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

PRESENT: DEBRA A. JAMES PART 59
Justice

DR. OWEN COWITT and DR. MAITRAYA,
Plaintiffs,

- v -

THE 80 PARK AVENUE CONDOMINIUM, MATTHEW ADAM PROPERTIES, INC., and THE BOARD OF MANAGERS OF THE 80 PARK AVENUE CONDOMINIUM,
Defendants.

Index No.: 106661/07
Motion Date: 07/10/07
Motion Seq. No.: 01
Motion Cal. No.: OSC

The following papers, numbered 1 to 4 were read on this motion for a preliminary injunction.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3, 4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The court shall grant plaintiffs' motion for a preliminary injunction and deny defendants' cross-motion to dismiss the complaint.

This declaratory judgment action arises out of common charges assessed by the condominium against the commercial units of the plaintiffs. The condominium consists of 220 residential units and 4 commercial units ("Units"). Plaintiff Dr. Owen Cowitt owns one professional Unit and Dr. Maitraya Thaker owns another professional Unit. A letter dated May 16, 2006, from the

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

condominium managing agent to the owners of the professional units, stated

> The Condominium Association has recently replaced the cooling tower which supplies water to the air conditioning system in your unit. The cooling tower is a limited common element, as it only supplies service to the Professional Units and the building lobby. The Condominium's Board of Managers has voted to assess these units in order to recover the costs of approximately $52,000 associated with the purchase and installation of this unit. The share of the cost attributable to your unit is $10,400.00. The assessment will be payable in four (4) equal installments of $2,600.00 each and will appear on your June 2006 common charge invoice.

By letter dated May 24, 2006, the professional Unit owners challenged the assessment claiming that "[c]learly this replacement is a "Common Expense" and if there is to be any assessment at all, it must be borne by all the Unit owners. By further letter dated August 9, 2006, the condominium threatened collection proceedings and various remedies against the professional Unit owners if the assessment was not paid. By further letter to certain of the professional Unit owners dated November 20, 2006, the condominium gave 90 days notice of its intention to discontinue "cooling tower services" to the professional Units. A further letter dated May 10, 2007, gave 10 days notice of the same.

This action was commenced by Order to Show Cause on notice signed by this court on May 22, 2007, which granted plaintiffs a temporary restraining order preventing defendants from discontinuing chilled water service from the cooling tower.

Separately, the parties stipulated to a briefing schedule for this motion. Defendants filed a cross-motion seeking to dismiss the action in its entirety and challenging the standing of Dr. Maitraya to maintain this suit.

Plaintiffs in their complaint seek an order compelling defendants to continue to provide chilled water to their units and a declaration that the defendants are not permitted to impose an assessment upon the professional Units for the cooling tower replacement. Plaintiffs on this motion seek a preliminary injunction preventing the discontinuance of service during the pendency of this action. Defendants' cross-motion seeks to dismiss the action on the grounds that the condominium board's action is insulated from review by the business judgment rule and asserts that in any case Dr. Maitraya does not have standing to maintain this suit because she is merely a tenant in the professional unit.

"A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." Residential Bd. of Managers of the Columbia Condominium v Alden, 178 AD2d 121, 122 (1st Dept 1991) (citation omitted). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance

of equities in its favor." (Nobu Next Door, LLC v Fine Arts Housing, Inc., 4 NY3d 839, 840 (2005); CPLR 6301.

The parties' claims and defenses in this action turn on the issue of the board's authority under the Bylaws and therefore any consideration of the likelihood of plaintiffs' success on the merits must begin there.

Section 1.2 of the Bylaws sets forth that the definitions of the terms therein are set forth in Declaration of the condominium. Declaration Article 6 © states that each "Residential and Professional Unit includes: . . . (iv) all equipment fixtures and appliances (including, without limitation, heating and cooling equipment, plumbing facilities, sinks, bathtubs, water closets, refrigerators, ovens, ranges, dishwashers and any other appliances) affixed, attached or appurtenant to such Unit and (v) all other Facilities affixed, attached or appurtenant to such Unit and [benefitting] only that Unit." Declaration Article 7 (a) defines "Common Elements" as comprised of "General Common Elements" and "Limited Common Elements."

Article 7(b) defines "General Common Elements" as consisting of "rooms, areas, corridors and other portions of the building (other than the Units), as well as those Facilities therein, either currently or hereafter existing for the common use of the Unit Owners . . ." General Common Elements include "(iv) all

central and appurtenant installations and Facilities for services such as power, light, telephone, intercom, gas, sewer, plumbing, drainage, hot and cold water distribution, heat, ventilation, air-conditioning, . . . and other mechanical and electrical systems to the extent that the same are not expressly included as part of a Unit pursuant to the terms of Article 6 hereof."

Article 7 © defines Limited Common Elements as consisting "of all portions of . . . the Building (other than the Units) that are for the use of one or more specified Units to the exclusion of all other Units." As an example, such definition includes "(I) any terrace or patio to which there is direct and exclusive access from the interior of a Residential Unit (which shall be for the exclusive use of such Residential Unit)."

The defendants in Paragraph 10 of their Affirmation in Opposition to Plaintiffs' Order to Show Cause and In Support of Defendants' Cross Motion To Dismiss agree with plaintiffs that "the Water Tower is a General Common Element of the Condominium since [it is] part of the operation of the Building." Section 5.1 (A) of the Bylaws entitled "Maintenance and Repairs" states that "all . . . maintenance, repairs and replacements . . . (ii) in or to the General Common Elements (other that any General Common Elements incorporated into one or more Units pursuant to

the terms of paragraph (B) of Section 5.8[1] hereof) will be performed by the Condominium Board as a Common Expense."

Finally, Section 6.1 of the Bylaws, "Determination of Common Expenses and Fixing of Common Charges", provides in pertinent part that "the Condominium Board will: . . . (iii) allocate and assess such Common Charges among Unit Owners pro rata, in accordance with their respective Common Interests."

Were the cooling tower to be determined to be a General Common Element, as conceded by defendants, then the cost of its replacement would be a Common Charge to be paid pro rata as set forth in the documents governing the Condominium. On that basis, by the very terms of the Bylaws the plaintiffs have demonstrated a likelihood of success on the merits as to their claim that the Board failed to properly allocate the expenses incident to replacing the cooling tower.

Defendants rely upon the language on Page 34 of the Offering Plan for the Condominium dated July 28, 1992, in asserting that the Board has the unfettered right to discontinue the flow from the cooling tower at any time. Defendants' reliance is misplaced. The cited language in the Offering Plan never mentions the cooling tower among the services and facilities that

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[1] Section 5.8 (B) applies only to Common Elements adjacent to one or more individual Units that may be exclusively used by such Units (i.e. a hallway) upon permission from the Board, which is inapplicable here.

may be discontinued by the Board. The only clause remotely applicable to the action at hand states-

> Heating and Air-Conditioning of Units: The Residential and Professional Units are heated by self-contained fan coil units located by each window. In the summer, the units provide cool air through individual compressors and condensers. The fan coil unit is fitted with a manual air damper control and a thermostatic control.

There is nothing in the quoted language that grants the Board authority to discontinue services to any particular Unit and nothing at all is said about the cooling (or using defendants' distinction- condenser) water. The quoted language refers to the air conditioning units in the Units, describes each Unit as having its own local blower singular to that Unit, and states that the equipment within the Units is the responsibility of the Unit Owners. While the cooling water tower at issue in this case may provide water to the Professional Units' air conditioning units, such tower is not a part of any air conditioning unit. Nor is the cooling tower exclusive to the Professional Units since it is also used by the common lobby.

Therefore, defendants have failed to demonstrate that they have a clear right to discontinue the provision of cooling water to the plaintiffs or any of the Professional Units under the Declaration and Bylaws.

Defendants further argue that this court should defer to the business judgment of the Board and dismiss plaintiffs' claims citing Levandusky v One Fifth Ave. Apartment Corp., (75 NY2d 530

[1990]). Levandusky held that "[s]o 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. 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." Id. at 538. However, on the facts presented here, defendants' reliance upon Levandusky is misplaced. "To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the 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 West 67th Street Corp. v Pullman, 100 NY2d 147, 155 (2003). "This action does not involve the issue of interference with the business decisions of the Board of Directors. . . [T]he Board may only exercise its judgment where it is authorized to act in the first instance. The authority of the Board of Directors, in the present case, . . . is expressly limited." Emily Towers Owners Corp. v Carleton Emily Towers, L.P., 170 Misc2d 82, 84 (Civ Ct, Queens County, 1996) mod on other grounds 175 Misc2d 283 (App Term, 2d Dept 1997).

Here, the plaintiffs' claim clearly is that the Board acted outside of the limitations on its authority expressed in the Declaration and Bylaws. For that reason, plaintiffs' claims are

not subject to dismissal at the pleading stage under the business judgment rule and based upon the documentary evidence presented, plaintiffs have demonstrated a likelihood of success on the merits of the claim sufficient to support preliminary relief.

The plaintiffs have further demonstrated that they will suffer irreparable harm. The termination of services letter sent by the defendants indicates that if access to the cooling tower water is discontinued the plaintiffs will be forced to expend significant sums in installing an alternate cooling system. Not only will the plaintiffs incur costs, but the defendants as set forth in their letter will have to have their engineer review the plans for any new installation with the attendant cost and delay of such review to be borne by the plaintiffs in addition to any disruption the installation process may cause.

With respect to the equities of this matter, they weigh on the side of the plaintiffs. One year ago, defendants filed notices of lien against plaintiffs' Units that provide security in the event liability for the greater assessment is established. Defendants have demonstrated absolutely no harm they would suffer as a result of the imposition of injunctive preliminary relief, while the plaintiffs have raised the specter of insufficient ventilation that would render their Units uninhabitable during any shut off. Therefore, the equities favor maintenance of the status quo pending the determination of this action.

the Board affecting the tenancy based upon the performance, or lack thereof of the tenant. Clearly the tenant would have standing to oppose a summary proceeding brought by the Condominium under a lease providing for such a remedy and therefore the corollary must be true with respect to a tenant's obligations under a lease to the condominium.

Pursuant to CPLR 6312 the court shall fix an undertaking upon the granting of plaintiffs' motion. The court shall set the amount of the undertaking as that amount that would be assessed against the plaintiffs based upon a pro rata share of the costs incurred in the replacement of the cooling tower. Should the parties be unable to agree on the amount, the court shall direct a reference to fix an undertaking.

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED on the terms set forth in this court's temporary restraining order of May 22, 2007, and an undertaking is fixed as that amount that would be assessed against the plaintiffs based upon a pro rata share of the costs incurred in the replacement of the cooling tower to be agreed upon by the parties and if not agreed upon within ten days after the entry of this Order the parties shall apply to the court for a reference to fix such amount; and it is further

ORDERED that the defendants' cross-motion to dismiss is DENIED;

ORDERED that the remaining parties are directed to attend a preliminary conference on October 23, 2007, at 9:30 A.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 28, 2007 ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.