

**Perlbinde v Board of Mgr. of 411 E. 53rd  
St. Condominium**

2008 NY Slip Op 32595(U)

September 25, 2008

Supreme Court, New York County

Docket Number: 0100974/2008

Judge: Marilyn Shafer

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HON. MARILYN SHAFER, JSC

PART 8

Justice

Index Number : 100974/2008  
**PERLBINDER, BARTON MARK**  
VS.  
**411 EAST 53RD STREET CONDOMINIUM**  
SEQUENCE NUMBER : # 001  
SUMMARY JUDGMENT

INDEX NO. 100974-08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3, 4  
5, 6  
7, 8

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... Memo

~~Notice of Cross Motion~~  
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits Memo

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment  
is denied and the cross-motion for summary  
judgment is granted in accord with the  
attached memorandum.

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

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/25/08

**MARILYN SHAFER**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

-----X  
Barton Mark Perl binder Steven Perl binder,

Plaintiffs,

Index No. 100974/08

-against-

Board of Managers of the 411 East 53<sup>rd</sup>  
Street Condominium,

Defendant

-----  
Shafer, J.:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1338).

Plaintiffs Barton Mark Perl binder and Stephen Perl binder move, pursuant to CPLR 3212 (a), for summary judgment on the complaint. Defendant cross-moves for summary judgment dismissing the complaint. The complaint alleges that plaintiffs are the designees of the sponsor of the offering plan to convert to condominium ownership the property located at 411 East 53rd Street in Manhattan (Building or Condominium); that they placed a sign on the south facade of the Building advertising for sale the six unsold units that they own; and that defendant Board of Managers (Board) of the Condominium caused the sign to be removed. The complaint seeks a declaration that plaintiffs are entitled to place signage advertising the unsold units on the Building and an injunction barring defendant from removing such signs, or from interfering with plaintiffs' right to place such signs. The complaint also alleges that the Board breached its fiduciary duty to plaintiffs, and it seeks damages for such alleged breach.

Article 10 (c) of the Condominium's Declaration provides that:  
the Sponsor and its successors, assignees, invitees,

licensees, contractors, employees, agents and tenants shall have an easement in ... the Common Elements to use the same ... for all purposes and activities in connection with the sale or renting of Unsold Units ... . In addition, the Sponsor reserves the right ... to use one or more portions of the Common Elements ... for sales ... purposes, which right shall include ... the right to place "for Sale" ... signs ... of such size and content as the Sponsor shall determine, in, on, about and adjacent to the Building (including on the exterior walls thereof) ... .

Thus, the right to post sales signs is a right additional to, and therefore, distinct from, the right to use the Common Elements for activities in connection with the sale of unsold units. Or, to put it another way, the right to place signs is not included in the easement provided for in the first sentence of Article 10 (c). Whereas that easement is provided for the Sponsor and for all the other listed categories of persons, the right to place signs on the Building is reserved to the Sponsor alone. See Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc., . 63 NY2d 396 (1984). Paragraph 46 of Exhibit C to the Declaration defines "Sponsor" as "85th Estates Company, a New York general partnership ... ." While plaintiffs appear, indeed, to be the "designees" of the Sponsor, plaintiffs do not thereby become the Sponsor, and therefore, Article 10 (c) of the Declaration, which reserves for the Sponsor the right to place signs on the Building, does not entitle

plaintiffs to do so. The court notes that in the more than 20 years since the Condominium was formed, during which time plaintiffs sold a number of units, they never claimed a right to place advertisements on the facade of the Building.

In their opposition to defendant's cross motion, plaintiffs contend, for the first time, that, in addition to being the designees of the Sponsor, they are the Sponsor. That argument is based upon 13 NYCRR 23.1 (c) (1), which defines "Sponsor" broadly to include, among others, the "owners of at least 10 units or 20 percent of the total number of units in the condominium, whichever is less, which are not purchased for occupancy by the owner or one or more members of his or [sic] immediate family." While the parties dispute whether plaintiffs ever qualified as a Sponsor within the meaning of this definition, that dispute is besides the point. Whether or not plaintiffs were bound, as sponsors, by the requirements set forth in 13 NYCRR 23.1, they are not the Sponsor within the meaning of the Declaration.

Finally, plaintiffs urge that section 5.8 (C) of the by-laws of the Condominium supports their position. While that by-law purports to grant "[t]he Sponsor or its designee" the right to place signs on the Building, section 14.3 of the by-laws provides that:

[i]n the event that any provision of these By-laws ... shall be construed to be inconsistent with any provision of the Declaration ... the provision contained in the Declaration ... shall control.

Perlbinder Aff., Exh. A, at 230. Accordingly, section 5.8 (C) of the by-laws cannot operate to grant to a designee of the Sponsor a

right that the Declaration restricts to the Sponsor.

To the extent that plaintiffs' claim of breach of fiduciary duty is not entirely redundant with their claim that they are entitled to install a sign on the facade of the Building, it alleges that defendant capriciously failed to notify plaintiff Barton Mark Perlbinder that it was meeting to discuss the sign that plaintiffs had posted, despite the fact that, as a member of defendant Board, he is entitled to notification of all Board meetings. James W. Prendergast, the president of the Board, states in his affidavit that Perlbinder had notified the Building's management company that he intended to install a sign; that he was requested to send a drawing of the proposed sign and other information to be forwarded to the Board; that he caused the sign to be installed without sending either the drawing or the information that had been requested; that after the sign was installed, the executive committee of the Board, of which neither plaintiff is a member, directed, on behalf of the Board, that the sign be removed; and that the executive committee's action was confirmed by an informal poll of the other members of the Board, other than Perlbinder. Mr. Prendergast avers that Perlbinder was not polled because, as an interested party, he would not have been entitled to vote had the matter been brought up at a formal meeting of the Board. In reply, Perlbinder notes that the wife of a Board member who is the co-owner of the Building's managing company is a real estate agent who has at least five listings for units in the Building for sale. This suggestion that the Board acted

invidiously when it removed plaintiffs' sales sign from the facade of the Building is insufficient to raise an issue of fact as to the Board's good faith and its entitlement to the benefit of the business judgment rule. See Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530 (1990); Pelton v 77 Park Ave. Condominium, 38 AD3d 1 (1st Dept 2006). Mr. Perl binder does not dispute that he was asked to provide a drawing of the proposed sign, and that he had the sign installed without having complied with that request.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ADJUDGED and DECLARED that plaintiffs are not entitled to place a sign on the outside of the building known as 411 East 53rd Street in Manhattan, without the permission of the defendant.

Dated: 9/25/08

ENTER:

**MARILYN SHAPER**  
J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**