At an IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of February, 2009

P R E S E N T:

HON. LAURA LEE JACOBSON,

Justice.

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CATHERINE GUTMAN, in her capacity as President of the Condominium Board of the unincorporated Condominium Association THE WASHINGTON CONDOMINIUM,

Plaintiff(s),

- against -

Index No. 25405/08

HEYLIN CABRERA,

Defendant(s).

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	5 - 7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Catherine Gutman, in her capacity as President of the Condominium Board of the unincorporated condominium association of The Washington Condominium Association (the Condominium Association), moves for an order: (1) pursuant to New York Condominium Law § 339-j, enjoining defendant Heylin Cabrera, as owner of unit B-3-H of the premises located at 35 Underhill Avenue in Brooklyn, from

performing or continuing any construction work or making any alterations to her unit without the prior written approval and authorization from the Condominium Board; (2) pursuant to the by-laws of the Condominium Association, including §§5.9 and 9.1, and the condominium documents, declaring that the Condominium Board shall have the right of access for the purpose of conducting an inspection of defendant's unit and ordering defendant to permit entry; (3) pursuant to the by-laws, condominium documents and Condominium Act §339-j, ordering that defendant restore the subject condominium unit and any and all common areas encroached upon by her to their original condition at her own expense and to the satisfaction of the Condominium Board; (4) pursuant to the provisions of the By-Laws, including §9.1, and the condominium documents, ordering defendant to reimburse, indemnify and hold harmless the Condominium Board should it be necessary for the Board to exercise its right to self help to restore the common areas to their original condition; (5) pursuant to the By-Laws, including §9.4, and the condominium documents, awarding plaintiff reasonable attorneys' fees and costs incurred in the instant action; and (6) pursuant to Condominium Act §339-j, requiring defendant to give sufficient sureties for her future compliance with the By-Laws, rules, regulations, resolutions and decisions.

Facts and Procedural Background

Plaintiff commenced this action seeking the same relief sought on the instant motion. By order to show cause dated September 8, 2008, the court temporarily restrained defendant from continuing any and all construction or alteration work to the subject unit. On October

7, 2008, the court ordered defendant to provide plaintiff's representative with access to her apartment, so that the work that plaintiff alleges had been performed could be inspected. While there appears to have been some problems in scheduling, plaintiff and a representative inspected the unit on October 11, 2008 and two representatives from the managing agent inspected it on October 14, 2008. Accordingly, that branch of plaintiff's motion seeking access to the unit to conduct an inspection shall not be further addressed herein.

The Parties' Contentions

Plaintiff

Plaintiff alleges that on August 1, 2008, she became aware that defendant had commenced construction work to make alterations, improvements and/or additions to her unit without obtaining the written approval of the Condominium Board. Plaintiff subsequently became aware that the construction was encroaching in and upon the common areas of the building and the adjacent unit in that defendant had broken through the walls of her apartment in order to expand the unit for her own benefit. Plaintiff further avers that as the result of breaking through the walls, defendant has potentially undermined the structural integrity of the building, as well as its resistence to fire. Although plaintiff and other members of the Condominium Board demanded that defendant cease and desist in her construction activities and allow the Condominium Board to conduct an inspection of her unit, both orally and in writing, defendant allegedly disregarded these demands.

Plaintiff accordingly argues that the unit must be restored to its original condition and

in the event that defendant fails to comply with any court order so directing, so that it is necessary for the Condominium Board to exercise self help and make the necessary repairs, defendant should be ordered to reimburse, indemnify and hold harmless the Board. Plaintiff also claims that the Condominium Association should be awarded all costs incurred in maintaining the instant action, including attorneys' fees.

In support of its motion, plaintiff also relies upon an affidavit submitted by Jeremy Villano, the owner of the unit adjacent to that owned by defendant, in which he alleges that he observed and heard defendant performing unauthorized construction work that encroached on the common areas of the building prior to the commencement of the instant action. He further alleges that after the temporary restraining order was issued, he was able to hear sounds of construction, including the use of power tools, hammering and sawing, and he observed workers leaving defendant's apartment.

Defendant

In opposition, defendant argues that she purchased her unit from the sponsor pursuant to a contract of sale dated October 28, 2006 for $771,000. She further avers that pursuant to Schedule A of the Condominium Offering Plan (the Plan), her unit contained 986 square feet on the main floor and 603 square feet on the mezzanine floor, for a total of 1,589 square feet. When the apartment was shown to her on October 30, 2006 by Rick Staula of Aguayo & Huebener, the exclusive broker for the building, she was advised that there was additional space available to her, behind one of the interior walls (the disputed area), if she opened a

doorway into the space. Defendant measured the area of the unit and found it to be 1,300 square feet without the disputed area and 1,500 square feet with the area included. Defendant accordingly concludes that she relied upon the representations of Staula and the Plan with respect to her purchase of the unit. If she is not permitted to use the disputed area, defendant contends that she should be refunded a portion of the purchase price and common charges that she paid to compensate her for the reduction in the square footage of the unit, since it would be inequitable if she is compelled to stop using the space that was represented as belonging to her. Defendant further avers that she has not created an unsafe, hazardous or dangerous condition on the premises.

Defendant also submits a second affidavit in which she alleges that she is not performing any work on her unit and that the work referred to by Villano was being performed on the unit of one of her neighbors, Jonathon DeLeon, in apartment B3G, by contractors hired by one of the sponsors. Defendant further alleges that she believes that Villano is involved in the instant dispute because he wishes to occupy the disputed area as well. Moreover, on August 8, 2008, Villano attempted to break through the wall into the disputed area, causing her to call the police. In support of her position, defendant attaches a copy of an email from Villano in which he asks her to call him with regard to "our space" and an email from a person named Sam, who advises her that "we are doing work in apartment #B-3G."

Plaintiff's Reply

In reply, counsel for plaintiff argues that there is no doubt that defendant broke through the wall of her unit so as to annex parts of the common area for her own personal use, without the authorization of the Condominium Board and without permits. Plaintiff further avers that defendant's request for a declaration that the disputed area is hers or for an order reducing the purchase price and maintenance is improper, since she did not cross-move for this relief, nor did she file any counterclaims.

Further, plaintiff argues that defendant cannot rely upon the representations allegedly made to her by the real estate broker, since these representations were not incorporated into the contract and therefore are not binding. Plaintiff further points out that defendant fails to annex a copy of the contract upon which she relies to her papers. Morever, the Plan contains a provision stating that "[a]ny floor plan or sketch shown to a prospective purchaser is only an approximation of the dimensions and layout of a Unit. Accordingly, each Unit should be inspected prior to purchase to determine its actual dimensions, layout, and physical condition" (Plan at 18). Another provision states that:

> "Purchaser acknowledges that Purchaser has not relied upon any architect's plans, sales, plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent or others, including, but not limited to, any relating to the description or physical condition of the Property, the Building or the Unit, or the size or dimensions of the condition of the Property or the rooms therein contained or any other physical characteristics thereof, the services to be provided to Unit Owners or the estimated common charges . . ."

Plaintiff thus argues that even if defendant's claims have merit, her claims are against the real estate agent who sold her the unit and do not legitimize her alleged disregard for the rules of the Condominium Association, nor would they immunize her from the contractual penalties provided in the Plan and other documents with regard to unauthorized construction or alteration, or the Condominium Board's entitlement to recover attorneys' fees.

The Law

It is well settled that in order to obtain the drastic remedy of a preliminary injunction, a movant must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of granting the injunction (*see e.g. Evans-Freke v. Showcase Contr.*, 25 AD3d 642 [2004], citing *Matter of Merscorp v Romaine*, 295 AD2d 431, 432 [2002]; *Peterson v Corbin*, 275 AD2d 35, 37 [2000], appeal dismissed 95 NY2d 919 [2000]; *Laro Maintenance v Culkin*, 255 AD2d 560 [1998]). The purpose of a preliminary injunction is to maintain the status quo pending determination of the action (*see e.g. Coinmach v Alley Pond Owners*, 25 AD3d 642, 643 [2006], citing *Schweizer v Town of Smithtown*, 19 AD3d 682 [2005]; *Rattner & Assoc. v Sears, Roebuck & Co.*, 294 AD2d 346 [2002]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the court (*see e.g. City of Long Beach v Sterling Am. Capital*, 40 AD3d 902, 902 [2007], citing *Glorious Temple Church of God in Christ v Dean Holding*, 35 AD3d 806 [2006]; *Matter of Merscorp*, 295 AD2d at 432).

It has also been recognized that "preliminary injunctions prevent litigants from taking

actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, [and accordingly] should be issued cautiously and in accordance with appropriate safeguards" (*Putter v City of New York*, 27 AD3d 250, 253 [2006], citing *Uniformed Firefighters Assn. v City of New York*, 79 NY2d 236, 241[1992]). In addition, "[d]amages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable" (*Scotto v Mei*, 219 AD2d 181, 184 [1996], citing *SportsChannel Am. Assocs. v National Hockey League*, 186 AD2d 417, 418 [1992] [emphasis in original]). Also, it is well settled that where the facts are in sharp dispute, a temporary injunction will not be granted (*see e.g. Matter of Related Props. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 590 [2005], citing *Blueberries Gourmet v Aris Realty*, 255 AD2d 348 [1998]). It must also be noted that as a general rule, an injunction will not be issued to prohibit a fait accompli (*see E.F.S. Ventures v Foster*, 71 NY2d 359, 372 [1988]; *Currier v First Transcapital*, 190 AD2d 507, 508 [1993]; *Town of Oyster Bay v New York Tel. Co.*, 75 AD2d 598, 598 [1990]).

As is also relevant herein, the function of a preliminary injunction is not to determine the ultimate rights of the parties to an action or to obviate the necessity for a plaintiff to prosecute the action to completion. In fact, in a case involving similar facts to the matter now before the court, in which plaintiff condominium board sought a declaration that defendants were in violation of their by-laws, together with a permanent injunction compelling defendants to remove the walls enclosing the leased hallway space abutting their apartments that they had constructed and to restore the leased hallway space and the

apartments to their original condition, the Appellate Division, First Department, reversed the granting of injunctive relief, holding that:

> "A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits (*Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306). By granting, preliminary [sic], the relief ultimately sought, Supreme Court has obviated the necessity for plaintiff to prosecute this action to completion. Furthermore, the order does not merely restrain action, it mandates action in the absence of any demonstration that such extraordinary relief is essential to maintain the status quo (*Times Square Stores Corp. v Bernice Realty Co.*, 107 AD2d 677, 682). Moreover, it is by no means clear that any building systems are affected by the renovations provided for in the alteration agreement. Therefore, even it a building permit is ultimately shown to be required, plaintiff has not demonstrated that injunctive as opposed to monetary relief is warranted (*see*, *South Ferry Building Co. v J. Henry Schroder Bank & Trust Co.*, 91 AD2d 963). The need to obtain a building permit is sharply disputed and, where conflicting affidavits raise sharp issues of fact, injunctive relief should be denied (*O'Hara v Corporate Audit Co.*, 161 AD2d 309, 310)."

(*Residential Bd. of Managers of Columbia Condominium v Alden*, 178 AD2d 121 [1991]; *see also Wall St. Garage Parking v New York Stock Exch.*, 10 AD3d 223, 227 [2004]). Accordingly, it has been recognized that on a motion for a preliminary injunction, it is error to grant the ultimate relief sought, without a trial or an evidentiary hearing (*see e.g. Monarch Condominium v Raskin*, 37 AD3d 288, 288 [2007] [plaintiff's request for relief was properly denied because it clearly did not seek to maintain the status quo, but rather sought the ultimate relief in the action]; *New York Auto. Ins. Plan v New York Schools Ins. Reciprocal*, 241 AD2d 313 [1997] [a final determination on the merits was unwarranted and was an

abuse of discretion on a motion for preliminary injunctive relief]).

Similarly, it has also been held that:

> "A mandatory injunction, which is used to compel the performance of an act (*see Matter of Wyckoff Hgts. Med. Ctr. v Rodriguez*, 191 Misc2d 207, 208 [2002]), is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action (*see Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793, 794 [1995]; *Times Square Stores Corp. v Bernice Realty Co.*, 107 AD2d 677, 682 [1985])."

(*Matos v City of New York*, 21 AD3d 936, 937 [2005]).

Discussion

The court first notes that plaintiff commenced the instant action on September 5, 2008 and the order to show cause now before the court was signed on September 8, 2008. Accordingly, defendant was not afforded the opportunity to answer the complaint prior to the time that the instant motion was made. From this it follows that plaintiff's assertion that defendant is not entitled to any relief on the ground that no counterclaims have been interposed is premature.[1]

Moreover, those branches of plaintiff's motion seeking an order directing defendant to restore her unit to its original condition, ordering her to reimburse the Condominium Association for the costs incurred in the instant action and ordering her to post a surety seek

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[1] Although defendant may have served an answer after the instant motion was submitted, no answer was annexed to the moving papers or to the opposition papers and a review of the court file similarly fails to indicate that an answer had been served.

the ultimate relief sought in the complaint. Hence, the above discussed principles of law compel the conclusion that such relief should not be granted in a preliminary injunction, so that these requests for relief must be denied on this ground (*see e.g. Monarch Condominium*, 37 AD3d at 288; *Wall St. Garage Parking*, 10 AD3d at 227; *New York Auto. Ins. Plan*, 241 AD2d 313; *Residential Bd. of Managers of Columbia Condominium*, 178 AD2d 121).

In the alternative, even if this was not the case, plaintiff fails to establish entitlement to the preliminary injunction that she seeks. In the first instance, plaintiff has not demonstrated a likelihood of success on the merits. Although the By-Law provisions relied upon prohibit a tenant from making structural alterations or additions without the approval of the Condominium Board, plaintiff's assertion that defendant is doing construction work and/or making alterations in her apartment is denied by defendant. More significantly, although plaintiff and representatives from the managing agent inspected defendant's apartment prior to the final submissions on the motion, no affidavit from any of the persons who viewed the apartment is offered in support of the assertion that defendant is performing construction work or making alterations to her unit. In this regard, inasmuch as Villano seems to have an interest in obtaining the disputed area for his own use, his affidavit is not sufficient to resolve this dispute. Therefore, since the facts upon which the application is based are disputed, the motion must be denied on this ground as well (*see e.g. Omakaze Sushi Rest. v Ngan Kam Lee*, ___ AD3d ___, 2008 NY Slip Op 9571 [2008]; *Matter of Advanced Digital Sec. Solutions v Samsung Techwin Co.*, 53 AD3d 612, 613 [2008]; *Matter of Related*

Props., 22 AD3d at 590; *Blueberries Gourmet*, 255 AD2d 348).

Similarly, plaintiff's failure to offer any authority for the assertion that building permits would be necessary to open a doorway into what is apparently unused interior space or that any work created unsafe or hazardous conditions for the building also supports the conclusion that the motion should be denied (*see generally Residential Bd. of Managers of Columbia Condominium*, 178 AD2d 121). Further, since it appears that any work that plaintiff claims that defendant has done has already been completed, a preliminary injunction must be denied on the ground that an injunction is not available to prevent a fait accompli (*see e.g. E.F.S. Ventures*, 71 NY2d at 372; *Currier*, 190 AD2d at 508; *Town of Oyster Bay*, 75 AD2d 598). With regard to plaintiff's request for a preliminary injunction ordering defendant to restore the unit to its original condition, plaintiff also fails to establish that such a mandatory injunction is essential to maintain the status quo pending trial of the action (*see e.g. Matos*, 21 AD3d at 937; *Rosa Hair Stylists*, 218 AD2d at 794; *Times Square Stores*, 107 AD2d at 682).

Plaintiff also fails to establish irreparable harm, since her conclusory assertion that the work that defendant is performing may cause structural damage to the building is not supported by an affidavit of an expert or from any tenant alleging that her or she has suffered injury by virtue of the work that plaintiff alleges has been done (*cf. Winzelberg v 1319 50th Realty*, 52 AD3d 700, 701 [2008] [injunctive relief was properly granted where it was undisputed that the excavation in question damaged plaintiff's building since defendants'

engineer acknowledged that the shift in the lintel on plaintiff's building was attributable to the construction on the defendants' property and some of the crack patterns could also be attributed to the construction and plaintiffs' experts testified that there would be additional irreparable harm]; *Stockley v Gorelik*, 24 AD3d 535 [2005] [plaintiffs demonstrated that the proposed structure would encroach upon portions of the common elements of the condominium, which may require an easement the defendants did not seek, and would deprive the plaintiffs of the use and enjoyment of certain common elements, as well as portions of their own units, so that the status quo would not be preserved absent a preliminary injunction]). Similarly, an award of monetary damages would allow plaintiff to restore defendant's unit to its original condition, as is evidenced by plaintiff's demands for compensatory and punitive damages, so that plaintiff fails to make a showing of irreparable harm for this reason as well (*see e.g. Scotto*, 219 AD2d at 184; *SportsChannel Am. Assocs.*, 186 AD2d at 418).

Finally, from the above discussion, it follows that plaintiff has not established that a balance of the equities lies in her favor.

Conclusion

Plaintiff's motion for preliminary injunctive relief is denied in its entirety.

The foregoing constitutes the order and decision of this court.

ENTER

HON. LAURA JACOBSON

J. S. C.