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SHORT FORM ORDER

INDEX No. 07-31111

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 2-1-08 (001)
MOTION DATE 4-2-08 (002)
ADJ. DATE 8-13-08
Mot. Seq. # 001 - MD
002 - XMG; CASEDISP

BAY CREST ASSOCIATION, INC., Plaintiff, - against - LOUIS PAAR and SUZANNE DeLISI, Defendants.	HAMBURGER, MAXSON, YAFFE, et al. Attorneys for Plaintiff 225 Broad Hollow Road, Suite 301E Melville, New York 11747
	SINNREICH & KOSAKOFF, LLP Attorneys for Defendants 267 Carleton Avenue, Suite 301 Central Islip, New York 11722

Upon the following papers numbered 1 to 136 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-30 ; Notice of Cross Motion and supporting papers (002) 31-60 Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers Further Notice of Motion and Reply 61-63; Reply and Further Affirmation in Support 64-92; Reply 93-94; Reply 95-131; Other Pltf's Mem/Law 132-133; Pltf's Reply Mem/Law 134-135; Deft's Reply Mem/Law 136 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Louis Paar and Suzanne Delisi pursuant to CPLR 3211(a)(7) dismissing the amended complaint, and Further Notice of Motion to dismiss the amended complaint pursuant to CPLR (a)(3), (7) and (10), and pursuant to CPLR 3211(a)(1) for summary judgment granting an immediate cease and desist order pending judicial dissolution of the action, are denied; and it is further

ORDERED that this cross motion (002) by the plaintiff, Bay Crest Association, Inc., pursuant to CPLR 3212 granting summary judgment to plaintiff on its first cause of action against Louis Paar in the amount of $16,462.65 plus interest is granted; and for summary judgment on its second cause of action against defendant Suzanne DeLisi in the amount of $5,487.55 plus interest is granted.

This action has been commenced by the plaintiff, Bay Crest Association, Inc. (a non-profit homeowners' association for the private community of Bay Crest) to collect monies from two Bay Crest shareholders, Louis Paar and Suzanne DeLisi, for unpaid annual assessments. The complaint sets forth that

the defendants purchased property and reside within the Bay Crest community but have refused to pay the duly adopted assessments for the past several years. Louis Paar is the owner of residential real property located at 42 Bay Crest, Village of Huntington Bay, County of Suffolk and Suzanne DeLisi is the owner of real property located at 56 Bay Crest, Village of Huntington Bay, County of Suffolk. The association holds title to a 2.4 acre private beach on Huntington Bay for the benefit of the shareholders of the corporation and is responsible for the maintenance of the private beach and all of its facilities which include four separate buildings which house ninety two lockers (approximately 4'x7' in size), a picnic table area, showers and restrooms. Lifeguards are hired at the beach during the summer season. The association repairs, maintains and plows the private roads in Bay Crest. The main entrance to Bay Crest (Beach Avenue) is a private road which intersects Bay Avenue, a public road, marked with pillars and signs giving notice that one is entering a private community. The private beach is gated and marked as private.

Bay Crest was incorporated as a stock corporation[1] in 1905 under the Stock Corporation Law and has never functioned as a profit-making enterprise. Bay Crest has classes of shares in the Association: restricted shares, in which the shares may only be transferred to owners of real property within the geographic boundary of the Bay Crest community and "run with the land" so that anyone who purchases a house in the community becomes the holder of restricted shares; and unrestricted shares, which do not "run with the land," are not tied to any real property in the community, and are freely transferrable. Louis Paar is stated to be the holder of three shares in the Association: two unrestricted shares and one restricted share. Suzanne DeLisi is stated to be the holder of three restricted shares in the Association, acquired when she purchased her home within Bay Crest in 2002. Louis Paar first purchased an unrestricted share in the Association in 1993, acquired another unrestricted share in 1998, and purchased property in Bay Crest (acquiring a restricted share) in 1999.

According to Article II of the Certificate of Incorporation, the Association was formed, inter alia, (b) to build and maintain one or more buildings to be used for bathing and other purposes, for the benefit of members of the corporation, and generally, in all practicable ways to care for and promote the property interests of the owners of real property at Bay Crest, on East Neck, Town of Huntington, County of Suffolk, and included the construction of beach facilities on the private beach in the Bay Crest Community, title to which is held by the Association for the benefit of its shareholders. To pay expenses, including maintenance of the private beach and roads in the community, Bay Crest imposes on its shareholders special assessments and also annual assessments which have increased periodically over the years. The annual assessments imposed are one assessment per restricted shareholder and one assessment per unrestricted share. Pursuant to that formula, defendant Parr is obligated to pay three annual assessments and defendant DeLisi is obligated to pay one annual assessment. An additional special assessment of $325.99 was imposed in or about December 2006 on each assessable restricted shareholder and each assessable unrestricted share.

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[1] Under N.Y. Gen. Corp. Law §2, corporations are classified, and a stock corporation is declared to be either a moneyed, a transportation or a business corporation (***Adams v Wallace et al***, 82 AD2d 117, 81 NYS 848 [1st Dept 1903]). Section 33 further provides that if in any corporate law there is or will be any provision in conflict with any provisions of this chapter or of the Stock Corporation Law, the provisions so conflicting shall prevail, and the provision of this chapter or of the Stock Corporation Law with which it conflicts does not apply in such a case.

Therefore, it is asserted that the defendant Louis Paar has a total due and owing for unpaid annual assessments for each of his three shares for 2005, 2006, and 2007 and the special assessment in the total amount of $16,462.65; and that Suzanne DeLisi has a total due and owing for unpaid annual assessments for her shares for 2005, 2006, and 2007 and the special assessment in the total amount of $5,487.55.

The defendants seek dismissal of the complaint on the basis that a stock corporation organized pursuant to the Business Corporation Law, and not a homeowner's association organized pursuant to the Not-For-Profit Corporation or the Cooperative Corporations Law has no authority to assess its shareholders for capital contributions. Neither its Certificate of Incorporation nor statutory authority give the plaintiff this right, and any by-law adopted to the contrary is resultantly invalid, and therefore the plaintiff's claim against the defendants must fail as a matter of law. While the defendants' arguments in support of their applications are rambling and often times conclusory and unsupported, this court is giving the defendants every attendant consideration for their arguments in that they are self-represented.

In support of the motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) dated January 15, 2008, the defendants have submitted an attorney's affirmation; the affidavit of Suzanne DeLisi; a copy of the complaint; a copy of the Certificate of Incorporation filed with the Secretary of State on March 23, 1905 for the Bay Crest Association; copies of various minutes of the meetings of the shareholders of the Bay Crest Association; a copy of the By-Laws of the Bay Crest Association with amendments to April 16, 1977; a copy of the By-Laws of the Bay Crest Association with amendments to January 12, 2006.

By way of a submission dated June 12, 2008, the defendants, appearing pro se, have submitted a 32 page document entitled "Further Notice of Motion to Dismiss and in Support of Cross Motion for Summary Judgment pursuant to CPLR 3211 (a)(1),(3),(7), and (10), accompanied by documentary evidence and numerous exhibits labeled 1-36 and A-Z; a "Reply Memorandum of Law in Further Support of the Motion to Dismiss and in Support of the Cross Motion for Summary Judgment; and an affidavit which has not been notarized.

Motion (002) is supported by, inter alia, an affirmation in opposition to the defendants' motions to dismiss and in support of the cross motion for summary judgment; a copy of the award of the arbitrator Richard I. Levine dated March 27, 2006 awarding the plaintiff Bay Crest Association, Inc. $4,942.95 against the defendant Louis Paar; a copy of the decision and order dated June 12, 2007 (Spinner, J.) under Index No. 06-21628 in the action captioned Louis Paar v Bay Crest Association, et al, in which application was made to consolidate a small claims action Docket No. HUCT 05-282 with a declaratory judgment action and injunctive relief underlying that motion (003) in Supreme Court, which motion to consolidate was denied and which motion for declaratory relief was granted dismissing the complaint of plaintiff Paar for failure to join necessary parties, Memorandum of Law, Reply Memorandum of Law; the reply affirmation of George Pezold, Esq.; copy of the Certificate of Amendment of the Certificate of Incorporation of Bay Crest Association to delete the number and qualifications of directors; various documentary evidence; copies of the By-Laws of the Bay Crest Association with amendments date April, 1962 and April 16, 1982, and 2006; and the affidavit of Patricia M. Antonucci.

In reviewing the history attendant with this action, it is noted that in ***Bay Crest Association, Inc. v Suzanne Delisi,*** 11 Misc3d 10549A, 815 NYS2d 493 [Dist Ct of NY, First Dist., Suffolk County,

February 2, 2006]) (Hackeling, J.) the court set forth that the plaintiff, Bay Crest Association, by complaint dated July 28, 2005, seeks to recover $1,647.65 representing a common charge (homeowner's assessment) imposed upon the defendant Suzanne DeLisi in June of 2005. Ms. DeLeLisi orally interposed several defenses asserting she is not in privity of contract with Bay Crest Association; that no covenants running with the land obligate her to pay such an assessment; that Bay Crest Association is illegally constituted; that its assessments are erroneous and/or improper as to her; and that the association's corporate by-laws limit its remedy for non-payment of assessments to exclusion from the common beach. The court set forth in its decision that the undisputed facts are: "The Bay Crest Association has owned and been responsible for the maintenance of streets and beach facilities, and has provided various community services for the benefit of Bay Crest residents since 1905. The board of directors prepares an annual budget which is presented and approved at the annual meeting of the property owners and shareholders. Based on the budget, dues are established by the board of directors. Property owners and shareholders are each assessed a proportionate share of the association's annual operating expenses. The association is incorporated and 43 homeowners and 41 non residents each own equivalent corporate stock interests. Ms. DeLisi is one of the homeowners who objects to the 41 non-residents having rights to beach cabanas. In 2005, the association assessed Ms. DeLisi $1,647.65 as her proportionate share for maintenance of the common roads and beach facilities. As a result of the defendant's refusal to pay the assessment imposed upon her, the association voted to ban her from utilizing its beach facilities, pursuant to Article V, Section 5 of the By-Laws of the Bay Crest Association."

This court takes judicial notice of the prior undisputed factual issues found at that time.

It is further noted that in ***Bay Crest Association, Inc. v Suzanne Delisi,*** 16 Misc3d 129A, 841 NYS2d 825 [Sup. Ct. of New York, Appellate Term, 2nd Dept., June 25, 2007]) involving an appeal from that judgment of the District Court of Suffolk County, Third District (Hackeling, J.) entered on February 23, 2006, judgment after a nonjury trial awarded the plaintiff the principal sum of $1,647.65 as against defendant DeLisi. The Appellate Term stated that "Plaintiff homeowner's association brought this commercial claims action against defendant, an owner of property within the private community to recover an annual assessment for the year 2005. Until 2005, defendant paid her yearly assessment for, inter alia, use of a bathhouse. She argued that, pursuant to the bylaws of the homeowners' association, she should not have to pay the assessment for 2005 because she did not request a bathhouse for that year. Plaintiff contended that community homeowner's associations are permitted to make assessments regardless of the member's actual usage of facilities. The court below awarded judgment in favor of plaintiff on the basis of an implied-in-fact contract finding that defendant had failed to establish that she was barred from using beach facilities at the same time that she was improperly assessed a maintenance fee."

The Appellate Term further set forth that upon a review of the record, that it was of the opinion that the court below did not render substantial justice between the parties in accordance with the rules and principles of substantial law (UDCA 1804-A, 1807-A), setting forth "[A] contract implied in fact rests upon the parties' conduct and [2] not their verbal or written words" (*see,* ***Parsa v State,*** 64 NY2d 143. 148, 474 N.E. 235, 485 NYS2d 27 [1984])." The Appellate Term further stated that a review of the instant record indicates that the testimony regarding the conduct of the parties was too sparse to permit a finding as to the existence of an implied in fact contract or as to the effect the by-laws had upon the rights of the parties relative to the issues presented. Accordingly, the matter was remanded for a trial as to all issues before a

new judge. However, by Stipulation dated September 25, 2007, that matter under Docket No. HUCT 873 SC was voluntarily discontinued by Bay Crest Association.

CPLR 3211(a)(3)

The defendants assert that the Bay Crest Homeowners Association does not have standing to sue. 'Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend....The traditional rule was that the homeowners' association would not have standing to enforce a covenant that ran with the land because it was not the actual landowner and had no direct proprietary interest in the land. However, the court reasoned that the modern trend in property disputes was to broaden the scope of standing, so that individual homeowners could form associations to fight wealthy developers. The homeowners' association was formed as a convenient instrument to advance the common interests, and it had a substantial identification with the real property owners (***Westmoreland Association, Inc. v West Cutter Estates, Ltd.,*** 174 AD2d 144, 579 NYS2d 413 [2nd Dept 1992]; *see also,* ***Challette, Inc. v Town of Brookhaven et al,*** 43 Misc2d 264, 250 NYS2d 165 [Sup. Ct. of New York, Spec. Term, Suffolk County 1964]). It has been held that homeowners associations are important to the community and have standing to sue (***Douglaston Civic Ass'n v Galvin,*** 36 NY2d 1, 364 NYS2d 830 [1974]). The Court of Appeals has recognized an homeowners association as having standing in zoning matters, even though the association technically did not own any land in the municipality in question (*see,* ***Douglaston Civic Ass'n v Galvin,*** supra) in that an appropriate representative association should have standing to assert rights of the individual members of the association where such persons may be affected by a rezoning, variance, or an exception determination of a zoning board. The Court stated that the factors to be considered in assessing such appropriateness include: (1) the capacity of the organization to assume an adversary position; (2) the size and composition of the organization as reflecting a position fairly representative of the community or interests which it seeks to protect; (3) the adverse effect of the zoning decision sought to be reviewed on the group represented by the organization as within the scope of interests sought to be protected; and (4) the openness of the organization to full participating membership by all residents and property owners in the relevant neighborhood." In applying those factors deemed to be applicable, it is determined that the homeowners association has the capacity to assume an adversary position and has hired counsel to represent them; the adverse effect of abatement of assessments would destroy the existence of the private community (*see*, ***Sea Gate Ass'n. v Fleischer***, 211 NYS2d 767 [Sup. Ct. 1960]); the entirety of the community is being represented and only several homeowners, who have the right to participate in the various homeowners' and annual board meetings, are objecting to the assessment.

Accordingly, it is determined that the Bay Crest Homeowners Association has standing to sue and that part of the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(3) is denied.

CPLR 3211(a)(7)

When deciding a motion to dismiss made pursuant to CPLR 3211(a)(7), the court must determine

whether the pleader has a cognizable cause of action, not whether it has been properly plead (***Guggenheimer v Ginzburg,*** 43 NY2d 268, 401 NYS2d 182 [1977]; ***Rovello v Orofino Realty Co.,*** 40 NY2d 633, 389 NYS2d 314 [1976]). In making such a determination, the court must accept as true all the facts alleged in the complaint and any factual submissions made in opposition to the motion to dismiss (***511 W. 232nd Owners Corp. v Jennifer Realty,*** 98 NY2d 144, 746 NYS2d 131 [2002]). The complaint must be liberally construed and the pleader must be given every favorable inference that can be drawn (***Leon v Martinez,*** 84 NY2d 83, 614 NYS2d 972 [1944]). If we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient (***Campaign for Fiscal Equity, Inc. v State of New York,*** 86 NY2d 307, 631 NYS2d 565 [1995]). In light of the foregoing and in reviewing the complaint, it is determined that the plaintiff has sufficiently pleaded two causes of action for monies due and owing from the defendants for the stated time for the assessment levied by the Bay Crest Association against its shareholders.

Accordingly, that part of the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint is denied.

CPLR 3211(a)(10)

The defendants seek dismissal of the complaint on the basis that the plaintiffs have failed to name necessary parties as they claim there are other shareholders who are delinquent in their payment of the assessments. CPLR 1001(a) provides in pertinent part that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. However, it is determined that the plaintiff may proceed against the defendants named herein without any other defendants being named as complete relief may be accorded between the plaintiff and the defendants in this action without joining other parties. The defendants do not claim that the other parties are necessary because they oppose the assessments, but merely assert that they are delinquent in making their payments. Therefore, they have not demonstrated with admissible evidence, such as an affidavit from the other parties who are delinquent in payment, that those others oppose the assessments and might be inequitably affected by a judgment in this action.

Accordingly, that part of the defendants' application pursuant to CPLR 3211(a)(10) is denied.

CPLR 3211(a)(1) and CPLR 3212

CPLR 3211(a)(1) permits the court to dismiss an action based upon documentary evidence. A cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Leon v Martinez,*** 84 NY2d 83, 614 NYS2d 972 [1994]).

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]).

George C. Pezold, Esq. set forth in his Affirmation that he is a member of the law office which was former counsel to Bay Crest Association, Inc. and in that capacity researched the history of the 46 existing unrestricted shares in the Association to trace them back to the original stock issuance and that contrary to the defendants' assertions, the unrestricted shares were not first conjured in the 1950's as part of some conspiracy to take over the Association. He states that the Certificate of Incorporation expressly recites that the unrestricted shares were given to people who owned beach lots but not upland property within Bay Crest. The shares were given in exchange for those people surrendering their beach lots to the Association. The Certificate of Incorporation places transfer restrictions on the shares owned by property owners within Bay Crest, limiting such transfer to other Bay Crest property owners, but not on those shares issued to non-resident stockholders in exchange for the surrender of beach lots. Mr. Pezold states that it may not be accurate to refer to the stock as having different classes inasmuch as all the stock in the association carries the same privileges and voting rights, and the Association has always recognized that the most shares could only be transferred with the sale of upland property within Bay Crest, while some shares, those dating back to the transfer of beach lots by people who did not own upland (residential property within Bay Crest) were freely transferrable. He further avers that he traced the history of all the existing 46 unrestricted shares and was able to connect most all of them back to transfers of beach lots in that the May 29, 1949 shareholder list refers to 45 shares of "free" stock, which is entirely consistent with the existence of 46 unrestricted shares because the last unrestricted share dates back to the transfer of a beach lot to the Association in 1951. Mr. Pezold affirms that 35 of the present 46 unrestricted shares trace back through successive transfers to shares that were originally issued in 1905 (to Eckert, Gordon, Howard, Bronson, Dane and Geoghegan) and ten of the present unrestricted shares trace back to shares that were originally issued in 1916-1918 (to Geoghegan), and the one present unrestricted share traces back to a share originally issued in 1951 (to Heil). Mr. Pezold states he was able to locate recorded deeds evincing the transfer of beach lots from all of the above individuals to the Association except for John Eckert, but there was no indication that he owned upland property within Bay Crest and it is likely that he did deed a beach lot to the Association but that the transfer was not recorded.

In reviewing the submissions, it is noted that the certified copy of the Certificate of Incorporation,

dated March 28, 1905, sets forth that the Bay Crest Association is a stock corporation pursuant to the provisions of the Business Corporations Law of the State of New York, the purpose (Article II(a)) for which it is to acquire by purchase, lease, exchange, hire or otherwise, lands or any interest therein, to erect and construct houses, buildings or works of every description on any land of the Company or upon any other lands, and to rebuild, enlarge, alter and improve existing houses, buildings or works thereon; to convert and appropriate any such lands into and for roads, streets and other conveniences; and generally to deal with and improve the property of the Company; to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property of the Company, to undertake or direct the management and sale of the real property of the Company and of others; and to transact a general real estate business on behalf of the Company. Pursuant to Article II(b), it may build and maintain one or more buildings to be used for bathing and other purposes for the benefit of the members of the corporation, and generally, in all practicable ways to care for and promote the property interests of the owners of real property on Bay Crest, on East Neck, Huntington. Section (c) provides for the Corporation to carry on any other business or businesses which may be lawfully carried on in connection with the above, or calculated to enhance the value of the Company's property or rights.

At paragraph X it is set forth in relevant part that the Corporation is organized for the benefit and protection of the owners of real property on East Neck. It further states that "[s]tockholders of said corporation, in accepting certificates of such capital stock, shall thereby enter into an agreement with all other owners of the capital stock of the corporation, that they will not sell, assign or transfer any shares of the capital stock of the corporation except to owners of real property shown on said maps, and collectively known as 'Bay Crest'; nor will they lease bathing privileges except in connection with the lease of upland in 'Bay Crest'. It is the intention by this provision that the ownership of stock in this corporation shall be confined to persons or corporations owning upland in 'Bay Crest', excepting that this provision shall not apply to owners of stock in said corporation who are not at the time owners of record of upland in 'Bay Crest', and who take such stock for an existing interest in lands on the beach shown on said maps. Neither is it to apply to stock to be issued to or for Joshua B.H. Janeway. This provision shall be printed on all certificates of stock of the corporation."

Based upon the foregoing, it is determined that the Certificate of Incorporation does distinguish between the upland and beach property. The Certificate clearly set forth that shareholders, in accepting certificates of such capital stock, shall thereby enter into an agreement with all other owners of the capital stock of the corporation, that they will not sell, assign or transfer any shares of the capital stock of the corporation except to owners of real property shown on said maps, and collectively known as 'Bay Crest'; nor will they lease bathing privileges except in connection with the lease of upland in 'Bay Crest'. The ownership of stock in the corporation is to be confined to persons or corporations owning upland in 'Bay Crest', excepting that the provision shall not apply to owners of stock in the corporations who are not at the time owners of record of upland in By Crest and who take stock for an existing interest in lands on the beach shown on the maps. The language of the Certificate of Incorporation supports Bay Crest in its referring to the stock as "restricted and unrestricted" stock to distinguish the interest of the owners and to know which stock is transferrable as set forth above.

Based upon the foregoing, it is determined that the Board of Directors has not set up an illegal class of stock, and instead, the reference to the two types of stock has been set forth in the Certificate of

Incorporation. The defendants' contentions that there is an illegal class of stock for persons who are not homeowners created by Bay Crest is conclusory and entirely without support as the distinction of the stock was originally set forth in the Certificate of Incorporation. The uncontroverted affirmation of Mr. Pezold and the Certificate of Incorporation establishes that the shareholders, whether they have restricted or unrestricted shares of stock in the corporation, have equal voting rights, whether upland owners (restricted) or those who surrendered their beach lots to the Association (unrestricted). Therefore, it is also determined that the defendants' assertions that the plaintiff's officers and directors consist primarily of holders of the fraudulent second class of shares is totally without basis as it is determined there is no fraudulent class of stocks, only that which was established with the Certificate of Incorporation and clarified by the By-Law as set forth above.

Accordingly, the defendants' contentions that there was an illegal class of stock is without basis and is totally unsupported by the documentary evidence.

The defendants assert that the Board of Directors has not provided them with copies of all their records. "A shareholder's right to inspect the books and records of a corporation is conditioned upon the shareholder's good faith. Improper purposes are those which are inimical to the corporation, for example, to discover business secrets to aid a competitor of the corporation, to secure prospects for personal business, to find technical defects in corporate transactions to institute "strike suits", and to locate information to pursue one's own social or political goals (***In the Matter of Gordon E. Presher, Jr. v ORMEC Systems Corp. et al,*** 1 Misc3d 546, 765 NYS2d 210 [Sup. Ct. of New York, Monroe County 2003]). Here the defendants have not demonstrated that they exhausted their remedies to obtain the business records of the corporation, such as in the nature of a mandamus, or that an affidavit has been furnished (*see,* N.Y. Bus. Corp. Law §§1315, ***In the Matter of Crane Co. v Anaconda Company,*** 39 NY2d 14, 382 NYS2d 707 [1976]).

This court has also reviewed the copies of the By-laws of the corporation provided by the parties. "The term "by-law" was originally applied to the laws and ordinances enacted by the public or municipal corporations. The difference between a by-law of a private company and a law enacted by a municipality is wide and obvious. The former is merely a rule prescribed by the majority, under authority of the other members, for the regulation and management of their joint affairs" (***Monroe Dairy Association v Elizabeth Webb,*** 40 AD2d 49, 57 NYS2d 572 [2nd Dept 1899]). The administration of the affairs of condominiums, once created, is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner and obligations of units owners, both with respect to their own units and the condominiums' common elements (***Schoninger v. Yardarm Beach Homeowners' Association, Inc. et al,*** 134 AD2d 1, 523 NYS2d 523 [2nd Dept 1987], *citing* New York Real Prop. Law §339-v).

The defendants claim that the by-laws of the corporation and amendments were obtained through improper voting procedures and self dealing. However, this claim is based almost entirely on the defendants' own opinions, speculations and interpretations as to how data pertaining to the attendance at meetings and how the votes should be conducted or interpreted. However, this is not sufficient to raise an issue of fraud, self-dealing or improper voting procedures (*see,* ***Pawling Lake Property Owners Association v McGoorty,*** 6 Misc3d 138A, 800 NYS2d 352 [2nd Dept 2005]). N.Y. Stock Corporation Law §25 provides

that the directors shall be chosen by a plurality[2] of the votes at an election. Further, each owner, as set forth in the minutes submitted, was given one vote based upon his or her ownership, and that has remained consistent throughout the years of incorporation. Quorums[3] were established at the annual meetings for the purpose of voting for the candidates nominated for the Board of Directors.

Accordingly, the defendants have failed to raise a factual issue that the voting procedures were improper, that there was self-dealing, or that the by-laws of the corporation were improperly made.

In reviewing the actions and determinations of the Board of Directors in imposing the assessments on all shareholder it is determined that "[t]he standard often applied in actions to review resolutions of a board of manager is a loosely defined standard of reasonableness. It has been suggested that review under this reasonableness standard falls into two categories. The first is analogous to review of the rule-making powers of administrative agencies and looks to see if the board of managers was authorized to act and then whether, in acting, it acted in an arbitrary and capricious manner, unrelated to the purposes of the condominium. The second category analogized the condominiums to corporations and would apply the same business judgment rule to review the actions of a condominium board of managers as is applied in a shareholders' derivative action (***Schoninger v Yardarm Beach Homeowners' Association, Inc. et al,*** 134 AD2d 1, 523 NYS2d 523 [2nd Dept 1987]). Accordingly, the business judgment rule is applied in determining whether the assessments imposed by the Board of Directors of the Bay Crest Homeowners Association are reasonable, if they are related to the objectives of the Certificate of Incorporation, and if they are lawfully within the authority of the Board, and if they were made in good faith.

"In the homeowners' association context, the business judgment rule protects a board of director's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the development, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority" (***Cababe et al v Estates at Brookview Homeowner's Association*** et al, 52 AD3d 557, 859 NYS2d 742 [2nd Dept 2008]).

"The homeowners' association differs from condominia ownership primarily in the method of ownership of the common property. Unlike in the condominium, in the homeowners' association, the association itself has title to this property. The individual homeowners are members of the association.... In accordance with the Declaration, the association is required to maintain, manage, and regulate the common property, and, in some cases, all or a portion of the individually owned property. Another major difference is that in the homeowners' association, the individual unit owners will have title only to their own parcel of real estate and will not have an assigned percentage of ownership in the common property, as is

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[2]A plurality is defined in the Oxford University Press Dictionary as the number of votes cast for a candidate who receives more than any other but does not receive an absolute majority.

[3]A Quorum is defined in the Oxford University Press Dictionary as the minium number of members an assembly or society that must be present at a meeting to make the proceedings valid.

the case with the condominium. Finally, unlike the condominium, the homeowners' association development is not usually a creature of state-enabling legislation. As a result, some substantive areas (e.g., assessments) use restrictions, and rule enforcement can be less certain in their validity and effectiveness than with a condominium (73 St. John's L. Rev 199 [Winter 1999]).

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." The court went on to state that, "[t]hus 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' (***Id***, at 537). "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,*** supra). 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 [2003]).

The defendants further contend that the Board of Directors have had their own fiefdom for many years and that their decision to impose an assessment upon them is without basis and not permitted by law. It is determined however, that a defense of ultra vires has to be pleaded and proven, and here the defendants have not served an answer and thus have not plead the defense of ultra vires (***Patchogue Properties v Cirillo,*** 54 Misc2d 863, 283 NYS2d 560 [Dist. Ct. of New York, Sixth Dist. Suffolk County 1967]). " The term ultra vires is the modern legal nomenclature for acts of a corporation through any of its instrumentalities which are beyond the powers conferred by law upon the legal entity. A corporation has no natural or inherent rights or capacity. Brought into being by legislative enactment, it has such powers as the State see fit to give it nothing more. When it assumes to act beyond those powers the assumption is void, the act a nullity and any resulting contract ultra vires (***Fifth Avenue Coach Company v The City of New York,*** supra).

In reviewing the evidence submitted, it is determined that the Bay Crest Homeowners' Association did not act outside the scope of its authority; it did not act in a way that did not legitimately further the corporate purpose; and it did not act in bad faith. The record is devoid of evidence that the associations's actions were taken in defiance of the best interests of the shareholders and, thus, that they contravened their fiduciary responsibility (*see,* ***Staus v 345 East 73 Owners Corp,*** 181 AD2d 483, 581 NYS2d 185 [1st Dept 1992]). A stock corporation created under the laws of the state of New York...has all the powers conferred by N.Y. Gen. Corp. Law §14 and N.Y. Stock Law Art. 3, unless such powers are limited by the charter or by-laws (***In the Matter of the Petition of Peter Doelger et al,*** 254 AD 178, 4 NY

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 is determined that the Bay Crest Association board members had a fiduciary duty to the homeowners (*see*, ***Michael son et al v Albora et al,*** supra). Here, the plaintiffs have demonstrated prima facie that they, as members of the board, were acting on behalf of all the shareholders in charging assessments concerning maintenance of the roads, common properties, beach and attendant structures on the premises to prevent waste and maintain property values. In the instant action, the defendants have not demonstrated self-dealing or fraud or that the board members were acting tortuously, with malice, or made misrepresentations, or that their personal interests conflicted 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 is it found that the Board of Directors' actions in imposing the assessments acted in violation of Business Corporation Law outside the scope of its authority as asserted by the defendants.

In reviewing the Certificate of Incorporation, it is determined that the document does not expressly authorize the Association to impose assessments against its shareholders. The language of the document sets forth the power of the Association to erect houses, etc, rebuild, enlarge, alter and improve existing houses, and more specifically, to improve the property and to build and maintain one or more buildings to be used for bathing and other purposes for the benefit of the members of the corporation, and generally, in all practicable ways to care for and promote the property interests of the owners of real property on Bay Crest. Section (c) of the Certificate of Incorporation provides for it to carry on any other business or businesses which may be lawfully carried on in connection with the above, or calculated to enhance the value of the Company's property or rights. The Certificate does not specify the means by which this promoting and maintaining of the property interest of the owners of real property may be done, but it did provide for a governing board of directors to act on behalf of the property owners. However, this court determines that the Board of Directors of the homeowners' association possesses, in addition to those powers set forth, those powers which are necessarily incidental to those powers or essential to the purposes and objects of its corporate existence.

"It is truly said that corporations can only exercise such incidental powers as are necessary to carry into effect the express objects of their charters. But necessity is a word of flexible meaning. There may be an absolute necessity, a great necessity, and a small necessity; and between these degrees there may be many others depending on the ever-varying exigencies of human affairs. It is plain that corporations, in executing their express powers, are not confined to means of such indispensable necessity that without them there could be no execution at all" (***Hyde et al v The Equitable Life Assurance Society of the United States,*** 61

Misc 518, 116 NYS 219 [Sup. Ct. of New York , Spec. Term, New York County 1908]). For a power to be deemed implied or incidental to the express power granted, it must be directly and immediately appropriate or necessary to the execution of the specific powers. Any power sought to be exercised as incidental or auxiliary must be one which is within the scope and purview of the corporate objects and purposes as expressed in the charter. The test to be applied is whether the act in question is in direct and immediate furtherance of the corporate business, fairly incidental to the express powers and reasonably necessary to their exercise (***Premium Point Co. v Emigrant Industrial Sav. Bank,*** 1942 NY Misc LEXIS 1895, 36 NYS2d 829 [Westchester County Court 1942]). "A corporation is not a tangible being. It becomes a legal entity by statutory permission. Its powers are derived from the Legislature, and the measure of its powers is found in the charter which gives it existence. Although strict construction has resulted in the formulation of the rule that only the powers granted may be exercised, the rigidity of that rule has been relaxed and the rule itself qualified by the application of a more modern principle which recognized not only the express powers, but those which attach as necessary incidents to the powers specifically conferred....An incidental power is defined to be one that is directly and immediately appropriate to the execution of the specific powers granted, and not one that has only a slight or remote relation thereto. An incidental power exists merely for the purpose of enabling a corporation to carry out the powers expressly conferred and to accomplish the purpose of its existence; it can never avail to enlarge the express powers, and thereby warrant the corporation to devote its efforts and its capital to purposes other than those which its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate objects....Implied powers must result from the charter by necessary implication, regard being had to the purposes of the corporation, and if there is any uncertainty or doubt as to the terms or intendment of the charter, it must be resolved against the corporation" (***Fifth Avenue Coach Company v The City of New York,*** 58 Misc 401, 111 NYS 759 [Sup. Ct. New York, Spec. Term., New York County 1908]).

In reviewing the imposition of assessments on the shareholders, it is determined that the Board of Directors of the Bay Crest Homeowners Association exercised their implied and incidental powers to fulfill their obligation to improve the property and to build and maintain one or more buildings to be used for bathing and other purposes for the benefit of the members of the corporation, and generally, in all practicable ways to care for and promote the property interests of the owners of real property on Bay Crest, calculated to enhance the value of the company's property and rights. In so doing, it is determined that the assessment was the necessary means to that end and that Board of Directors did not act beyond its authority, nor is the assessment prohibited by law.

Justice Signorelli, in ***Patchogue Properties v Cirillo***, supra, rejected such claim and found that the same rule applicable to homeowners' associations generally is applicable to such associations incorporated under the BCL and determined that the BCL did not prohibit it from imposing assessments and found an implied consent to pay by choosing to purchase and reside in a private community. Therefore, it is determined that there is an implied consent by the defendants to pay the assessments which are not prohibited by the Business Corporation Law. In the instant action, the defendants have chosen to purchase and reside in a private community and paid their share of the assessments for several years before objecting to those assessments and before objecting to the Board of Directors and refusing to pay.

A review of the minutes submitted demonstrates that nominating committees were set up to nominate the various members of the board at each annual meeting. It was determined at each meeting that there was

a quorum based upon the number of shareholders present and by proxy. Nominations were made upon motion, motions were made to accept those nominations, and voting was conducted by the casting of votes by shareholders present and by proxy votes. Minutes were kept of the meetings, issues were discussed, addressed, and voted on.

At a meeting of the stockholders of the Bay Crest Associations on June 17, 1919, a motion was made to change the By-laws to the increase the charge to $20.00 per season for the bath rooms in the bath pavilion instead of the $5.00 charge in the original By-Laws. By voluntary subscription, $1025.00 was paid to the Bay Crest Association for filling in low land, building drains and catch basins and repairing roads, and the Committee was authorized by the shareholders to expend the monies as outlined. On June 5, 1945, following the hurricane of 1944 and due to damage to the beach causing abnormal expenditures, a motion was passed empowering the Association officers to negotiate a loan to pay for the necessary repair, and the bath house charges were increased to $50.00 annually. On June 7, 1949, it was voted upon by the Board that there would be a bath house assessment for member occupancy at $60.00 for each bath house. This assessment was continued again on June 6, 1950, and periodically, the assessments were raised over the years and continually referred to as assessments. In 1977, the Association's By-Laws were amended to include an express provision mandating the imposition of an assessment on all Association shareholders regardless of their actual use of the bath house facilities. It was not until 2006, however, that Article V §5 of the By-laws, which created a facial ambiguity with the amendment, was deleted, thus eliminating any facial ambiguity between the contradicting provisions. Article V §5 provided for an assessment applicable to shareholders who requested the use of a beach locker. It is determined that the history of the Association reveals an ongoing conduct wherein monies were charged via an assessment against all shareholders. However, it is undisputed that there was an ambiguity between Article V §5 and the 1977 By-laws as amended, which was eliminated with the deletion of Article V §5 in 2006. The defendants, however, have demonstrated that there was a twenty year history in which the homeowners' association imposed assessments on all shareholders for use of the lockers before the defendants purchased their properties, and for more than 25 years prior to the defendants refusing to pay such assessment.

In ***Pawling Lake Property Owners Association v Edward McGoorty and Ida McGoorty,*** 6 Misc 3d 138A, 800 NYS2d 352 [2nd Dept]), wherein the Association sought to recover homeowner's assessments due, the defendants claimed that they were assessed unfairly and incorrectly in that the by-laws were invalid, the court held that such claims were without merit. The Appellate Term held that defendant's opinions as to how data pertaining to meeting attendance and the vote itself was conclusory and that the court below properly found that the board's action in proposing a dues structure wherein lots conjoined through proceedings at the town and county level were charged a single assessment and unimproved lots were charged half an assessment was "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" and thus was shielded by the business judgment rule (*citing* ***Levandusky v One Fifth Ave. Corp.,*** 75 NY2d 530, 553 NYS2d 807 [1990]).

Based upon the application on the business judgment rule, it is determined that the assessments as asserted herein were made in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of the corporate purpose set forth in the Certificate of Incorporation for the maintenance and improvement of the properties. This court will therefore exercise restraint and defer to those good faith decisions made by boards of directors in this particular business setting (***Pelton et al v Park Avenue***

Condominiums, supra). It is further determined that the defendants have failed to trigger further judicial scrutiny as they have not demonstrated that they are aggrieved shareholders in 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 [2003]).

In reviewing the reasonableness of a board of directors' exercise of its rule-making authority, absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance, of the legitimate interests of the corporation, N.Y. Not for Profit Corp. Law §717(a) (***Gillman et al v Pebble Cove Home Owners Association, Inc.,*** 154 AD2d 508, 546 NYS2d 134 [2nd Dept 1989]; ***Captain's Walk Homeowners Association v Penny et al,*** 17 AD3d 617, 794 NYS2d 82 [2nd Dept 2005]). There is nothing in the record that supports any conclusion that the assessments were enacted by the Board of Directors in bad faith or that they are unreasonable. Instead, it has been demonstrated that the action of the Board of Directors in imposing the assessments over the years was in furtherance of the legitimate interests of the corporation and preserving the integrity of the property.

"New York Real Prop. Law §339-j requires all unit owners to abide by the by-laws and adopted rules while New York Real Prop. Law §339-x prohibits a unit owner from exempting himself or herself from liability for his common charges. To achieve the legislative purpose in establishing a scheme for Department of Law review of both condominiums and homeowners' associations, it must be concluded that these sections of the Real Property law also apply to homeowners' associations.... It is the ownership of the property, not membership in the corporation, which gives the right of a unit owner to enjoy the easements and services provided by the association and conversely gives rise to an obligation on the part of the homeowner to contribute his or her fair share for the maintenance of those services....Where there is knowledge that a private community homeowners' association provides facilities and services for the benefit of community residents, the purchase of property there may manifest acceptance of conditions of ownership, among them payment for the facilities and services offered. The resulting implied-in-fact contract includes the obligation to pay a proportionate share of the full cost of maintaining those facilities and services, not merely the reasonable value of those actually used by a particular resident.... The court further held that the defendant would be unjustly enriched if he were permitted to avoid dues and assessments that the other homeowners were required to pay" (***Board of Directors of Millennium Homeowners Association v Bosco,*** 8 Misc3d 950, 799 NYS2d 697 [Civ. Ct., City of New York, Richmond County 2005]).

In ***Patchogue Properties, Inc. v Joseph Mascia and Kathleen Mascia,*** 13 Misc3d 1221A, 831 NYS2d 348 [Dist. Ct. of New York, Third Dist., Suffolk County 2006]), the plaintiff sought to recover homeowner association assessments from defendant homeowners who resided at and owned real property and had access to the association's common property and facilities, but were not a shareholder in Patchogue Properties, Inc. which administers the affairs of the plaintiff homeowner's association. The residents each owned and were equally assessed for the plaintiff's annual operating budget. The court set forth that "[t]he law is well settled concerning the controversy present, and that both this Court and the Appellate Courts have already determined that property owners in a private community are liable for their share of the maintenance costs of common property and facilities, citing, ***Seaview Association of Fire Island, NY v Williams,*** 69 NY2d 987, 517 NYS2d 709 [N.Y. 1987]; ***Bay Crest Ass'n, Inc. v DeLisi,*** citations omitted; ***Patchogue Props. v Saccio,*** 185 Misc3d 1054A, 815 NYS2d 493, 712 NYS2d 737 [App. Term, 2nd Dept.

2003]. The Appellate Term set forth that property owners in private communities who are not members of a community association may be held liable in quasi contract and implied contract for payment of their proportionate share of the cost of maintaining the common community property and facilities. In the instant action it is determined that the defendants are homeowners and shareholders in the corporation and therefore, as property owners in a private community, are liable for their share of the maintenance costs of common property and facilities.

In ***Harbor Hills Landowners v Frank Manelski,*** 65 Misc2d 682, 318 NYS2d 793 [Dist. Ct. of New York, Third Dist., Suffolk County 1970] it was held that a purchaser could be penalized for nonpayment of the maintenance fees because the by-laws of the membership corporation provided for a penalty.

In ***Sea Gate v Fleischer,*** 211 NYS2d 767 [1960], it was set forth that the rule that residents cannot avoid responsibility for their fair share of assessments by opting not to use them or foregoing membership privileges finds a parallel in the Condominium Act provisions that prohibits unit owners from attempting to exempt themselves from assessments by agreeing not to use common facilities. In ***Seaview Association of Fire Island, N.Y., Inc., v Howard Williams et al and Renee Roth et al,*** 69 NY2d 987, 517 NYS2d 709 [1987]), the Court held that where there is knowledge that a private community homeowners' association provides facilities and services for the benefit of community residents, the purchase of property there may manifest acceptance of conditions of ownership, among them payment for the facilities and services offered. The resulting implied-in-fact contract includes the obligation to pay a proportionate share of the full cost of maintaining those facilities and services, not merely the reasonable value of those actually used by any particular resident.

Accordingly, it is determined that the defendants have an obligation to pay their proportionate share of the full cost of maintaining those facilities and services and not merely the reasonable value of those actually used by the defendants.

The plaintiff, Bay Crest Homeowners' Association has demonstrated entitlement to summary judgment on their motion (002) and the defendants have failed to raise triable issues of fact.

Accordingly, it is determined that defendant Suzanne DeLisi is obligated to pay the assessments for 2005, 2006, and 2007 for a total due and owing in the amount of $5,487.55; and the defendant Louis Paar is obligated to pay the assessments for 2005, 2006, and 2007 for a total due and owing in the amount of $16,462.65. It is further determined that that part of the defendants' application for summary judgment pursuant to CPLR 3211(a)(1) based upon documentary evidence has been rendered academic by the granting of summary judgment to the plaintiff in this action and is denied as moot.

Dated: OCT 23 2008

J.S.C.
JEFFREY ARLEN SPINNER

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION