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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 117356/2006

W A SPECIAL 9 LLC

VS

KILAR, ROBERT

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered ... 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

FILED
OCT 01 2007
COUNTY CLERK'S OFFICE
NEW YORK

**motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.**

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

Dated: 9/21/07

JUDITH J. GISCHE, 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: PART 10

----------x

WA SPECIAL 9 LLC,

Plaintiff,

-against-

ROBERT KILAR, DOUGLAS BEER, ALICE DE CALLARAY AND JESSE BIGELOW, individually and as members of the BOARD OF MANAGERS OF 49 EAST 21ST STREET AND 49 EAST 21ST STREET CONDOMINIUM,

Defendants.

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**Decision/Order**
Index No.: 117356/06
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.



Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

| **Papers** | **Numbered** |
|---|---|
| Pltf's motion [SJ] w/KAM affid in support, exhs | 1 |
| Def's opp w/BDS affirm, exhs | 2 |
| Pltf's RJO reply affirm in further support, exhs | 3 |

*Upon the foregoing papers, the decision and order of the court is as follows:*

The underlying action concerns a casualty loss to a condominium unit owned by plaintiff WA Special 9 LLC. Plaintiff now moves for summary judgment: (1) declaring that defendants are obligated under the bylaws of 49 East 21st Street Condominium (the "Bylaws"), located at 49 East 21st Street in Manhattan (the "Building"), to restore and repair apartment 2B at said address (the "Unit") as a result of the casualty loss therein occurring; (2) declaring that defendants breached their fiduciary obligations by conditioning plaintiff's ability to restore its Unit on the giving up of any claims plaintiff may have against the

defendants; (3) for an order enjoining defendants from interfering with and/or refusing plaintiff's request to rehabilitate the Unit, continuing to bill or make any assessments in violation of the bylaws and granting a mandatory injunction directing and/or permitting such rehabilitation and severing plaintiff's damage claims including its punitive damages claims against defendants; (4) declaring that defendants are precluded by the bylaws from billing/assessing charges until the Unit is habitable and awarding plaintiff damages in all amounts previously billed; and (5) striking defendants' answer and all affirmative defenses; and (6) awarding sanctions to plaintiff against defendants. CPLR § 3212, 22 NYCRR § 130.

Defendants are Robert Kilar, Douglas Beer, Alice de Callaray and Jesse Bigelow (the "board members"), individually and as members of the Board of Managers of 49 East 21 Street Condominium (the "Condominium Board"). Defendants oppose the instant motion.

Summary judgment relief may be considered by the court since issue has been joined, and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Plaintiff is the owner of the Unit and was leasing the Unit to Kim Bishop ("Bishop"), for an annual rent of $5,200 per month, until April 24, 2006, when a domestic water line in the common area at the Building ruptured (the "Loss"). It is undisputed that the Loss caused extensive damage to the Unit, as well as damaging common areas and other units located on the Building's second floor. Bishop vacated the unit after April 24, 2006.

Plaintiff filed a claim with its insurance carrier, Harleysville Worcester Insurance Company ("HWIC"), on April 24, 2006.

Sometime thereafter, plaintiff received an undated letter from the Condominium Board which stated that repair costs relating to the domestic water line rupture were $250,000 and the Condominium's insurance claims had been settled for $125,675.65. The Condominium Board stated that the Condominium did not have the funds to pay for all repairs. The letter also stated that:

> "Although we still believe that the apartments should be covered and will continue to fight this claim, at the current time in order for the units to be completed, the four unit owners on the second floor will have to go through their respective insurance carriers to settle payment claims on their apartments."

Defendants then hired MKG Construction and Consulting ("MKG"), the Condominium's contractor, to remediate mold occurring on the second floor (including inside the Unit) as a result of the Loss. According to plaintiff, the mold remediation in the Unit was conducted without its permission. Plaintiff alleges that MKG removed all of its kitchen appliances and fixtures and "rip[ped] up the floor and destroy[ed] walls in the apartment." According to plaintiff, the floor and walls have never been replaced.

On August 16, 2006, Max Freedman, on behalf of the Condominium Board, sent plaintiff an email indicating that its insurance company still disclaimed coverage for the individual units on the second floor, including the Unit. Freedman went on to state that:

> "[t]he Board has currently over extended itself to MKG Construction for work that has already been completed thus far. As of today, all apartments as well as the common areas have been completely remediate (sic) and have been cleared for repair. However, the failure of our insurance carrier to compensate us for work done has nevertheless put the building $200,000 in debt to MKG. Consequently, MKG has decided to stop all pending work until some form of compensation is received.

> That being said, the quickest way to get your apartment restored would not be to wait until this insurance claim settles...
>
> I strongly advise that you speak with Patrick from MKG [redacted] and come to a monetary agreement to start work on your apartment ASAP. Please notify your carrier of your intentions and demand reimbursement from them. Should they request a copy of the bylaws or the declaration of the Condominium I have attached them to this email."

By letter dated August 29, 2006, plaintiff notified the Condominium Board that it would initiate a lawsuit against the Condominium Board for its "conduct arising out of the failure to maintain a water pipe in the building common area, the casualty loss from the break in the water pipe, the damage to [the Unit], and the conversion of furniture and fixtures by your contractor, MKG."

According to the minutes from the Condominium Board's annual meeting on September 27, 2006, "[t]he mold remediation [on the second floor] was the first priority given the potential impact on the health of all tenants and this has been completed. The Association's insurance company's limited liability stems from interpretation and some potentially confusing language in the bylaws. This may need to be remedied by an amendment to the bylaws; our legal counsel will investigate this."

By letter dated October 6, 2006, plaintiff notified the Condominium Board that it had retained the firm of Anko General Contracting ("Anko") to rehabilitate the Unit and requested the Condominium Board's approval for this contractor. That letter set forth the work that Anko would perform, to wit: "install new wood flooring, tape and plaster all damaged areas, provide and install any moldings, reinstall the kitchen cabinets and appliances and paint the apartment." Plaintiff reiterated this request on October 12 and

October 17, 2006.

On October 22, 2006, Kent Karlsson, Esq., attorney for the Condominium Board, responded to plaintiff's request. He stated that: "I do not see why the condominium would agree to allow your client's contractors to rehab the apartment and at the same time maintain a claim that the board would be responsible. This cannot be agreed to." Based on the affidavit of Karlsson, this was "an opinion that [he] expressed to [plaintiff], and [this letter] has to be considered in the context of... many discussions and communications on the topic.... I advised [plaintiff] orally, and in my letter, that it would make no sense for the Building to try to work things out amicably with the Plaintiff using its own contractor, under the threat of litigation. But this was never formalized as a precondition in any regard."

Plaintiff then contacted MKG to complete the rehabilitation of the Unit. By letter dated November 7, 2007, MKG acknowledged this agreement. MKG estimated that the total cost for the rehabilitation work for the Unit would be between $45,085 - $52,185.

On Friday, November 10, 2006, plaintiff sent a proposal to the Condominium Board that it would have MKG complete the rehabilitation work. He stated "[i]f the building persists in its claim that it will not permit rehabilitation work to go forward unless and until our client waves any possible claims then the Board is inviting suit. Please let me hear from you by the end of the day Monday that MKG is approved to start work ... Anything less that unqualified approval for MKG to do the work will not be acceptable."

Meanwhile, plaintiff's claim with its own insurance carrier declined coverage by letter dated January 19, 2007, citing the obligation of the Condominium Board, under Section 5.6(B) of the Bylaws, to repair and restore the unit.

The Condominium Board, by letter dated January 29, 2007, informed plaintiff that

there would be an assessment for the mold remediation in the total amount of $35,000.00, which would be covered by the Condominium, provided plaintiff executed a waiver of any claims against the Condominium Board and MKG arising from the mold remediation of the Unit. Plaintiff has not executed this waiver.

Plaintiff's complaint asserts three causes of action. The first cause of action seeks damages stemming from defendants' alleged breach of their fiduciary duty to plaintiff by failing to repair and rehabilitate the Unit in connection with the Loss and/or denying plaintiff permission to repair or rehabilitate the Unit through the services of either Anko or MKG without conditioning such approval on plaintiff's waiver of its rights available under the Bylaws. The second cause of action seeks a preliminary and permanent injunction directing defendants to permit rehabilitation of the Unit without conditioning such approval on plaintiff's waiver of its rights available under the Bylaws and a declaration that defendants may not withhold their approval of the rehabilitation of the Unit or levy any special assessment for any monies in connection with the rehabilitation. The third cause of action seeks a declaration that: (1) the domestic water line rupture which occurred on the second floor of the Building on April 24, 2006 constituted a "casualty loss" within the meaning of Paragraph 5.6(B) of the Bylaws; and (2) defendants are obligated to repair and rehabilitate the Unit.

Plaintiff previously moved for summary judgment. By order dated April 26, 2007, the court denied that motion as premature with the right to renew after defendants had an opportunity to inspect the Unit. Defendants' expert, Frank Antonucci, inspected the Unit on May 9, 2007, therefore this motion is timely and will be considered on the merits, since the denial was without prejudice. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept.

this case should proceed so that they can add an otherwise unidentified third-party who they claim is the "negligent tortfeasor." Defendants also claim that plaintiff is not entitled to injunctive relief because, under the Bylaws, defendants are not obligated to pay for the repairs out of its own finances where insurance coverage is inadequate, but solely to "arrange for" the repairs. Finally, defendants argue that because plaintiff failed to comply with the Bylaws in submitting the proper documentation to have the repair work in the Unit performed, plaintiff is not entitled to the return of any common charges.

Defendants also contend that plaintiff's claim, that plaintiff was denied access to the Unit until plaintiff waived its right to future claims, is false. Rather, defendants claim that plaintiff sought to remediate a mold condition and other conditions in its apartment with its own contractor as opposed to MKG, the Condominium's approved contractor. Defendants argue that they did not approve plaintiff's alleged proposal to use Anko to rehabilitate the Unit because plaintiff did not formally submit a proposal to use either contractor to perform the rehabilitation work. Defendants also claim that, in the context of settlement discussions, they offered to approve plaintiff's request to use Anko on the condition that it waived its claims against defendants. Finally, defendants contend that plaintiff's proposal to use MKG was improper because it did not give defendants enough time to consider this request as required under the Bylaws.

Defendant has withdrawn its third affirmative defense of lack of personal jurisdiction.

In reply, plaintiff argues that defendants do not have a right to arbitrate and that defendants, by utilizing discovery procedures, have chosen to defend this case on the merits.

**Discussion**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

A condominium's by-laws constitute a contract with the unit owners. Lesal Assoc. v Board of Mgrs. of Downing Ct. Condominium, 309 A.D.2d 594 (1st Dept 2003). Two fundamental principles of contract construction are that: (1) agreements are to be construed in accordance with the parties intent; and (2) the best evidence of what the parties intend is what they provide in their writing. Greenfield v. Phillies Records, 98

N.Y.2d 562 (2002); Van Kipnis v. Van Kipnis, 840 N.Y.S.2d 36 (1st Dept. 2007). A written agreement that is complete, clear and unambiguous on its face, must be enforced according to the plain meaning of its terms.

At the outset, the court rejects defendants' contention that summary judgment should be denied because plaintiff failed to pursue arbitration. While Section 5.6(H) of the Bylaws does provide a contractual right to arbitrate, defendants have waived that right by affirmatively seeking the benefits of litigation. Sherrill v. Grayco Bldrs., 64 N.Y.2d 261 (1985); Matter of Zimmerman v. Cohen, 236 N.Y. 15 (1923). Here, defendants were given the opportunity to inspect the Unit, an opportunity they sought in opposition to plaintiff's prior motion for summary judgment. In addition, they fully opposed the prior motion for summary judgment without ever raising the issue of arbitration. Defendants' time to argue that this matter should be submitted to arbitration has expired.

The first cause of action alleges that defendants breached their fiduciary duty to plaintiff. However, plaintiff's claimed actions by the individual members of the Condominium Board do not form the basis of a cause of action against them in their individual capacities. Corporate directors are not personally liable in tort in the absence of allegations of individually tortious conduct. The directors of a cooperative corporation remain insulated from personal liability under the business judgment rule. Dinicu v. Groff Studios Corp., 257 A.D.2d 218 (1st Dept. 1999). The Condominium Board's actions were arguably a proper exercise of business judgment, thus insulating them from personal liability. Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530; *cf.*, Ludwig v. 25 Plaza Tenants Corp., 184 A.D.2d 623. Since plaintiff has failed to *prima facie* show proof of individually tortious conduct, summary judgment against the board members

individually is denied.

Plaintiff contends that the Condominium Board breached its fiduciary duty to it by conditioning plaintiff's ability to restore its Unit on waiving its claims against defendants arising in connection with the Loss. A condominium board owes a fiduciary duty to the condominium and its unit owners. Board of Managers of Fairways at North Hills v. Fairway at North Hills, 193 A.D.2d 322 (2nd Dept. 1993). The decisions and actions taken by the board are, however, protected by the business judgment rule. Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1 (1st Dept. 2006). In order for plaintiff to trigger any further judicial scrutiny, plaintiff must show that the Condominium Board acted: (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. 40 W. 67th St. v. Pullman, 100 N.Y.2d 147 (2003). "So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's." Levandusky v. One Fifth Avenue, 75 N.Y.2d 530 (1990).

Section 5.2(A) of the Bylaws provides that:

> "no Residential Unit Owner may make any structural alteration, addition, improvement or repair, in or to his Residential Unit... without the prior written approval of the Condominium Board. In the event, however, that the Condominium Board shall fail to answer any written, *reasonably detailed request for such approval within 30 days* after such request is received, such failure to respond shall constitute the Condominium Board's consent thereto. Prior to, and as a condition of, the granting of any such approval, the Condominium Board may, at its sole option, require the Residential Unit Owner to procure and agree to maintain during the course of such work such insurance satisfactory to the Condominium Board..." (emphasis added).

Plaintiff claims that defendants "rejected each of plaintiff's requests and demands to permit plaintiff to mitigate its losses and restore plaintiff to possession or its lessee to possession." The evidence presented by plaintiff does not unequivocally establish this claim, and indeed, defendants have raised issues of fact which otherwise precludes summary judgment. Plaintiff's request dated October 6, 2006 for permission to use Anko to perform the rehabilitation was not as a "reasonably detailed request," as required by the Bylaws. Moreover defendants have raised issues regarding whether their response, made through attorney Karlsson, was part of an ongoing negotiation about who was responsible for repairs after the water line broke as well as when the repairs would take place. Further, plaintiff did not comply with the bylaws when it gave defendants only three days to consider the November 10, 2006 proposal to use MKG. Instead of giving defendant 30 days to pass on whether to approve plaintiff's proposal to make repairs to the Unit itself, Plaintiff delivered its own ultimatum when it stated that, by Monday, November 13, 2006, "anything less than the unqualified approval for MKG to do the work will not be acceptable."

There is no evidence of any Condominium Board response to the November 10, 2006 letter. There is no showing on this motion by plaintiff that the Condominium Board's response was to condition approval on a waiver of claims. Indeed, prior correspondence indicates that the Condominium Board believed a practical way for the second floor unit owners to have the work done was to use its contractor MKG, while it was pursuing its own claims its insurance carrier. The Condominium Board has otherwise raised issues of fact regarding whether its actions were the result of financial inability of the Condominium to fulfill its obligations under the Bylaws and its assessment that it would address the most pressing problems (i.e. mold) first and whether any or all of its actions were conducted in

contemplation of settlement. Therefore, the court cannot conclude as a matter of law that the Condominium Board breached its fiduciary duty to plaintiff. Accordingly, plaintiff's motion for summary judgment on the first cause of action is hereby denied.

In the third cause of action, plaintiff seeks a declaration that: (1) defendants are obligated to repair and rehabilitate the Unit; and (2) the Loss constituted a "casualty loss" within the meaning of Paragraph 5.6(B) of the Bylaws.

It is undisputed that the Loss constituted a "casualty loss" under the Bylaws. However, defendants contend that they were merely obligated to "arrange for" the repair.

Section 5.6(B) of the Bylaws provides that:

> "the Condominium Board shall arrange for the prompt repair or restoration ("Work") of: (i) in the event of a Casualty Loss, the portion(s) of the Building (including all Units and the bathroom and kitchen fixtures installed therein on the date of recording the Declaration and all service machinery contained therein, but not including appliances, fixtures, improvements made therein by a Unit Owner, or any furniture, furnishings, decorations, belongings, or other prsonal property supplied or installed by either Unit Owners or the tenants of the Unit Owners) affected by such Casualty Loss..."

Section 5.6(C) of the Bylaws provides that:

> "[i]n the event that Work shall be performed pursuant to the terms of paragraphs (B)... of this Section 5.6, the Condominium Board or the Insurance Trustee, as the case may be, shall disburse the Trust Funds to the contractors engaged in the Work in appropriate progress payments. If the Trust Funds shall be less than sufficient to discharge the cost and expense of performing the Work, the deficiency in proportion to their respective Common Interest, for Work to the General Common Elements and against all Residential Unit Owners, and all proceeds of such Special Assessment shall become part of the Trust Funds. If, conversely, the Trust Funds shall prove to be more than sufficient to discharge the cost and expense of

> performing the Work, such excess shall be paid to all Unit Owners in that no payment shall be made to a Unit Owner until there has first been paid, out of such Unit Owner's share of such excess, such amounts as may be necessary to reduce unpaid liens on the Unit Owner's Unit..."

Section 5.6(G)(i) defines "prompt repair or restoration" as work:

> "to be commenced not more than either: (a) 60 days after the date upon which the Insurance Trustee notifies the Condominium Board that it has received Trust Funds sufficient to discharge the estimated cost and expense of the Work or (b) 90 days after the date upon which the Insurance Trustee notifies the Condominium Board that it has received Trust Funds insufficient to discharge the estimated cost and expense of the Work..."

Section 5.6(C) outlines how the Condominium shall pay for rehabilitation and repair work as a result of a casualty loss. Section 5.6(G)(i) indicates the various time frames that would apply, whether trust funds are sufficient to pay for the rehabilitation work or not. Defendants' interpretation of Section 5.6(B) would render Section 5.6(C) and 5.6(G)(i) surplusage. These provisions about payment are meaningless without any obligation to pay.

Since contract provisions are to be interpreted in a manner that gives fair meaning to all of the language employed and leaves no provision without force or effect, defendants arguments are rejected. God's Battalion of Prayer Pentacostal Church, Inc. v. Miele Associates, LLP, 6 N.Y.3d 371 (2006); Travelers Indemnity Co. v. Commerce and Industry Ins. Co. of Canada, 36 A.D.3d 1121 (3rd dept. 2007); American Express Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275 (1st dept. 1990).

Accordingly, plaintiff is entitled to a declaration that: (1) the Loss is a "casualty loss" within the meaning of Section 5.6(B) of the Bylaws; and (2) defendants are obligated to

repair and restore the Unit in connection with the Loss.

Plaintiff seeks a permanent injunction: (1) against defendants from interfering with and/or refusing plaintiff's request to rehabilitate the Unit; (2) against defendants from continuing to bill, or make any assessments in violation of Paragraph 5.6(D) of the Bylaws; and (3) directing and/or permitting rehabilitation of the Unit.

Having failed to prove its *prima facie* case that plaintiff is entitled to summary judgment on the first cause of action, plaintiff is not entitled to a permanent injunction against defendants from interfering with and/or refusing plaintiff's prior requests to rehabilitate the Unit.

Further, under Section 5.6(G)(i) of the Bylaws, defendants may levy a special assessment to pay for the rehabilitation work if trust funds are insufficient to pay for such work. There is simply insufficient evidence in the record from which the court could determine whether plaintiff is entitled to an order enjoining the remaining defendants from levying any special assessment against it for any monies in connection with the rehabilitation work in the second cause of action.

That the Unit needs repair is undisputed. While under the Bylaws the Condominium Board has the obligation to undertake repairs, it is undisputed that they are not now in a financial position to do so. In addition, they have indicated in these motion papers that they will not stand in plaintiff's way if he does the repairs himself. Permitting plaintiff to undertake repairs himself is also consistent with defendants' position that plaintiff has a duty to mitigate damages and to prevent further waste.

Accordingly, the court finds that plaintiff is entitled to summary judgment on the second cause of action only to the extent of granting a permanent injunction permitting

rehabilitation/restoration of the Unit by plaintiff himself. The parties each reserve any and all rights they otherwise have, especially regarding money damages. Any proposal for work must, however, be compliant with Section 5.2(A) of the Bylaws and the Condominium Board may not unreasonably withhold such consent or impose conditions on such consent, other than to require appropriate insurance.

Plaintiff also seeks a declaration that the remaining defendants are precluded, under the Bylaws, from billing or assessing common charges against it when the Unit has remained uninhabitable since April 24, 2006. This claim is ancillary to the issue of what damages plaintiff may recover, if any, from defendants as a result of the Loss. Accordingly, plaintiff's request for summary judgment declaring that defendants are precluded, under the Bylaws, from billing or assessing common charges, is hereby denied. The issue will be determined at trial.

Plaintiff also seeks an order striking defendants' answer and all affirmative defenses. However, plaintiff has not asserted any proper grounds to strike defendants' answer [CPLR § 3126] and no evidence has been advanced as the basis for summary judgment dismissing defendants' affirmative defenses. Defendants have withdrawn their third affirmative defense. This part of the motion is, therefore, denied without prejudice to renew after the completion of discovery.

Plaintiff separately moves for sanctions, costs and attorneys fees pursuant to 22 NYCRR §130 against defendants. While defendants did not prevail on certain claims, their conduct/positions were not completely without merit in law, nor was the action in this case initiated primarily to delay or prolong resolution of the litigation within the meaning of this court rule. Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of

N.Y. v. 198 Broadway, 76 N.Y.2d 411 (1990)]. Accordingly, that branch of plaintiff's motion seeking the imposition of sanctions, costs or attorneys fees is hereby denied.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff is granted summary judgment against defendants Robert Kilar, Douglas Beer, Alice de Callaray and Jesse Bigelow, in their capacity as Members of the Board of Managers of 49 East 21st Street, and 49 East 21st Street Condominium on its third cause of action only to the extent of declaring that: (1) the domestic water line rupture which occurred on the second floor of the Building on April 24, 2006 constituted a "casualty loss" within the meaning of Paragraph 5.6(B) of the bylaws of 49 East 21st Street Condominium; and (2) defendants are obligated to restore and repair the apartment 2B at 49 East 21st Street as a result of the domestic water line break therein occurring on April 24, 2006; and it is further

**ORDERED** that defendants Robert Kilar, Douglas Beer, Alice de Callaray and Jesse Bigelow, in their capacity as Members of the Board of Managers of 49 East 21st Street, and 49 East 21st Street Condominium, their agents or anyone acting on their behalf, are hereby directed to permit rehabilitation/restoration of the Unit by plaintiff himself, pursuant to a proper proposal made under Section 5.2(A) of the Bylaws. The Condominium Board may not unreasonably withhold consent to such proposal or impose conditions on such consent, other than to require insurance; and it is further

**ORDERED** that plaintiff's motion for summary judgment is otherwise denied; and it is further

**ORDERED** that plaintiff's motion to strike defendants' answer and affirmative defenses is denied; and it is further

**ORDERED** that plaintiff's motion for sanctions, costs and attorneys fees is denied; and it is further

**ORDERED** that this matter is hereby scheduled for a status conference on October 11, 2007 at 9:30 a.m. at 80 Centre Street, Room 122.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
September 21, 2007

So Ordered:

**HON. JUDITH J. GISCHE, J.S.C.**