

**Glibbery v Timber Ridge at Holbrook Home Owners
Assn. Inc.**

2008 NY Slip Op 31201(U)

April 23, 2008

Supreme Court, Suffolk County

Docket Number: 0029392/2004

Judge: Joseph C. Pastoressa

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INDEX No. 04-29382

CAL. No. 07-01709-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 11-26-07

ADJ. DATE 2-20-08

Mot. Seq. # 002 - MG

-----X	
ALAN GLIBBERY,	:
	Plaintiff,
- against -	:
	:
TIMBER RIDGE AT HOLBROOK HOME	:
OWNERS ASSOCIATION INC., JOAN C.	:
FIorentino, KEN LUCKOW, DONALD	:
KORODY, FRANK SARACENI, "JOHN DOE 1",	:
"JOHN DOE 2", both being fictitious names as	:
true ID of the board member not being known,	:
"CAMCO" SERVICES INC., DOUBLE B	:
ASSOCIATES, INC.,	:
	Defendants.
	:
-----X	

PATRICK W. JOHNSON, P.C.
Attorney for Plaintiff
9118 Third Avenue
Brooklyn, New York 11209

VINCENT D. McNAMARA, ESQ.
Attorneys for Defendants
Tower Square
1045 Oyster Bay Road, Suite 1
East Norwich, New York 11732

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 25; Replying Affidavits and supporting papers 26 - 27; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants, Timber Ridge at Holbrook Home Owners Association Inc., Joann C. Fiorentino, Ken Luckow, Donald Korody, Frank Saraceni, "John Doe 1," "John Doe 2," and Camco Services, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint against the moving defendants, is granted.

This action has been commenced by plaintiff, a shareholder of Timber Ridge at Holbrook Home Owners Association, Inc. (hereinafter TRHOA), when the deck of his housing unit located at the aforementioned premises was allegedly improperly stained by defendant Double B Associates, Inc. (hereinafter Double B).

The complaint asserts a first cause of action which is inartfully pleaded and sounds in negligence, breach of contract and breach of fiduciary duty wherein plaintiff asserts TRHOA breached its fiduciary duty by negligently hiring Double B; breached its fiduciary duty to contract with a party with the ability and qualifications to perform the contract for painting; that Camco breached its fiduciary duty by contracting with an unqualified painting contractor; that plaintiff was a third-party beneficiary to the

contracts between TRHOA and Camco and Double B; that Double B breached its contract by improperly and unprofessionally painting plaintiff's deck, wherein plaintiff claims consequential and incidental damages arising out of a claim for property damage.

The second cause of action, also inartfully pleaded, asserts the occurrence and resulting damages were caused by the carelessness and negligence of defendants TRHOA and Double B in the hiring, operation, management, maintenance and control of the premises by improperly hiring, clearing, repairing said deck, permitting the wrong stain to be used to stain the premises, and in failing to strip and remove the improper stain before it dried and causing the condition to become and remain in an unsafe and defective, peeling, and ugly condition.

The third cause of action is premised upon a claim wherein plaintiff alleges the various individual members of the Board of the Homeowners Association, who are also homeowners at the subject premises, breached their fiduciary duty and harassed him by issuing violations to him without cause or justification on two separate occasions and in continuing a course from January 2002 to date, causing plaintiff to sustain incidental and consequential damages including attorneys' fees relating to this action.

The fourth cause of action alleges that TRHOA and the individual board members misused their power and breached their fiduciary duty by damaging plaintiff's integrity and reputation through ridicule and harassing plaintiff's quiet enjoyment of his premises through the issuance of violations to plaintiff and disregarding his rights as a shareholder for which plaintiff seeks punitive damages and attorneys' fees.

The moving defendants seek summary judgment dismissing the complaint on the basis that Camco is an agent of a disclosed principal TRHOA who is vicariously liable for the actions of its agent; that decisions of residential cooperative boards and their individual members are protected from law suits by the business judgment rule; that there is no proof as to what product was used by Double B in painting the decks, or how the paint was applied, and whether or not the application was proper; and that there is no cause of action for tortious harassment in New York.

In support of motion (002), the moving defendants have submitted, inter alia, copies of the pleadings and plaintiff's bill of particulars; and copies of the transcripts of the examinations before trial of Alan Glibbery, Frank Saraceni, Dr. Kenneth Luckow, and Donald Korody.

Plaintiff opposes this motion, submitting, inter alia, untabbed exhibits consisting of a copy of a prior motion to dismiss the complaint pursuant to CPLR 3211 for failure to state a cause of action, and the opposing papers and decision and Order dated March 23, 2006 (Burke, J.); a copy of an amended verified bill of particulars; affidavit of Alan Glibbery; copies of photographs and various letters; certified copies of two police field reports; and a copy of the examination before trial of Jo-Ann Fiorentino.

It is noted that the affidavit of Alan Glibbery is improperly notarized due to the expired notary stamp and is therefor not in admissible form and is not considered by this Court. However, even if such affidavit were notarized, it is unsupported by admissible evidence which raises factual issues to

preclude summary judgment to the moving defendants.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

It is undisputed that Alan Glibbery, a former police officer out from work on a job related disability, has lived at Timber Ridge since 1994, and married Diane Lee in August, 2005, with whom he currently resides. The deed for his condominium is in his name only. His condominium is part of the Timber Ridge Home Owners Association which consists of about one hundred and four condominiums. Mr. Glibbery had a cedar deck on the street level of his condominium which was added by him at his direction in 1995 with permission from the board and homeowners association, and which deck was stained several times by him or at his direction after the deck was built.

Jo-Ann Fiorentino was the president of the board of TRHOA and Donald Korody, Ken Luckow, and Frank Saraceni were some of the board members during the time he lived there. There was also a board member named Tom who was replaced by Leslie, neither of whom are still living at Timber Ridge. Einsidler Management was the management company in 1994, and was replaced by Camco, then Alexander Wolf, then Fairfield. Each management company was hired subsequent to the board obtaining at least three bids for each company, and the board agreeing to their hiring after discussion.

TRHOA hired Camco as their management company prior to 2003. Camco contracted with Double B to paint the condominiums in 2003, including the decks which were part of the original construction of the units. The homeowners whose decks were not part of the original construction were advised Double B could paint their decks for \$150.00, or the homeowner could paint his/her own deck, or hire someone else to paint it, but it was the homeowner’s own responsibility. Mr. Glibbery, whose deck was not original to the units, agreed to have Double B paint his deck. Although he received a bill from Double B in the amount of \$150.00, he never paid it. Mr. Glibbery was not present when the painting was done on his deck and he did not see any of the paint job being done, but did see the paint job the next afternoon. It is further undisputed that about thirteen or fourteen decks experienced peeling

after they were painted, Mr. Glibbery's deck allegedly being one of them. It is not known how many of the peeling decks were original decks and how many were decks which were added after the condominiums were built.

There were house rules which set forth certain conduct and requirements to be followed by the residents at Timber Ridge. Mr. Glibbery received a copy of the green book and a copy of the house rules of the association at the closing of his condominium, which rules he stated he read in part for the first time in 2004. The house rules can be changed if agreed upon by three of the five board members. Warnings and fines could be imposed for violation of the house rules. In about 2004, Mr. Glibbery was issued a warning letter concerning garbage consisting of construction material which he put out in front of his condominium before six o'clock, in violation of the house rules which required that no garbage could be placed out prior to six p.m. He was not fined for this violation. Thereafter, Mr. Glibbery was issued a fine in the amount of \$50 dollars concerning his placing garbage out in a plastic garbage bag and not placing it in a garbage pail, in violation of the house rules. Such fine has not been paid by him to date. In 2004, Mr. Glibbery was issued a warning about his cat roaming the grounds of Timber Ridge without a leash. In 2005, Mr. Glibbery built a shed next to his condominium without permission from the board, but upon application after the fact, permission was given by the board for the shed to remain. He was not warned or fined for this.

FIRST AND SECOND CAUSES OF ACTION

The first and second causes of action assert that TRHOA and Camco breached their fiduciary duties as set forth above, that Double B breached its contract by improperly and unprofessionally painting plaintiff's deck, and that the occurrence and resulting damage were caused by the carelessness and negligence of defendants TRHOA in the hiring, operation, management, maintenance and control of the premises by improperly hiring, clearing, repairing said deck, permitting the wrong stain to be used to stain the premises, and in failing to strip and remove the improper stain before it dried and causing the condition to become and remain in an unsafe and defective peeling, and ugly condition.

The moving defendants have established that TRHOA hired Camco as its managing agent for the property and that Camco contracted with Double B to paint the units and the original decks. Those homeowners who did not have an original deck were advised they could make an agreement with Double B to paint their own deck, paint it themselves, or have another painter paint the deck. Mr. Glibbery, by his own testimony established that his deck was added on by him after he moved into Timber Ridge. it was not an original deck, he had been maintaining it over the years, and that he agreed to have Double B paint his deck for \$150.00, rather than paint it himself or hire someone else to paint it.

Based upon the foregoing, the moving defendants have demonstrated prima facie entitlement to summary judgment on the issue they were not negligent in causing the alleged damage to plaintiff's deck.

Plaintiff has not raised factual issue to preclude summary judgment on the first and second causes of action as it relates to any negligence or breach of contract claims against TRHOA or Camco.

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Plaintiff testified he agreed to pay Double B to paint his deck rather than paint it himself or hire another painter to do the job. He was billed in the amount of \$150.00 by Double B for painting his deck. Mr. Glibbery, by his own testimony, entered into his own agreement with Double B to paint his deck and agreed to pay Double B to paint his deck. Mr. Glibbery has not raised a factual issue to demonstrate he was a beneficiary of the contract between Camco and Double B in that Double B was hired pursuant to contract with Camco only to paint the original decks.

Although plaintiff asserts he is a third-party beneficiary of the contract to paint the homes and decks, plaintiff has not demonstrated that his deck was intended to be painted pursuant to that contract. Plaintiff testified that he agreed to have Double B paint his deck for \$150.00 rather than do it himself or have another do it for him. No copy of any contract has been submitted to rebut defendants' claims and plaintiff has not submitted any evidence to raise a factual issue that any contract stated an intention to benefit him as a third party, or that he was more than an incidental beneficiary to the contract, or that he was given the right to enforce the latter's contract with another (*Regatta Condominium Association v Village of Mamaroneck, et al*, 303 AD2d 739 [2nd Dept 2003]; *Board of Managers of Riverview at College Point Condominium III v. Schorr Brothers Dev. Corp.*, 182 AD2d 664 [2nd Dept 1992]).

Plaintiff, in opposing this motion, has not demonstrated duty or proximate cause between his claimed property damage and any action or inaction by TRHOA or Camco. In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see, Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]).

It is determined that there was no duty owed to plaintiff by TRHOA in that Mr. Glibbery entered into his own agreement with Double B, independent of any agreement between Camco and Double B. It is also determined that plaintiff has not established the element of proximate cause, or raised a factual issue concerning proximate cause between the alleged negligence by defendants and the peeling of his deck in that plaintiff has not submitted admissible evidence to raise a factual issue concerning whether an improper material was used to paint his deck or that the material was improperly applied to cause the deck to peel. Plaintiff has not submitted the testimony of an expert to demonstrate that incorrect paints were used to paint his deck. Plaintiff has merely submitted speculative, conclusive testimony in his improperly notarized affidavit and deposition transcript which are unsupported by an expert opinion to establish what material his deck had been previously painted with, what type of material was used by Double B to stain or paint his deck, how this material was improperly applied, and why it was improper to use the material which was applied by Double B to his deck. Plaintiff, therefore, has not established that any alleged negligence on behalf of the moving defendants has proximately caused the damage claimed to his deck.

It is further determined that Double B, pursuant to its contract with Camco, was an independent contractor. “The well-settled rule provides that a party who retains an independent contractor is liable for the negligence of the independent contractor because it has no right to supervise or control the work.” An exception to this general rule is the nondelegable duty exception, which is applicable when the party is under a duty to keep the premises safe. Where the premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe means of ingress and egress. This duty may not be delegated by the owner to its agents or employees or to an independent contractor (*Brackeill v Citibank, N. A., et al*, 299 AD2d 504 [2nd Dept 2002]). It is further determined that the facts of this case relative to a claim for property damage for the alleged incorrect application of paint to a deck which is not in the common area of Timber Ridge, does not fall within the exceptions to the general rule. Accordingly, it is determined that neither TRHOA nor Camco are liable for the alleged negligence of Double B, an independent contractor with whom plaintiff contracted to paint his deck.

Accordingly, summary judgment is granted and that part of the first cause of action alleging negligence and breach of contract and negligent hiring and the second cause of action are dismissed as against the moving defendants.

FIRST, THIRD AND FOURTH CAUSES OF ACTION

The first cause of action also asserts that TRHOA and Camco breached their fiduciary duties to enter into a contract and hire a company with the ability and qualifications to paint; breached its fiduciary duty in hiring Double B; and that Camco breached its fiduciary duty by contracting with an unqualified painting contractor. It has been previously decided that plaintiff was not a third party beneficiary or even an incidental beneficiary to the contract between Camco and Double B, and therefore there was no breach of a fiduciary duty as to him on this issue. It has also been determined that Double B was an independent contractor with whom plaintiff contracted to paint his deck. Therefore any claim for breach of fiduciary duty by TRHOA or Camco with respect to the hiring of Double B must fail as plaintiff's deck was not painted pursuant to the contract involving Camco and Double B.

With regard to the third cause of action, plaintiff alleges the various individual members of the Board of the Homeowners Association, who are also homeowners at the subject premises, breached their fiduciary duty and harassed him by issuing violations to him without cause or justification on two separate occasions and in continuing a course from January 2002 to date, causing plaintiff to sustain incidental and consequential damages including attorney fees relating to this action. Plaintiff also alleges that defendants breached their fiduciary duty by hiring defendant Camco without first obtaining bids.

With regard to the fourth cause of action, plaintiff alleges that TRHOA and the individual board members misused their power and breached their fiduciary duty by damaging plaintiff's integrity and reputation through ridicule and harassing plaintiff's quiet enjoyment of his premises through the issuance of violations to plaintiff on two separate occasions, and disregarding his rights as a shareholder. Plaintiff seeks punitive damages and attorneys' fees.

Plaintiff alleges the various individual members of the board harassed him by issuing violations

to him without cause. Plaintiff testified that he received one fine in the amount of fifty dollars for putting his garbage out without it being placed in a garbage pail. Plaintiff admitted to having done so and stated he did not pay the fine which appears on his monthly statement. Plaintiff also states he received a warning from the board for putting out his garbage and construction debris prior to six o'clock, but that he did not receive a fine and testified that he did put out the garbage and construction debris prior to six o'clock. He also received a letter from the board warning him that his cat cannot be out without being on a leash and testified that he let his cat out at least two to three times a day, without a leash.

During his deposition, Mr. Glibbery was asked how, Jo-Ann Fiorentino, in breach of her fiduciary duty, harassed his quiet enjoyment of his premises by deliberately misusing her board power. Mr. Glibbery responded that (after the law suit was commenced) she told him that he can no longer call her, at the advice of her attorney, so that eliminated the procedure for him going through the board in an attempt to rectify the problem with his deck. He testified she instructed him to call Mr. Bracken as he was the attorney representing the homeowners' association.

Mr. Glibbery testified that Dr. Luckow breached his fiduciary duty by saying he was going to look into the problems with the deck, but he did not know if he ever did. The only outcome he heard was that some people accepted back the \$150.00 they paid for having their deck painted.

Mr. Glibbery testified Donald Korody breached his fiduciary duty by misusing his board power on the date the building materials were placed out as garbage before six o'clock because his fiancée, now Mrs. Glibbery, saw Mr. Korody look at the garbage, they said hello to each other, and Mr. Korody did not say anything about the garbage being out before six o'clock. After he received the warning, and spoke to Mr. Korody after a meeting, he said Mr. Korody said he did not know that National Waste had been called to pick up his garbage. However, Mr. Glibbery only received a warning for that violation and no fine.

Mr. Glibbery further testified that Frank Saraceni, the code enforcement officer, reported him for putting his garbage out without it being in a pail. He also stated the board refused to give him the names of the two board members when he asked them which board members reported his garbage being out without a pail.

Mr. Glibbery further testified that the continuing course of threatening behavior was based upon his writing down the license plate number of a board member, Dr. Luckow, whom he claimed parked on the wrong side of the street on one occasion. He sent a letter to the board advising that Dr. Luckow was in violation of the parking rule.

He also stated that Ken Luckow used stone on his deck but he was told he could not use patio bricks when he made application for permission to use that type of stone. One day in 2005 he and his wife were walking through common property, passed by Ken Luckow's home, and started taking pictures of Dr. Luckow's stone deck. Dr. Luckow's wife came out and told him to "get a life" when he said they were taking pictures because they wanted to build a deck. After that, a police officer, who had been called to the scene, asked plaintiff and his wife what they were doing behind the Luckow's house.

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Frank Luckow said his wife was threatened as Mr. Glibbery and his wife were looking into their windows. This incident came out at a board meeting which followed and Mr. Glibbery said this incident should not have been discussed at the meeting.

Mr. Glibbery further testified that at a board meeting, Frank Saraceni would not let his fiancée talk because she was only a guest and not an owner, thus abusing his authority. Also, Mr. Glibbery testified that at the board meeting his lawsuit was discussed and homeowners were told what the potential cost to the members would be concerning the suit. He also complained that Mr. Bracken, counsel for TRHOA sent a letter to the residents concerning this lawsuit.

Mr. Glibbery testified that although no one witnessed it, he thought the landscapers put a hole in his garage door when he was not home, but the board would not authorize repair of it because it was not witnessed. He stated he believed that if it were someone else, the board would have had it repaired.

Testimony was submitted of the three board members, Donald Korody, Kenneth Luckow and Jo-Ann Fiorentino. Ms. Fiorentino testified that in 2003, TRHOA wanted to have properties painted, which painting was done by Double B. She stated only the original decks were the responsibility of the TRHOA; that although Camco contracted with Double B for the painting of all the homes and the original decks, it was the responsibility of the remaining individual homeowners to paint their own decks, make an agreement with Double B to paint their decks, or hire their own painter to paint those remaining decks. TRHOA discussed the painting with Double B. She stated that to her knowledge, Double B used the appropriate paint for the job, however, there were complaints about the peeling of the decks on about thirteen or fourteen decks. She said Frank Saraceni complained to Camco and Double B about the peeling of the paint. She said the board did not do anything about the peeling paint because the non-original decks, which were to be painted at the homeowner's expense, were the responsibility of the homeowner pursuant to an agreement between the homeowner and whichever contractor they used. Mr. Glibbery testified he agreed to have his deck painted by Double B, who sent him a bill in the amount of \$150.00 to paint his deck, and which bill he did not pay. Mr. Glibbery did testify that Mr. Vaccaro from Camco had Mr. Broderick from Double D look at the deck, and that Mr. Broderick said they could sand the deck and repaint it. Mr. Glibbery testified that he said, "No, you are not doing it because it's going to happen again because it's an oil based paint."

Dr. Luckow stated the rule book was not changed or modified in any way since he moved into the community and while he was on the board. He stated that Frank Saraceni handled code enforcement for the board and would walk around the neighborhood and designate who is in violation. He testified that if someone were accused of a violation, the procedure had been to appeal by writing a letter to the management company who forwards it to the board, and the person is given the opportunity to discuss it at a board meeting. To his knowledge, Mr. Glibbery never had a hearing concerning any violations in 2004 or 2005.

Mr. Korody testified that he was aware in 2003 that Alan Glibbery received violations but did not know what they were for, and whomever was in charge of the particular violation, probably Frank Saraceni, would notify the management company who in turn would send the violation and/or fine letter. He believed Mr. Glibbery was only ever in violation of house rules once concerning garbage. He knew

of Alan's cat and said the cat even appeared at a board meeting at the pool and people commented that he was supposed to be on a leash. The cat was seen numerous times outside without a leash. He did not know if Alan was issued a fine for the same. Mr. Korody testified that if a homeowner saw a violation, the homeowner would have to notify the management company, then the board would have to see the violation because an individual homeowner was not able to issue a violation or have a violation issued.

Jo-Ann Fiorentino testified the rule book, also known as the green book, has never been amended since she entered the community. Each member of the community has a copy of the book. She stated that in 2003, Frank Saraceni was the code enforcement officer at the community. If there was a violation of the house rules (which are different from the green book rules), and the homeowner was given a warning, they were also given a certain period of time to appeal it, and if they did not appeal, they would be fined. She further testified, however, the board changed this procedure and sent out a letter to all homeowners advising that if a homeowner was not abiding by the rules that they would get an automatic fine on a violation without an appeal. Ms. Fiorentino testified that this procedure concerning violations was changed prior to Mr. Glibbery being issued any warnings or violations. She testified that house rules can be changed by a vote of agreement by three board members out of the five board members and that this was done when the house rules were changed. With regard to parking violations and garbage violations, the board decided that two board members would have to see the vehicle illegally parked or garbage out before a violation would be issued as they had concerns if one resident did not like another resident that they would be telling the board; therefore, one resident cannot authorize a fine to another resident.

She testified there was a violation issued to Mr. Glibbery in about 2004 for garbage after the amendment to the rules. Concerning Mr. Glibbery's cat, she testified it had been walking around for years without a leash, and there were letters from residents about the cat. She stated she and another board member, Frank, witnessed the cat at large, and then Mr. Glibbery was issued a letter advising he would be fined if the cat continued to walk around without a leash. She testified she went to Mr. Glibbery before this letter was sent to him to advise him people had been complaining that the cat was jumping on the ledge, ripped some screens, and that is how it all started. People were also complaining about the dogs barking, and when the cat was off the leash, the dogs would run, and some residents were afraid they would be caused to fall. She testified Mr. Glibbery would leave the garage door open a little bit for the cat, and the cat would roam. She stated she saw the cat out all the time. She testified she also started receiving verbal complaints about the cat. Mr. Glibbery testified that he let his cat out two to three times a day without a leash. At a board meeting, the complaints were discussed and Alexander Wolf management sent out a letter to Mr. Glibbery. She testified that the board had a meeting with Mr. Glibbery at Donald Korody's house, at Alan Glibbery's request, and they discussed the cat problem, the garbage, and correspondence Mr. Glibbery was circulating suggesting Ms. Fiorentino was in collusion with or receiving kickbacks from Camco management company. She also testified that Mr. Glibbery built a shed on the side of his home in 2005 and then put in an application for the construction, after the fact, which the board later approved.

It is determined that the moving defendants have demonstrated prima facie entitlement to

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summary judgment in that Mr. Glibbery was issued only one violation concerning his garbage, one warning about his garbage, and one warning about his cat since 1996. He admitted that he put garbage out in a bag without putting it in a pail for which he was fined, that he placed his garbage out prior to six o'clock for which he received a warning, and that he let his cat out without a leash on a regular basis, for which he received a warning. He also testified that he had received a copy of the rules book when he purchased his condominium but did not read it till years later when he received the violation and two warnings.

Based upon the foregoing, defendants have demonstrated that there was cause for the one violation and two warnings to be issued, and although Mr. Glibbery did not seek appropriate approval before building his shed, he was not issued a warning or fine. Therefore, a pattern of harassment has not been demonstrated as cause has been found for each violation asserted by plaintiff, as well as restraint on behalf of the board for not issuing any warning concerning Mr. Glibbery building his shed without application and prior board approval.

Mr. Glibbery asserted that a complaint was filed with the police by Dr. Luckow after plaintiff and his wife went to the common area outside Dr. Luckow's deck and started photographing Dr. Luckow's deck. Dr. Luckow testified he was not home when the incident arose concerning plaintiff being in the common area outside his home, and after provocation at an open meeting, he did say that he did not think it was appropriate that somebody be staring into his house through his windows. He filed a report and an amended police report wherein his wife complained that Mr. Glibbery made repeated attempts to harass her because he stares at her, is present every time she is outside the front of her home, stands across the street for ten minutes at a time staring at her, and that she fears for her safety. Plaintiff does not deny he was outside Dr. Luckow's deck and testified that he photographed Dr. Luckow's deck because it was made of stone, and that he had put an application in to do his deck in paver stone, but that application was denied. Mr. Korody testified that the materials which can be used on decks are cedar and a couple types of stone. Dr. Luckow testified his deck has stone and he received the necessary permission for it. He stated the deck requirements are for cedar or block and it has to conform with the community.

Based upon the foregoing, it is determined that this police report was filed against plaintiff by Dr. Luckow and his wife as private citizens, and the incidents complained of involved his wife when he was not home and her concern for her safety. Relative to discussion of this matter at a board meeting, Dr. Luckow testified that it was only after provocation that he commented that it was inappropriate for plaintiff to be staring into his windows.

Mr. Glibbery testified that his fiancée was not permitted to speak at an open board meeting. Mr. Korody stated that all the residents are allowed to speak at the open meetings, but a nonowner would not be permitted to speak out as the meetings are open to private homeowners and not to the public. He did not know if Mr. Glibbery's then fiancée was denied speaking, but stated he would not have done it. Dr. Luckow testified that only homeowners are permitted at the general meetings, but wives and significant others may attend. He did not ask Mr. Glibbery's fiancée to leave a meeting. Ms. Fiorentino also testified that Mr. Glibbery's girlfriend was at an open meeting and began to speak publicly in defense of the lawsuit Alan Glibbery brought against the TRHOA, but another resident and Frank Saraceni objected

to her speaking. Ms. Fiorentino, who was conducting the meeting, stopped Frank Saraceni, but did not permit the girlfriend to talk as there was a lot of tension at the meeting and she did not want it to blow up.

Mr. Glibbery alleges the board breached its duty by not maintaining confidentiality by advising TRHOA that he commenced a lawsuit against the board and the homeowners association. Ms. Fiorentino told the homeowners association by way of a letter, written by the attorney for the homeowners association to her as president of the board addressing questions posed by Mr. Glibbery, that a lawsuit was brought by Mr. Glibbery which could cost them all thousands of dollars as the money would have to come out of the homeowners association. Dr. Luckow testified confidentiality is maintained about complaints by closed board meetings and the executive meeting minutes are not distributed to the community. The general community meetings are open meetings that pertain only to business for the entire community. Summaries of those meetings are distributed by the management company. Dr. Luckow testified that at the board meeting of July 2005, that Mr. Glibbery's law suit may have been discussed at the open meeting and further stated that he did advise homeowners at an open meeting that the lawsuit brought by Mr. Glibbery was going to cost everybody in the community. It is determined that this action has been filed with the Clerk of the County of Suffolk and is a public record. In that TRHOA was named as a defendant, they are parties to the action and were rightfully notified by letter and at the board meeting that they were being sued. Accordingly, there was no breach of confidentiality.

The Supreme Court of New York, Appellate Division, Second Department, holds that a sponsor-appointed board of managers of a condominium owes a fiduciary duty to shareholders. A fiduciary is one who transacts business, or who handles money or property, which is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part (*Board of Managers of the Fairways at North Hills Condominium v Fairway at North Hills et al*, 193 AD2d 322 [2nd Dept 1993]). "The condominium association by-laws are the vehicle by which unit owners forgo certain individual property rights and delegates them to a board of managers. They spell out the limits of the board's authority to act. One area in which the board of managers is given broad authority to act is in the area of maintenance and repair of the common elements of the condominium" (*Michaelson et al v Albora et al*, 196 Misc2d 517 [Sup. Ct. Suffolk County 2003]).

It has been demonstrated by the moving defendants that Camco did not have a fiduciary duty to plaintiff as the By-Laws delegate those certain individual property rights to a board of managers, not to the management company. Plaintiff has not presented evidence to raise a factual issue in this regard. Although Camco entered into the contract with Double B, it has been determined that the contract for the painting of the homes and original decks did not inure to plaintiff. Plaintiff did not have an original deck and entered into his own agreement with Double D for the painting of his deck. Therefore, plaintiff has not raised factual issue to demonstrate that Camco had a fiduciary duty to plaintiff given the facts of this case.

Based upon the foregoing, it is determined that TRHOA and the board members named herein had a fiduciary duty to the homeowners. All the condominium unit owners, including the board

members, pursuant to N.Y. Real Prop. Law §339-I and the community by-laws, owned interests in the community's common areas (*Michael son et al v Albora et al*, supra). Here, the moving defendants have demonstrated prima facie that they, as members of the board, were acting on behalf of all the unit owners in enforcing the house rules concerning garbage disposal and animals at large on the premises. In opposing this motion, plaintiff has not demonstrated self-dealing or fraud or that the board members were acting tortuously, with malice, or made misrepresentations, or that their personal interests conflict with common interests to demonstrate that the moving defendants breached their fiduciary duty to plaintiff (see *Brasseur et al v Speranza et al*, 21 AD3d 297 [1st Dept 2005]). Nor has plaintiff submitted any evidence to raise triable issues of fact in that regard.

As set forth in *Pelton et al v 77 Park Avenue Condominiums*, 38 AD3d 1 [1st Dept 2006] citing, *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990], “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. Moreover, the prospect that each board decision may be subjected to full judicial review hampers the effectiveness of the board's managing authority. Thus, the Court of Appeals decided that the appropriate standard for judicial review of decisions of the boards of managers of residential condominiums and cooperative corporations ‘is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors’. This ‘deferential standard’ that has become the hallmark of the business judgment rule requires the courts to ‘exercise restraint and defer to good faith decisions made by boards of directors in business settings’” (*Pelton et al v Park Avenue Condominiums*, 38 AD2d at 8). “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 W. 67th St. v Pullman*, 100 NY2d 147, 155, [2003]).

Plaintiff's claims that defendants breached their fiduciary duty are merely conclusory, speculative, and unsupported. Plaintiff has failed to raise factual issues concerning that the board acted outside the scope of its authority, in a way that did not legitimately further the corporate purpose, or in bad faith (see *40 W. 67th St. v Pullman*, supra). This court determines that the board of managers acted in good faith when enforcing the house rules concerning garbage disposal and animals at large; in advising the homeowners who did not have original decks that they could pay Double B to paint their deck, paint their own, or hire someone else to paint it; and in advising the homeowners of their potential liability concerning the lawsuit brought against them, the homeowners association, by plaintiff. Plaintiff hired Double B himself to paint his deck and admitted to performing those three acts which gave rise to the one violation and two warnings since 1994.

Plaintiff's claim that the paint job should have gone out to bid rather than the board exercising its discretion in maintaining the properties as defendants assert is merely conjecture and speculation. Plaintiff has not provided this court with a copy of the By-Laws of the Association to raise a factual

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issue to demonstrate that the By-Laws indeed provided that the paint job and maintenance projects were supposed to go out to bid. In fact, plaintiff submitted the letter from counsel from TRHOA sent to him which set forth, inter alia, that Article VIII, Section 5(a)(8) of the By-Laws specifically granted the board the authority to enter into contracts to provide maintenance and other services. With regard to the hiring of the management companies, the moving defendants testified that the management companies submitted bids and that three bids were obtained each time a new management company was hired.

Based upon the foregoing, it is determined plaintiff has not raised a triable issue of fact in opposing this motion in that plaintiff has not demonstrated by admissible evidence that TRHOA, Camco or the individual board members breached their fiduciary duties relative to any of his claims set forth in the First, Third and Fourth Causes of Action.

Accordingly, the first, second, third and fourth causes of action asserted against the moving defendants are dismissed in their entirety and those causes of action are severed from the remaining claim asserted against defendant Double B, which claim shall continue.

Dated: April 23, 2008



HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION