Board of Mgrs. of 425 Fifth Ave. Condominium v CH Manhattan I, L.L.C.
2008 NY Slip Op 33699(U)
April 15, 2008
Supreme Court, New York County
Docket Number: 114487/06
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

---X

THE BOARD OF MANAGERS OF 425 FIFTH AVENUE CONDOMINIUM,

Plaintiff,

-against-

CH MANHATTAN I, L.L.C., CH MANHATTAN II, L.L.C., CLUB HOLDINGS, L.L.C. and CLUB HOLDINGS PROPERTIES I, L.L.C.,

Defendants.

---X

Index No.: 114487/06
DECISION/ORDER

FILED
APR 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL EDMEAD, J.S.C.:

In this commercial landlord/tenant action, plaintiff moves for partial summary judgment on the complaint, and defendants cross-move for summary judgment to dismiss the complaint (collectively, motion sequence number 002). For the following reasons, plaintiff's motion is granted in part and denied in part, and defendants' cross motion is denied.

BACKGROUND

The Parties

The plaintiff Board of Managers of 425 Fifth Avenue Condominium (the board) is a condominium association organized and existing under the laws of the State of New York. See Notice of Motion, Ferre Affidavit, ¶ 9. The board is responsible for managing, operating and maintaining a building located at 425 Fifth Avenue (the building) in the County, City and State of New York. Id., ¶ 10. These responsibilities include enforcing the building's by-laws (discussed below). Id.

Defendants CH Manhattan I, L.L.C. (CH I) and CH Manhattan II, L.L.C. (CH II) are Delaware limited liability companies that own, respectively, Tower Unit apartments 64A and

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Delaware limited liability companies that own, respectively, Tower Unit apartments 64A and 64B in the building. Id., ¶ 11. Defendant Club Holdings, L.L.C. (Club Holdings), another Delaware limited liability company, owns CH I and CH II. Id., ¶ 19. In 2006, Club Holdings assigned and transferred its interests in CH I, CH II and their respective apartments to defendant Club Holdings Properties I, L.L.C. (Club Holdings I), yet another Delaware limited liability company. Id. All of the named defendants (collectively, defendants) are affiliated with certain unnamed corporate entities - which do business under the names "Dreamcatcher" and "Quintess" - that are engaged in the business of acquiring and renting apartments to individuals who purchase time-share memberships that confer the right to use those apartments for short-term vacation purposes. Id., ¶¶ 2-3.

Section 5.7 of the building's by-laws governs the "use of the units," and provides, in pertinent part, as follows:

> (A) In order to provide for congenial occupancy of the Property and for the protection of the values of the Units, the use of Units shall be restricted to, and shall be in accordance with, the terms contained in the balance of this Section 5.7.
>
> (B) Subject to the terms of paragraphs (C) and (D) of this Section 5.7, each Tower Unit shall be used for residential use only, and not more than one family may occupy a Tower Unit at any one time ... . A Tower Unit owned or leased by an individual, corporation, partnership, fiduciary, or any other entity may be occupied only by an individual, or by an individual officer, director, stockholder, or employee of such corporation, ... or by an individual principal or employee of such other entity, respectively, or by the Family Members and guests of any of the foregoing (and nothing herein contained shall be deemed to prohibit the exclusive occupancy of any such Unit by such Family Members or guests). Notwithstanding the foregoing ... the Condominium Board may, in its sole discretion, permit Persons other than those set forth above to occupy a Tower Unit. In no event, however, shall a portion of a Tower Unit (as opposed to the entire Tower Unit) be sold, conveyed, leased or subleased, and no transient occupant (other than a Guest permitted under this paragraph (B)) may be accommodated therein. [emphasis added]

Id.; Exhibit F, at 26. Section 7.1 of the building's by-laws falls under the heading of "selling and leasing of Units; assignment of leases," and provides, in pertinent part, as follows:

> Subject to the terms of Section 7.5 hereof, each Tower Unit Owner may ... lease his Tower Unit for periods of one year or more only, provided, however, [that] no Tower Unit Owner may ... lease his Tower Unit except in compliance with the applicable provisions of this Article 7. Any purported ... lease consummated in default in the applicable terms hereof shall be voidable at the sole election of the Condominium Board, and, if the Condominium Board shall so elect, the ... leasing Tower Unit Owner shall be deemed to have authorized and empowered the Condominium Board to institute legal proceedings to ... evict the unauthorized tenant (in the event of an unauthorized lease) in the name of such Tower Unit Owner. Such Tower Unit Owner shall reimburse the Condominium Board for all costs and expenses paid or incurred in connection with such proceedings, including, without limitation, reasonable attorneys' fees and disbursements and court costs.

Id. at 35. Section 7.2 of the by-laws gives the board a right of first refusal of any proposed lease of a Tower Unit apartment. Id. at 35. Section 9 of the by-laws prohibits a Tower Unit owner from using a unit in a manner that violates any of the "Condominium Documents" - a term which alleges to include the building's certificate of occupancy - and provides that a Tower Unit owner who does engage in such unauthorized use shall be liable to the board for fines to be calculated pursuant to a specified formula. Id. at 41. The building's certificate of occupancy designates all of the Tower Unit apartments as Building Code occupancy group J-2, and Zoning use group 2 (discussed below). Id.; Exhibit I.

Prior Proceedings

On February 8, 2006, CH I executed a purchase agreement for Tower Unit 64A (a one-bedroom apartment), and CH II executed a purchase agreement for Tower Unit 64B (a two-bedroom apartment). See Notice of Cross Motion, Baker Affirmation, Exhibit A. Although the closing date was initially set for March 15, 2006, both transactions evidently did not close until

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May 25, 2006. See Notice of Motion, Ferre Affidavit, Exhibit H. Thereafter, defendants made the two apartments available to individuals who had purchased time-share memberships in the above-mentioned "Dreamcatcher" and "Quintess" enterprises. Id.; ¶ 23-25. The board alleges that, between June 2006 and June 2007, 26 different "Dreamcatcher" and "Quintess" members occupied the units for periods of one to three days at a time, accompanied by unknown numbers of family and/or friends. Id., ¶ 25. The board further alleges that this occupancy violates both the building's by-laws and certificate of occupancy, and states that it has levied fines on defendants that defendants have refused to pay. Id. Defendants respond that, prior to purchasing Tower Units 64A and 64B, they met with the board and disclosed the type of use which they intended to put the apartments to, and that the board assured them that such use would not violate the building's by-laws. See Notice of Cross Motion, Anderson Affidavit, ¶¶ 2-7. Defendants have also produced two letters, dated May 25 2006, that state, in pertinent part, as follows:

> Your members using and occupying the apartments must, of course, comply with the Rules and Regulations of the Condominium. Their use or occupancy shall not be deemed to be a business or commercial activity and shall be deemed to be consistent with the residential use of the apartments.

Id.; Exhibit B. Finally, defendants present the deposition testimony of the building's managing agent, who states that approximately 40% of the building's apartments are owned by corporations that make them available to their employees for short stays of between several days to a week at a time. Id.; Baker Affirmation, Exhibit C. The board replies that the aforementioned letters were sent by the building's sponsor, not by the board, and are therefore not binding on it. The board also states that the only meeting between it and defendants took place on May 1, 2006 - three months after the purchase agreements had been executed - and denies that it ever agreed to

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defendants' proposed use of the subject apartments. See Ritter Reply Affidavit, ¶¶ 2-4. Finally, the board has produced a letter, dated May 16, 2006, from its counsel to the building's sponsor that stated that the board did not consent to said proposed use, and reserved its right to seek any available remedies. See Notice of Cross Motion, Baker Affirmation, Exhibit C. In any event, the parties' dispute then ensued over the course of the following year.

On May 8, 2007, the board served an amended complaint that sets forth causes of action for: 1) an injunction to prevent defendants from using the subject apartments in a manner that violates the building's certificate of occupancy; 2) an injunction to prevent defendants from using the subject apartments in a manner that violates the building's by-laws; 3) a declaratory judgment that any agreements made between defendants and members of the "Dreamcatcher" or "Quintess" entities constitute "leases" as the term is defined in Article 7 of the building's by-laws; 4) a declaratory judgment that any such "leases" made between defendants and members of the "Dreamcatcher" or "Quintess" entities are void because they fail to comply with Article 7 of the building's by-laws; 5) a declaratory judgment that any agreements made between the "Dreamcatcher" or "Quintess" entities and their members regarding the use and occupancy of the subject apartments constitute "sub-leases"; 6) an injunction to prevent defendants from "sub-leasing" the subject apartments without first obtaining the board's approval; and 7) costs, attorneys' fees and fines.[1] See Notice of Motion, Exhibit A. On June 4, 2007, defendants filed an answer which set forth affirmative defenses but no counterclaims. Id.; Exhibit B. The board now moves for partial summary judgment on the complaint, and defendants cross-move for

[1] The court notes that the board's moving papers mislabel the seventh cause of action as the "eighth," when, in fact, there is no eighth cause of action set forth in the amended complaint.

summary judgment to dismiss the complaint (motion sequence number 002).

DISCUSSION

At the outset, the court notes that, when seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). Also germane to this decision is the rule that, "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." Maysek & Moran, Inc. v S.G. Warburg & Co., Inc., 284 AD2d 203, 204 (1st Dept 2001), quoting Lake Constr. & Development Corp. v City of New York, 211 AD2d 514, 515 (1st Dept 1995).

Plaintiff's Motion

I. Injunctive Relief

The board's first, second and sixth causes of action seek permanent injunctive relief - on three specified grounds - to prevent defendants from using their apartment units as time-share rentals. Such relief is specifically authorized by Real Property Law § 339-j, and will be granted where a board of managers can establish that a unit owner has violated the building's by-laws.

See e.g. Board of Managers of Village House (a Condominium) v Frazier, 81 AD2d 760 (1st Dept 1981), affd 55 NY2d 991 (1982). Here, the board alleges that defendants' use of the subject apartments violates the building's by-laws in three ways.

In its first cause of action, the board alleges that defendants' actions violate the building's certificate of occupancy, and that violations of the certificate of occupancy, in turn, constitute violations of Article 9 of the building's by-laws. The board specifically notes that the certificate of occupancy designates all of the Tower Unit apartments as Building Code "occupancy group J-2," which "[s]hall include buildings with three or more dwelling units that are primarily occupied for the shelter and sleeping accommodation of individuals on a month-to-month or longer-term basis. Administrative Code of the City of New York (Administrative Code) § 27-265; see Plaintiff's Memorandum of Law, at 11. The board then argues that "[i]n order for the Units to be used on a transient basis ... a J-1 classification is required." Id. at 11. Under the Building Code, an "occupancy group J-1" classification "shall include buildings and spaces that are primarily occupied for the shelter and sleeping accommodation of individuals on a day-to-day or week-to-week basis." Administrative Code § 27-264. The board cites the Appellate Division, First Department's decision in Greystone Hotel Co. v City of New York Bd. of Standards and Appeals (214 AD2d 467 [1st Dept 1995]) for the proposition that the Building Code's use group designations must reflect the "actual use to which the apartments are being put - here ... on a day-to-day basis," and concludes that "the plain language of the Administrative Code makes it clear that the use of the units at [the building] requires, at least, a month-to-month basis." See Plaintiff's Memorandum of Law, at 12. Defendants respond that the board's argument incorrectly reads the Appellate Division's holding in Greystone Hotel Co. v City of New York

Bd. of Standards and Appeals, and also ignores Administrative Code § 27-242, which permits a "minor variation of any occupancy or use of a space." See Defendants' Memorandum of Law, at 10-13. For the following reasons, the court must agree.

The Appellate Division in Greystone Hotel Co. v City of New York Bd. of Standards and Appeals did not rule on an alleged violation of a certificate of occupancy. Instead, it merely found that the defendant agency had mis-classified the subject building because it was "actually" being used by permanent residents as opposed to the transients whose occupancy had been "authorized" by the J-1 classification. Here, the managing agent's deposition testimony makes it clear that 60% of the building's Tower Units are "actually" occupied by permanent residents, while some of the remaining40% of the units, which are corporately owned, may occasionally be occupied for short intervals by their owners' employees or guests. See Notice of Cross Motion, Baker Affirmation, Exhibit B. Because the majority of the Tower Units in the building are occupied by permanent residents, it is clear that the "J-2" Building Code classification accurately describes the "primary use" to which those units are being put. Thus, the Appellate Division's holding in Greystone Hotel Co. v City of New York Bd. of Standards and Appeals is inapposite to this case. Further, defendants correctly point out that the Building Code specifically provides that:

> a minor variation of any occupancy or use of a space from technical compliance with a particular space occupancy classification shall not be prohibited if such variation is normally associated with the occupancy classification and no specific danger or hazard is created.

Administrative Code § 27-242. Here, because both the J-1 and J-2 classifications contemplate "residential occupancy," the variation that the board complains of would have to be deemed

minor. The board's additional concern - i.e., concerning alleged heightened fire safety requirements - does not constitute a "hazard" since the Building Code clearly provides that both J-1 and J-2 classifications bear the same Fire Index of "1." Administrative Code § 27-237. Finally, the court notes that Article 9 of the by-laws, upon which the board premises its certificate of occupancy argument, does not specifically mention violations of the certificate of occupancy at all. Rather, Article 9 deals with violations of the "condominium documents." However, the board has not produced the declaration exhibit that purportedly defines that term as including the certificate of occupancy among the "condominium documents." See Notice of Motion, Ferre Affidavit, Exhibit G. Thus, for the foregoing reasons, the court finds that the board has failed to establish its certificate of occupancy argument. The board's reply papers do not add anything new. Accordingly, the court finds that the board is not entitled to summary judgment on its first cause of action for injunctive relief.

In its second cause of action, the board alleges that defendants' actions violate the portion of Article 5 of the building's by-laws that prohibits use of apartments by "transients." As previously mentioned, Section 5.7 (B) of the by-laws states that:

> A Tower Unit owned or leased by a ... corporation ... may be occupied only by ... an individual officer, director, stockholder, or employee of such corporation, ... by the Family Members and guests of [the corporation] (and nothing herein contained shall be deemed to prohibit the exclusive occupancy of any such Unit by such Family Members or guests). Notwithstanding the foregoing ... the Condominium Board may, in its sole discretion, permit Persons other than those set forth above to occupy a Tower Unit. In no event, however, shall a portion of a Tower Unit (as opposed to the entire Tower Unit) be sold, conveyed, leased or subleased, and no transient occupant (other than a Guest permitted under this paragraph (B)) may be accommodated therein. [emphasis added]

See Notice of Motion, Ferre Affidavit, Exhibit F, at 26. The board argues that "although the by-laws ... do not contain a definition of the word 'transient,' ... visitors of one, two or three days

must be considered transient, particularly where, as here, they are not owners of units or an individual entitled to use a unit." See Plaintiff's Memorandum of Law, at 13-14. Defendants, citing the letters that they received from the building's sponsor upon their purchase of the subject apartments, respond that "there can be no doubt that ["Dreamcatcher" or "Quintess"] members are 'guests' under the by-laws." See Defendants' Memorandum of Law, at 14. The board replies that defendants' "paid business invitees cannot be considered guests." See Plaintiff's Reply Memorandum, at 15-16. The court must agree. In Hoffman v 345 East 73 Street Owners Corp. (186 AD2d 507 [1st Dept 1992]), the Appellate Division, First Department, specifically held that "persons who pay a fee to the proprietary lessee to temporarily reside in the premises" must be deemed to be "licensees" rather than "guests." The court further held that the occupancy of such business invitees "can fairly be characterized as both transient and commercial [emphasis added]." 186 AD2d at 508. Here, the court must similarly find that the typical one, two or three day stays at the subject apartments by "Dreamcatcher" and/or "Quintess" members is also "transient" and, therefore, in violation of Section 5.7 (B) of the by-laws. Defendants may not rely on the letters that they received from the building's sponsor to support a contrary result. First, the by-laws clearly afford the board - and not the sponsor - the authority to interpret and enforce the by-laws. See Notice of Motion, Ferre Affidavit, Exhibit F. Second, the board correctly notes that it did not accede to the sponsor's representation that "[y]our members using and occupying the apartments ... shall not be deemed to be a business or commercial activity and shall be deemed to be consistent with the residential use of the apartments," and, in fact, directed its own counsel to write to the sponsor that "we are ... concerned that [defendants]' proposed use of the units is not for 'residential' purposes and, as such, [is] in derogation of the condominium's

governing documents." See Notice of Cross Motion, Anderson Affirmation, Exhibit B; Baker Affidavit, Exhibit C. Accordingly, pursuant to Real Property Law § 339-j, the court finds that the board is entitled to summary judgment on its second cause of action for injunctive relief.

In its sixth cause of action, the board alleges that defendants' actions violate the portion of Article 7 of the building's by-laws that prohibits a unit owner from "sub-leasing" his or her apartment without first obtaining the board's approval. The board reasons that "[b]y virtue of their payment of membership and annual dues ... the members of ["Dreamcatcher" and/or "Quintess"] are tenants, sub-tenants or sub-sub-tenants of CH I and/or CH II," and that "[c]onsequently, the relationship between members of ["Dreamcatcher" and/or "Quintess"] and CH I and/or CH II is governed by Article 7 of the by-laws, which require that any leasing or sub-leasing arrangements be for a period of at least one year, and that [the board] must waive its right of first refusal." See Plaintiff's Memorandum of Law, at 15. The court notes that defendants did not respond to this Article 7 argument in their opposition papers, and that the board did not further discuss it in its own reply papers. In any event, the court rejects the board's reasoning because, as discussed above, the correct legal definition of the relationship between members of "Dreamcatcher" and/or "Quintess" who use the subject apartments and defendants herein is that of "licensees" to "owners," rather than "lessees" to "lessors." Therefore, the court finds that the board's Article 7 argument fails as a matter of law. Accordingly, the court also finds that the board is not entitled to summary judgment on its sixth cause of action.

II. Declaratory Relief

The board's third, fourth and fifth causes of action seek declaratory relief on certain specified grounds. A declaratory judgment is a discretionary remedy which may be granted "as

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to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; see e.g. Jenkins v State of New York Div. of Hous. and Community Renewal, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. See Leibowitz v Bickford's Lunch System, 241 NY 489 (1926). Here, the board seeks three distinct declarations.

In its third cause of action, the board seeks a judgment declaring that:

> any written or oral agreements or understandings by and between [defendants] and one or more of the Resort Entities [i.e., "Dreamcatcher" and/or "Quintess"], pursuant to which [defendants] receive consideration, directly or indirectly, for permitting members of the Resort Entities to use Tower Units 64A and 64B for sleeping accommodations, constitute leases within the meaning of Article 7 of the by-laws.

See Notice of Motion, Ferre Affidavit, Exhibit A (complaint), ¶ 79. The court finds that the board is not entitled to such a declaration. As discussed in the preceding section of this decision, the correct legal definition of the relationship between members of "Dreamcatcher" and/or "Quintess" who use the subject apartments and defendants herein is that of "licensees" to "owners," and not "lessees" to "lessors." Accordingly, the court finds that the board is not entitled to summary judgment on its third cause of action.

In its fourth cause of action, the board seeks a judgment declaring that:

> any written or oral agreements or understandings by and between [defendants] and one or more of the Resort Entities [i.e., "Dreamcatcher" and/or "Quintess"], pursuant to which [defendants] receive consideration, directly or indirectly, for permitting members of the Resort Entities to use Tower Units 64A and 64B are void, on the ground that [defendants] failed to comply with Article 7 of the by-laws of the Condominium.

See Notice of Motion, Ferre Affidavit, Exhibit A (complaint), ¶ 85. The court finds that the

board is not entitled to such a declaration for the same reasons as discussed above. Accordingly, the court also finds that the board is not entitled to summary judgment on its fourth cause of action.

In its fifth cause of action, the board seeks a judgment declaring that:

> the agreements between the Resort Entities [i.e., "Dreamcatcher" and/or "Quintess"], and their respective members which permit the members to occupy Tower Units 64A and 64B in consideration of the payment of any fee or fees, constitute actual and/or de facto subleases of the Units.

See Notice of Motion, Ferre Affidavit, Exhibit A (complaint), ¶ 91. The court finds that the board is not entitled to such a declaration for the same reasons as discussed above. Accordingly, the court also finds that the board is not entitled to summary judgment on its fifth cause of action.

III. Costs and Fees

The board's seventh and final cause of action seeks an inquest on the issue of the amount of fines, court costs and other expenses for which they claim defendants are liable. The court notes that Section 9.4 of the by-laws specifically authorizes the board to recover costs, expenses and fines from a unit owner who violates any provision of the by laws. See Notice of Motion, Ferre Affidavit, Exhibit F. Here, the court has found that defendants have violated Section 5.7 (B) of the by-laws. Thus, it is clear that defendants are liable for some amount of costs, expenses and fines pursuant to Section 9.4 of those same by-laws. In their opposition papers, however, defendants argue that Article 9 is "void for vagueness." See Defendants' Memorandum of Law, at 15-16. The board replies that Article 9 is not vague, since it sets forth a specific formula for calculating fines. See Reply Memorandum, at 16-19. Upon reviewing the papers, the court notes that defendants' argument appears to be directed not at the provisions of Article 9 of the by-laws

itself, but at the calculations of the fines levied thereunder that the board set forth in certain demand notices that it served on defendants. See Notice of Cross Motion, Baker Affidavit, Exhibit D. Those notices do indeed set forth a fine "of no less than $1000.00 per month" which it is difficult to reconcile with the fine calculation formula set forth in Section 9.4. Id. This is not to say that Article 9 is legally deficient, however, but merely that the board's calculations are incorrect. Accordingly, the court finds that the board is entitled to a summary judgment on its seventh cause of action solely on the issue of liability, with the issue of the amount of damages (i.e., costs, expenses, fines and attorneys' fees) to be determined at a separate hearing which the parties must schedule with the Clerk of the Court.

Defendants' Cross Motion

In addition to the arguments discussed above, defendants seek summary judgment dismissing the complaint on the ground that the board's claims are barred by the equitable doctrines of laches and estoppel. See Defendants' Memorandum of Law, at 8-9. "To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." Cohen v Krantz, 227 AD2d 581, 582 (2d Dept 1996), citing Dwyer v Mazzola, 171 AD2d 726, 727 (2d Dept 1991). Here, defendants argue that "[b]y waiting until long after [defendants] gave full disclosure to the board of [defendants]' membership program and planned use of the units, and long after [defendants] executed contracts ... for the purchase [of the units], and long after the closing of the sale before

seeking injunctive relief, the board threatens tremendous hardship and prejudice to [defendants]." See Defendants' Memorandum of Law, at 8. The board replies that defendants did not disclose their intended use of the apartments to it at any time before the May 1, 2006 meeting, which took place after defendants had executed the purchase agreements but before they closed on said purchases. See Reply Memorandum, at 10. The board thus asserts that it "did nothing 'to give rise to the situation complained of'." Id. The board further notes that, on May 16, 2006 (i.e., immediately after the aforementioned meeting but before the closing date), it notified the building's sponsor that it considered defendants' proposed use of the units to be in violation of the building's by-laws. Id. at 11. The board then argues that the fact that defendants were at that point obligated to close and were, therefore, also in possession of the by-laws, "negates any reasonable reliance argument." Id. Although defendants dispute the events of the May 1, 2006 meeting, the court finds that they have failed to raise any triable issues with respect to their laches argument. Defendants' papers are simply devoid of any documentary evidence to support their claim that they made any prior disclosure of their intended use of the subject apartments to the board. Conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment. See e.g. Mason v Dupont Direct Financial Holdings, Inc., 302 AD2d 260 (1st Dept 2003). The court further notes that the fine notices that the board sent to defendants, mentioned supra, were dated June 2006 - i.e., the month immediately following the closing date of the sale of the apartments. See Notice of Cross Motion, Baker Affidavit, Exhibit D. Thus, there can be no claim that the board delayed in asserting their claim for relief. Accordingly, because defendants have failed to establish at least two elements of their claim, the court rejects defendants' laches argument.

With respect to equitable estoppel, defendants argue that "by its delay, the board is equitably estopped from arguing now that [defendants'] use of the units is impermissible." See Defendants' Memorandum of Law, at 9. Defendants cite the Appellate Division, First Department's decision in Fleischer v Third Brevoort Corp. (40 AD2d 661 [1st Dept 1972]), wherein the Court found that:

> the plaintiff clearly had the necessary written permission from the co-operative corporation and its organizing board of directors [for his proposed use of the unit], and a subsequent change of attitude by new, albeit more permanent, officialdom, cannot alter his rights.

40 AD2d at 661. The board replies that the Fleisher decision is factually distinguishable because it [i.e., the board] never sent defendants any such permission letter. See Reply Memorandum, at 11. Instead, the board relies on the Appellate Division, First Department's decision in Xenopoulos v Board of Managers of 150 East 56th Street Condominium (221 AD2d 257 [1st Dept 1995]), which held that "[t]he use of the unit purchased by plaintiff is governed by the condominium offering plan which specifically permitted only residential or professional office use," and that "[p]laintiff could not justifiably rely on alleged oral representations to the contrary, that the premises could be used for commercial purposes." 221 AD2d at 257. The board argues that Xenopoulos is applicable here because defendants - sophisticated real estate corporations represented by eminent legal counsel - were similarly aware of the contents of the building's by-laws and were not justified in relying on any representations by the sponsor, since it is clearly the board's function to administer those by-laws. The court agrees. Defendants offer no rationale why they should be permitted to rely upon the letters written by the sponsor when they could have sought a ruling from the board prior to closing on the apartments. In such a situation,

defendants have no recourse in equity. Accordingly, the court rejects defendants' equitable estoppel argument, and finds that defendants' cross motion should be denied in its entirety.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of the plaintiff Board of Managers of 425 Fifth Avenue Condominium is granted solely to the extent of awarding said plaintiff a summary judgment on its second cause of action for injunctive relief such that it is:

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are permanently enjoined and restrained from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

> using Tower Unit apartment units 64A and 64B in the building located at 425 Fifth Avenue (the building) in the County, City and State of New York, or permitting said apartments to be used, as sleeping accommodations by members of the "Dreamcatcher" and/or "Quintess" vacation resort entities with which the defendants named in this action are affiliated,

and, further, awarding said plaintiff a summary judgment on its seventh cause of action for costs, fees and fines only on the issue of liability, with the issue of damages on said cause of action to be determined at a separate hearing that plaintiff is directed to schedule with the Clerk of the Court, but is in all other respects denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of

readiness and pay the proper fees, if any, for the assessment hereinabove directed; and it is further

ORDERED that the cross motion of defendants CH Manhattan I, L.L.C., CH Manhattan II, L.L.C., Club Holdings, L.L.C. and Club Holdings Properties I, L.L.C. is in all respects denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York
April 15, 2008

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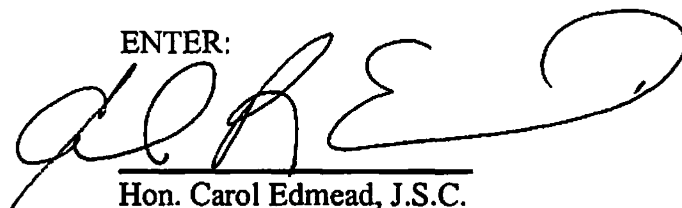

Hon. Carol Edmead, J.S.C.

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