held on January 17, 2007. This election was later adjourned by the HBA due to lack of quorum until February, 2007.

The Ordered election that gave rise to Action #1 was held on February 15, 2007. On that day, just prior to the election, the Sponsor presented to Linda Gibbs of the HBA, a list of the four persons that the Sponsor designated for the Board -- Steve Kaplan, James Kaplan, Joseph Lafferty and Russell Mohr. However, rather than only electing three directors to fill the remaining directors' positions, the Tillim Board claims that all seven positions were filled by this election. These seven individuals, the Tillim Board, allegedly tried to seize control of the operation of the HOA by attempting to gain control of and access to the bank accounts of the HOA and by attempting to discharge the attorney representing the HOA in the lawsuit brought by the Town of Huntington and replacing that attorney with Malcolm L. Tillim Esq., who is allegedly holding himself out as the attorney for the HOA. The Sponsor claims that its right to designate a majority of the Board of Directors has therefore been violated.

The central question in both current proceedings is whether or not the Sponsor maintains the right to designate a majority of the HOA directors under the By-laws of the Condominium. The Tillim Board claims that the 101 lots currently owned by the Sponsor are just lots, not "homes" and there is currently no construction or sales activity for any of the lots owned by the Sponsor. Furthermore, they claim that all of the lots in Condo I - IV have been sold and that the Sponsor is not doing anything to build or sell homes in Condo V. They claim that the Sponsor's right to designate the HOA directors ended in 2005. As previously discussed, the Sponsor is currently in litigation on a separate matter with the Town of Huntington regarding these specific

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units, as a result of the Sponsor seeking to amend the previously agreed upon price for the affordable housing units. The Tillim Board claims that the Sponsor's reliance on the unsold homes in Condo V is insufficient to maintain control of the HOA Board for Condos I-IV.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see, Hartford Accident & Indemnity Co. v Wesolowski*, 33 NY2d 169, 172; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see, Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century Fox Film Corp.*, *supra* at 404). To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see, Freedman v Chemical Constr. Co.*, 43 NY2d 260, 264). Mere conclusions, expressions of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (*see, Zuckerman v City of New York*, *supra* at 562).

The by-laws for the Greens HOA call for a board consisting of seven directors. In addition the by-laws state in Section 2:

The developer shall have the right to designate a majority of the total directors, until all of the Homes in Greens at Half Hollow Condominium I and any homes to be built on the Phase II property have been conveyed. When the Developer no longer owns any unsold home in the Development, it may not designate any Directors.

The Tillim Board claims that since the Sponsor has not performed any construction on Condo V, and that it does not own "homes" under the definition in the contract, that it has waived its right to designate the majority of the board.

The documentary evidence produced by the Sponsor clearly demonstrates that the Sponsor has the right to designate four members of the HCA for as long as it owns even one unit. The clear unambiguous language in the by-laws as stated above indicates that the offering plan unequivocally refers to "any homes to be built". Accordingly, the sponsor has demonstrated *prima facie* entitlement to Summary Judgment.

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In response, the Tillim Board argues that their rights as homeowners have been violated. When the homeowners in this development purchased their homes in the Greens, they entered into a contractual relationship with the Sponsor and relied on the representations made in the contracts of sale and the offering plans.

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (*see, Smith v. General Acc. Ins. Co.* 91NY2d 648). Courts have held that Sponsor designated boards must meet standards of fair dealing and good faith to ensure that their members do not gear their decisions to benefit the Sponsor at the expense of the association or its members (*see, Board of Managers of the Fairways at North Hills Condominium v Fairway at North Hills* 193AD2d 322). As stated above, the record indicates that the Sponsor is involved in a separate proceeding dealing with the construction and ultimate sale of the affordable housing units in Condo V. Accordingly, it remains an owner of 101 units of the Greens. However, because the by-laws do not set forth a specific time in which the Sponsor must sell the remaining units, the Court has the right to interpose a reasonable time for performance (*see, Manzi Homes, Inc. v Mooney*, 29 AD3d 748).

Applying the above to the facts of both actions now before it, the Court finds that the existence of the litigation between the Sponsor and the Town of Huntington regarding the sales price for the affordable housing units bars a finding at this juncture of unreasonable delay by this Court. Accordingly, the Court grants Summary Judgment to Plaintiffs in Action #2 (the 5% Plaintiff's) on their first and second causes of action. Pursuant to **CPLR §3212 (b)** the Court may search the record where there is a pending motion for Summary Judgment, and then award judgment where it is warranted in favor of the non-moving party. Accordingly, the Court asserts this right and also grants Plaintiff/Sponsor in Action #1 Summary Judgment declaring that the Sponsor continues to have the right to designate four members of the HOA.

The Court cautions the Sponsor, however, that should the Sponsor fail to go forward with the construction and sale of the housing units in Condo V upon resolution of the Town litigation, the home owners within the Greens will then have standing to bring an action against the

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Sponsor for breach of the above described duty of good faith and fair dealing and for acting inconsistent with the terms of the contractual relationship they relied on in connection with their purchase (see, **511 West 232<sup>nd</sup> Owners Corp v Jennifer Realty Co.** 98 NY2d 144).

The Court now turns its attention to Motion 003 brought by the 5% Plaintiffs in Action #2. This motion seeks an Order citing the Respondents Malcolm Tillim and Tillim & Shepardson for contempt as well as an Order disqualifying these respondents from acting as attorneys for the HOA. In addition, this motion seeks to dismiss the counterclaim for Malicious Prosecution brought in Action #2 action pursuant to **CPLR §3211 (a) (7)**.

According to the record Justice Stephen A. Bucaria signed an Order to Show Cause with a Temporary Restraining Order enjoining certain members of the Tillim Board from acting as or claiming to be directors of the HOA. This TRO also enjoined Malcolm Tillim and Tillim & Shepardson from acting as the attorneys for the HOA. The 5% Plaintiffs now move for an order of contempt claiming that Malcolm Tillim violated this TRO on several occasions.

A motion to punish for contempt must be made in accordance with **CPLR §5104** which states that a certified copy of the contempt order be served on the party to be held in contempt. In addition, **Judiciary Law §756** requires that the application for contempt shall contain on its face a notice that the purpose of the hearing is to punish for contempt of court. The statute contains specific language which must be on the face of the application. The record now before the Court does not satisfy the statutory requirements set forth above and the motion for contempt is therefore denied. In addition, in light of the decision of this Court as stated above, defendants Malcolm Tillim and Tillim & Shepardson are enjoined from acting as the attorneys for the HOA.

The remaining portion of Motion 3 deals with the 5% Plaintiffs' request to dismiss the counterclaim brought by the Tillim Board for Malicious Prosecution. When deciding a motion to dismiss, pursuant to **CPLR 3211 (a) (7)**, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. The

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criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*see, Leon v Martinez*, 84 NY2d 83 and *Guggenheimer v Ginzburg*, 43 NY2d 268).

To succeed in an action for malicious prosecution, the plaintiff must prove malice, or a purpose other than the adjudication of claim, and must further prove an entire lack of probable cause in the prior proceeding. A plaintiff must also offer proof of a special injury as a necessary component of a malicious prosecution claim, (*see, Engel v CBS Inc.* 93 NY2d 195). In addition, an essential element of a cause of action to recover damage for malicious prosecution is that the action complained of terminated in favor of the party asserting the claim, (*see, Laval Realty v Shell Realty Co.*, 151 AD2d 321). Since the Court has granted Summary Judgment to the 5% Plaintiffs and found that the Sponsor has a continuing right to designate the majority of the HOA Board, the Court also finds that the Tillim Board has failed to satisfy the requirements to bring an action for malicious prosecution. Therefore, the Court grants the 5% Plaintiffs' motion to dismiss the counterclaims brought against them pursuant to **CPLR §3211(A) (7)**.

The last remaining issue before the Court is the Third Request for Relief in the Petition filed by the 5% Plaintiffs. As stated the Tillim Board has moved for Summary Judgment to dismiss that cause of action as part of motion sequence #001. The 5% Plaintiffs in Action #2 do not respond to this branch of the motion other than to state that Tillim violated various TRO's. However, the only evidence submitted demonstrates that such parties acted under the belief that they constructed the HOA Board. There does not appear to be any reason set forth by the 5% Plaintiffs to maintain this cause of action and all counsel suggested during oral argument that the Court's determination of these motions would dispose of these cases. Accordingly the Court grants the Tillim Board's motion for Summary Judgment dismissing the third cause of action in Action #2.

Accordingly it is:

**ORDERED**, that the portion of the motion by defendants dated June 7, 2007 ("Motion Sequence #001") to consolidate an action in Nassau County under index number 5909-07 ("Action #2") has previously been

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decided by Justice Leonard B. Austin on June 18, 2007, at which time Action #2 was consolidated with this action in Suffolk County under Index number 7605-07 ("Action #1") for joint trial pursuant to **CPLR Article 6**; and be it further

**ORDERED**, that the portion of Motion Sequence #001 seeking partial summary judgment dismissing the complaint served in Action #1 and the Petition/Complaint filed in Action #2 is denied except as it pertains to the Third Request for Relief in the petition in Action #2 seeking damages for improper actions of respondents Jack Solomons, Ray J. Mincone, Martin Speciner, Carol Merlis, Malcolm Tillim Esq. and Tillim & Shepardson and that is granted; and be it further

**ORDERED**, that the remainder of Motion Sequence #001 for a declaratory judgment declaring that the Sponsor-Developer designees are not eligible to serve on the Greens at Half Hollow Home Owner Association Inc's ("HOA") board of directors and staying Action #2 pending the determination of these motions and staying a purported election of three HOA directors scheduled for June 12, 2007 is denied; and be it further

**ORDERED**, that the Court exercises it's authority under **CPLR § 3212 (b)**, granting Summary Judgment to the Sponsor/Developer in Action #1; and be it further

**ORDERED**, that the motion dated April 12, 2007 brought under the Nassau County Action, Action #2, ("Motion Sequence #002") by the 5% Plaintiffs seeking to invalidate the February 15, 2007 pursuant to NYS N-CPL 613, and seeking to confirm that the four Sponsor designated directors and three elected directors, John DeGregorio, Henry Hasson and Eleanor Falco are the directors of the HOA until their successors are elected at the June 2007 annual meeting, and to enjoin and restrain Jack Solomons, Frank Rizzo, Ray Mincone and Charles Massaria from acting as or claiming to be directors of the HOA as a result of the February 15, 2007 election and any action taken by them null and void is granted; and be it further

**ORDERED**, that the portion of Motion Sequence #002 as it pertains to Malcolm Tillim, Esq. and Tillim & Shepardson from acting as

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or claiming to be attorneys for the HOA and declaring any and all actions taken by Malcolm Tillim, Esq. and/or Tillim & Shepardson as attorneys for the HOA null and void is granted; and be if further

**ORDERED**, that the portion of the motion by the 5% Plaintiffs in Action #2 under Index No. 5909-07 dated June 14, 2007 ("Motion Sequence #003") seeking to dismiss the respondents' counterclaim for failure to state a cause of action is granted and the portion that seeks an Order citing respondents, Malcolm Tillim and Tillim & Shepardson for contempt is denied and the portion of Motion Sequence #003 that seeks an Order prohibiting Malcolm Tillim and Tillim & Shepardson from appearing in this action as attorney for the HOA is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

Submit Judgment on Notice in accordance with the terms of this Decision.

Dated: August 20, 2007  
Riverhead, New York

  
\_\_\_\_\_  
EMILY PINES  
J. S. C.