[* 1]

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

PRESENT: JUDITH J. GISCHE PART 10
Justice

Board of Directors of the 133 Essex Street Condo

-v-

Evanford LLC et al

INDEX NO. 112906/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this 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 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and PC scheduled for 11/13/08 at 9:30 am

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

Dated: 10/16/08

HON. 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

Board of Directors of
133 Essex Street Condominium,

Plaintiffs,

-against-

Evanford, LLC, Calabrese Investors, LLC and others

Defendants.

----------x

DECISION/ORDER
Index No.: 112906/07
Seq. No.: 002, 003, 004

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
Motion Seq #2	
Calabrese n/m (3211) w/LAD affid, exhs	1
133's opp w/AJ affirm, CD & WG affids	2
Calabrese reply w/LAD affid, exhs	3
Motion Seq #3	
133's OSC (disqualify LAD) w/AJ affirm, WG affid, exhs	4
Evanford's response w/DR affirm	5
Calabrese opp w/LAD affid	6
133's reply w/AJ's affirm	7
Motion Seq #4	
Calabrese OSC w/LAD affid, exhs	8
133's opp w/AJ affirm, CD & WG, exhs	9
Calabrese reply w/LAD affid	10

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

This is an action by plaintiff the Board of Directors of 133 Essex Street ("Board") for a permanent injunction against a commercial tenant within the building located at

133 Essex Street, New York, New York ("building"). The commercial tenant, Evanford[1] LLC ("commercial tenant" or "Evanford") leases the ground level and basement space for its bar/restaurant called the "Mason Dixon." The commercial units are both owned by defendant Calabrese Investors, LLC, the sponsor of the condominium conversion (hereinafter "sponsor" or "Calabrese").

In connection with prior motions, plaintiff sought, and was granted, a conditional and temporary restraining order ("TRO") against Evanford using a door that exits from its establishment (the "bar") into the lobby of the building (Order, Gische J., April 18, 2008) ("prior order"). Evanford sought, but was denied, the preanswer dismissal of this action. Instead, this action was stayed so the board could serve an amended complaint clarifying the identity of the plaintiff and adding Calabrese as a named party.

The amended complaint was served ("amended complaint") and issue been joined as to Evanford. Calabrese, however, now moves to dismiss all causes of action against it, as well as one cause of action asserted only against Evanford, but also (according to the sponsor) abridging its rights. Calabrese has served a Third Party Summons and Complaint against the individual unit owners, including those who are currently board members.

By separate motion (Order to Show Cause, sequence number 3), the board seeks the disqualification of Calabrese's attorney, Lorenzo DeLuca, Esq. ("DeLuca"), on the basis that De Luca, who is also the managing member of the sponsor, is both an attorney and a witness. DR 5-102 (a) and (b). Calabrese and Evanford separately

---

[1]The lease identifies the tenant as "Evan Ford, LLC," as does Calabrese in its papers. The tenant uses the spelling appearing in the complaint and caption. The court will adhere to the spelling used in its prior decision.

oppose the motion.

Calabrese has brought a motion (Order to Show Cause, sequence number 4) for the disqualification of plaintiff's attorney, Robert Brill, Esq. ("Brill"), on the basis that Brill is conflicted by representing the unit owners on the one hand and the board on the other hand. DR 5-105 and DR 5-109. Calabrese also seeks a stay of this action and a preliminary injunction against the board making any changes to the common elements without the sponsor's approval and also against the imposition of any restrictions on the rental of units. Though the TRO was initially denied by Justice Schoenfeld in this court's absence, when the motion was heard (July 17, 2008) the court granted the TRO's pending its decision on these motions. Since the board has apparently reconsidered imposing restrictions on rentals, Calabrese has indicated (in its reply) that it believes this branch of its motion is moot. In accordance therewith, the request for a stay is denied as moot, but without prejudice.

In considering and deciding the motion to dismiss, the court accepts the facts as alleged by the board in its amended complaint as true, and they are afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by the moving party (*see* Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). Where, as here the party opposed to the dismissal provides sworn affidavits and other evidentiary materials, they will be considered by the court to remedy any defects in the pleading. Leon v Martinez, 84 NY2d 83, 88 [1994].

In connection with each motion to disqualify, the moving parties identify different sections of the Disciplinary Rules ("DR__") under which they are moving. The plaintiff-board seeks DeLuca's disqualification pursuant to DR 5-101 (a), DR 5-102 (a) and DR 5-102 (b). Under these rules the board has to show that DeLuca, who is an attorney, has a conflict of interests and/or DeLuca "ought" to be called as a witness by his client (Calabrese) because the testimony he is likely to give "is necessary." Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 1 (1st Dept 1994) (*citing* S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437 (1987).

The sponsor (Calabrese) seeks the disqualification of plaintiff-board's counsel (Brill) on the basis that Brill is conflicted by simultaneously representing the board and the unit owners [DR 5-105 (a), 5-105 (b) and 5-109] because the interests of the board and one or more unit owners diverge.

These motions are hereby consolidated for consideration and disposition in this decision and order because they are inter-related and bear upon one another. The court's decision is as follow:

Facts Considered and Arguments Presented

In November 2005, 133 Essex Street Corp., the original sponsor conveyed its interest in the property at 133 Essex Street, New York, New York ("building") to Calabrese. At that time the building was vacant and Calabrese owned all sixteen (16) residential and both commercial units ("S1" and "S2") in the building. Later Calabrese sold all the units, except for one residential and both commercial units. The original board was comprised of DeLuca, who was the managing member of Calabrese (and now its lawyer), and two other persons ("first board"). DeLuca was the president of the

first board.

The current board ("current board"), consists of seven (7) members; five (5) of whom were elected in June 2007. Two (2) of those five (5) members were selected by the sponsor. The remaining two (2) remaining members were elected in September 2007. Wesley Gaus ("Gaus") was one of the two last elected members and he is the current board's president. DeLuca is still a board member.

The first board considered, voted on and passed several resolutions at its board meeting held on May 17, 2007 ("resolutions"). It resolved that one of the commercial units (S2) and part another (S1) would be leased to Evanford for its bar. It was also resolved that the janitor's room, then on the first floor, and consisting of 120 square feet, would be relocated to S1 in its entirety. The common interest of S1 was reduced in a percentage corresponding to the square footage of the janitor's room. Thus, the original board voted that the common interest of S1 would be reduced from 5.2714% - the description[2] in the Declaration - to 5.0829%. However, the size of S2 was increased from 14.7286% to 14.9171%, corresponding to the dimensions of the relocated room and it resolved certain problems with emergency egress for the bar (*see* prior order for a complete discussion of this dispute).

The original board also voted to have the condominium enter into a 2 year lease with the sponsor for additional space in S1 at a monthly rent of $1,000. The additional space (430 square feet) made the relocated janitor's room bigger, increasing it to 650

---

[2]The court notes that the copy of the description plaintiff provided is different than the copy provided by Calabrese. Also, the copy of the Declaration Calabrese provides is undated except for the year (2005). The court uses the percentages plaintiff has provided.

square feet. The original janitor's room was included within the space leased to Evanford. The board also resolved that the commercial tenant could install an conditioning system at the rear of the premises.

The current board has brought this action against the commercial tenant and sponsor based upon allegations that the defendants have encroached upon, reduced, and invaded the common elements by taking these actions, without the permission of unit owners, all of whom have been affected. N.Y. Real Property Law § 339-i (2). Moreover, plaintiff alleges these actions interfere with the quiet enjoyment and peaceful possession of the premises by the residential owners who have been damages by having a boisterous bar in their building which they contend could not have existed, but for the unauthorized modifications to the 1st floor and basement.

Calabrese contends that each of these actions were undertaken with (original) board approval and the current board has no right to challenge those actions, but even it can challenge them, the original board's decisions withstand scrutiny under the business judgment rule.

The sponsor has served a third party summons and complaint against some, but not all, of the residential unit owners; several of these owners currently serve on the board, including Gaus, the board's president. Calabrese contends the unit owners elected the last two board members in violation of the Offering Plan, and therefore, any actions undertaken by the current board are null and void, including the approval of Gaus' installation of an air conditioning unit solely for his personal use on the roof.

In response, plaintiff alleges that the sponsor backdated the May 2007 resolution to make it appear there was a vote and meeting when, in fact, no such meeting, vote or

resolution ever took place.

In support of its motion to disqualify DeLuca, the board first argues that his personal interests do not coincide with Calabrese's. The board argues that even if their interests coincide, it is likely that DeLuca will have to testify as Calabrese's witness, probably as Evanford's witness, and that DeLuca's testimony will be adverse to his client's (Calabrese's) interest. Finally, the board argues that DeLuca's involvement as the managing member of Calabrese, as the president of the original board, a member of the current board, and as a unit owner creates the appearance of impropriety because he is in the position of arguing in favor of his own credibility.

Calabrese argues that Brill's conflict arises from his simultaneous representation of the board which is comprised of unit owners. Since Gaus has installed an air conditioning unit which Calabrese contends encroaches upon the common elements, Calabrese argues the board and some of the unit owners are not united in interest, but are at odds.

Discussion

Motion to dismiss

Whether the sponsor required board approval for any of the actions it took, or did not need board approval present factual disputes for trial. In connection with Calabrese's motion to dismiss the court's attention is not focused on whether plaintiff can prove its claims, but plaintiff has stated the causes of action it has pled. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept 1997); Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). For the reasons that follow, the court decides that this standard has been met by the plaintiff, and therefore, Calabrese's motion to dismiss must be denied,

except for the 8th cause of action, which is dismissed.

Calabrese has provided the court with a copy of the resolution it claims authorized the actions it took, including relocating the janitor room and reallocating the common interest between the two commercial units. Sponsor contends that these changes did not (adversely) affect the residential unit owners. However, not only is the authenticity of the resolution disputed, even if there was such a resolution, this does not resolve all factual issues or establish a defense to plaintiff's claims, as a matter of law. Leon v. Martinez, *supra*. Therefore, the overarching issue of whether the sponsor's actions have violated the condominium's governing documents remains to be decided at a later time.

While plaintiff correctly argues that under the Martin Act [GBL § 352 *et al*] the Attorney General has sole and exclusive jurisdiction to prosecute sponsors who make false statements in offering plans [*see* Vermeer Owners, Inc. v. Guterman, 78 NY2d (1991)], the Martin Act does not preclude a private, common law action for fraud. Whitehall Tenants Corp. v. Estate of Olnick, 213 AD2d 200 (1st Dept) *lv den* 86 NY2d 704 (1995); Kramer v. W10Z/515 Real Estate Limited P'ship, 44 AD3d 457 (1st Dept 2007). Plaintiff's claims against the sponsor are not limited to filing a false statement in the offering plan, but broader. The current board claims that the sponsor made material misrepresentations of a material fact, knowing they were false, that the unit owners relied upon, and that they have been damaged. NYU v. Continental Insurance Co., 87 NY2d 308 (1995); P. Chimento Co. v. Banco Popular, 208 AD2d 385, 386 (1st Dep't 1994). The damages alleged are that the bar could not otherwise have operated in the commercial space, had it not been for the unauthorized changes in the common

elements. While at trial plaintiff's burden is to prove the essential elements of a fraud cause of action, at this stage plaintiff has pled facts that support a private cause of action for fraud, thereby defeating defendant's motion to dismiss based upon lack of standing. *see* Kramer v. W10Z/515 Real Estate Limited P'ship, *supra* at 460 (*preanswer motion to dismiss denied*).

Other arguments by Calabrese, that the current board is improperly constituted because the last two members were not elected in accordance with the condominium's governing documents, raise affirmative defenses and counterclaims that the sponsor can assert in its answer or the 3rd party action, but they are not a basis for the dismissal of the amended complaint.

The court will, however, grant Calabrese's motion to dismiss the 8th cause of action which is to enjoin Evanford from operating its bar, unless and until the condominium is named as an additional insured under its policy. Calabrese provides proof that Evanford has added the condominium as a named additional insured under its policy, at the sponsor's request - without admitting it had any obligation to do, and pointing out that nothing in the condominium governing documents require the sponsor or Evanford to do this. None of these claims are addressed by plaintiff in its opposition and the complaint cites no applicable provision in any of the condominium governing documents.

Since the dispute raised by plaintiff has nothing to do with the scope of coverage, but more broadly whether Evanford has this obligation in the first place, the certificate of insurance is unrefuted documentary evidence that (whether it had the obligation to do so or not) Evanford has named the condominium an additional insured

under its policy. Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198 (1st Dept 2004). Therefore, Calabrese's motion to dismiss the 8th cause of action is granted; that claim is severed and dismissed.

The 3rd cause of action appears to contain a typographical error. It is asserted "jointly and severally against Evanford," but then states "111. Evanford and/or Calabrese failed to . . ." Neither the error in transcription, nor the nature of the relief sought (related to placement of signs at the building) provide a basis to dismiss this cause of action. Any inconsistencies in the governing documents remain to be decided at a later time and may be subject to *pro forma* motions to conform the pleadings to the proof.

Motion to disqualify DeLuca

Turning to plaintiff's motion for an order disqualifying DeLuca from representing the sponsor in this action, the court first considers whether the "advocate-witness rule" (DR 5-102 et seq) requires the disqualification of Attorney DeLuca. The advocate-witness rule provides guidance, not binding authority, when a court is deciding whether a party's lawyer has to be disqualified during the course of litigation. S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 440 (1987). Disqualification of an attorney or a law firm "may be required only when it is likely that the testimony to be given by the witness is necessary . . ." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d at 445-446; Giampa v. Marvin L. Shelton, M.D., P.C., 18 Misc.3d 1119(A) (N.Y.Sup. 2008) (*and cases cited therein*). While testimony may be relevant and even highly useful, it may not be strictly "necessary." Thus, in deciding whether DeLuca's testimony is necessary, the court takes into

account a number of factors, including the significance of the matters the attorney may be called upon to testify about, the weight of such testimony, and the availability of other evidence. S & S Hotel Ventures v. 777 S.H. Corp., *supra* at 446.

DeLuca plays several roles in this case. He is not only Calabrese's attorney (the sponsor), he is also its managing member. DeLuca was the president of the original board and he still is a member of the current board along with his daughter who owns a residential unit. DeLuca owns both commercial units and is therefore a unit owner, within the meaning of the governing documents.

Assuming that the plaintiff intends to call DeLuca as a witness, there is no expectation that his testimony will be so adverse to the factual assertions or account of events offered on behalf of the client so as to warrant his disqualification. Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64, 75 (1st Dept 2002) (*citing* Broadwhite Assocs. v. Truong, 237 A.D.2d 162, 162-163 (1st Dept 1997); S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra*). The mere fact that DeLuca has relevant knowledge or was involved in the transaction at the heart of this dispute does not make his testimony necessary requiring his disqualification. Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 152 (1st Dept 1994) *affirmed* 87 N.Y.2d 826 (1995). This is consistent with the general legal principle that a party has the right to be represented by an attorney of his or choosing. Strongback v. N.E.D. Cambridge Avenue Development Corp., 32 A.D.3d 793 (1st Dept 2006).

While DeLuca's analogy to being virtually "pro se" in this case is awkward, he is the managing member of Calabrese, a limited liability company, and his interests appear to be identical to those of Calabrese. Omansky v. Bermont Holdings LTD, 15

Misc.3d 11 (N.Y. Sup. App Term 2007). Although not named individually, plaintiff suggests that DeLuca might be one of the "John Does." Taking this to the next logical step, DeLuca is a major participant in this action, whether as a named or yet unnamed party. Therefore, his disqualification as counsel would have little or no effect on his participation in this action. Omansky v. Bermont Holdings LTD, *supra* (*internal citations omitted*).

There is, at this stage of the litigation, no evidence or reason to believe that DeLuca cannot exercise his professional judgment for his client's benefit, free from "compromising influences and loyalties . . ." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra. Further arguments that a jury will be confused by allowing DeLuca to remain as counsel, or by Evanford that there will be no confusion if this case is tried without a jury at a bench trial, are unavailing. Therefore, plaintiff's motion to disqualify DeLuca as Calabrese's attorney is denied at this time. The court will, however, allow plaintiff to depose DeLuca; plaintiff may serve DeLuca with the appropriate notice. This motion may be renewed if DeLuca's testimony at the deposition reveals a factual basis for disqualification not otherwise apparent at this time.

Motion to disqualify Brill

Calabrese argues that plaintiff's counsel (Brill) should be disqualified from jointly representing the current board and the individual unit owners against whom the sponsor has commenced a third party action. CPLR § 1007, however, requires that a defendant first answer the complaint in the main action, before serving his third party complaint. Since this is a pre-answer motion to dismiss, it would appear the third party complaint is

premature. Leaving this procedural issue aside, and assuming that these are the claims that Calabrese intends to assert against the unit owners, there is no reason to believe or evidence tending to show (at this stage of the litigation) that the board and the individual unit owners have different or incompatible interests. DR 5-109. The board and the unit owners are clearly united in their claims against Evanford and Calabrese. While Calabrese argues that the air conditioning unit Gaus installed impermissibly encroaches upon the common elements, and is therefore an unauthorized act under the governing documents, issue has yet been joined in that putative third party complaint. Therefore, not only is this motion to disqualify Brill is premature, there is no basis for the relief requested. The denial is, however, without prejudice.

Calabrese's motion for preliminary injunction

According to section 2.5 of the By Laws, there are restriction on the actions that the board can take in the first five (5) years after the first unit closes. This section provides, among other things, that the board cannot, without the sponsor or designee's prior written consent "(i) make any addition, alteration, or improvement to the Common Elements or to any Unit, unless the same is required by Law or an insurance company insuring the Property . . ." Calabrese contends the current board exceeded its authority by voting to allow Gaus install his air conditioning unit on the roof and also voting to make and pay for alterations to Gaus' private deck which is a limited common element.

To prevail on a motion for a preliminary injunction the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair

House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, *supra* at 605.

Assuming Calabrese has pled facts that support a likelihood of success on the merits and that the equities balance in its favor, the sponsor has not shown irreparable harm. The unit was already installed, and the terrace work has been completed. Calabrese points to no other projects that are being considered which if undertaken would irreparably harm him, or that he could not be compensated for monetarily. Although the court is not deciding whether the restrictions in section 2.5 of the By Laws apply, or have been violated, Calabrese has not put forth any facts to show any irreparable harm pending ultimate resolution of the parties' dispute. Since Calabrese has not met its burden on this motion for a preliminary injunction, it is hereby denied.

Conclusion

Calabrese's motion to dismiss the amended complaint is denied, except as to the 8th cause of action which is hereby severed and dismissed as to both defendants. Calabrese's time to answer is extended and may be served on plaintiff no later than October 28, 2008.

Calabrese's motion for a preliminary injunction is denied. Calabrese's motion for the disqualification of plaintiff's counsel (Brill) is denied, without prejudice.

Plaintiff's motion for the disqualification of Calabrese's attorney (DeLuca) is denied, without prejudice. Plaintiff may, however, notify DeLuca of its intent to take his deposition before trial.

This case is hereby scheduled for a Preliminary Conference on November 13, 2008 at 9:30 a.m. in Part 10, 80 Centre Street. No further notices will be sent.

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

This constitutes the decision and order of the court.

Dated: New York, New York
October 16, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK