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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 114054/2004

WATERFORD ASSOCIATION, INC.,

VS.

SAMII, NEGAR

SEQUENCE NUMBER : # 005

SUMMARY JUDGMENT

INDEX NO. 114054-04

MOTION DATE

MOTION SEQ. NO. #005

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

It is hereby

ORDERED that the instant motion (seq 005) and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for summary judgment on its second cause of action for a permanent injunction is denied; and it is further

ORDERED that plaintiff is granted summary judgment on its third cause of action for a declaratory judgment; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff has a right of access to defendant's unit as provided by § 6.17 of the bylaws of the Waterford condominium; and it is further

ORDERED that plaintiff is granted summary judgment dismissing defendant's first and second counterclaims; and it is further

UNFILED JUDGMENT

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

Dated: _____

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that defendant is granted summary judgment dismissing plaintiff's cause of action for breach of contract; and it is further

ORDERED that the remaining claims are severed and shall continue.

Dated 5/7/09 ENTER: J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 35

THE BOARD OF MANAGERS OF THE WATERFORD ASSOCIATION, INC., suing on behalf of the unit owners,

Plaintiffs,

- *against* -

NEGAR SAMII and NEGAR SAMII, as Executrix of the Estate of Mohammed Reza Samii,

Defendants.

Index No.: 114054/04

DECISION/ORDER

CAROL R. EDMEAD, J.:

This action arises out of an ongoing dispute between plaintiff Board of Managers of the Waterford Association, Inc. (Board), the governing body of a Manhattan condominium building, and defendant Negar Samii, individually and as executrix of the Estate of Mohammed Reza Samii, owner of a condominium unit in the building, regarding access to defendant's unit by plaintiff and its employees for purposes of making emergency plumbing repairs. The complaint alleges three causes of action, for breach of contract, for a preliminary and permanent injunction directing defendant to permit access to her apartment pursuant to the condominium's bylaws, and for a declaratory judgment that plaintiff has a right of access under the condominium's bylaws. Defendant asserts three counterclaims, for declaratory and injunctive relief ordering plaintiff to make repairs, for diminution of value of her apartment resulting from plaintiff's

creation of a nuisance, and for damages to personal property caused by plaintiff's negligence.

Plaintiff now moves for partial summary judgment on its second and third causes of action for a permanent injunction and a declaratory judgment, and to dismiss the first and second counterclaims. Defendant cross-moves for partial summary judgment for a declaration of the meaning of "emergency," and to dismiss the complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once the proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562. If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Plaintiff Board is the governing body of a 48-story condominium building, with over 200 residential units, located at 300 East 93rd Street, New York, New York, and known as the Waterford (the building). Defendant is the executrix of the

estate of her late husband, Mohammed Reza Samii, which owns Unit 28AF on the 28th floor of the building. Unit 28AF was purchased by Mr. Samii in 1997 as two units, which were then combined. Defendant resided in the apartment with her husband until his death in 1998, and continues to reside in the apartment with her son.

The building's plumbing system is split into a "Low Zone," which includes floors 1-28, and a "High Zone," which includes floors 29-44. Control, or shut-off, valves for the plumbing system are located in the ceiling above defendant's apartment, Unit 28AF, as well as above the other units on the 28th floor, and access to those apartments is necessary to reach the valves. Among other things, the control valves, also referred to as "return and drain valves" for the High Zone apartments, and "feed valves" for the Low Zone apartments, can be operated to shut off the flow of water to specific parts of the building, allowing plumbing leaks to be isolated and repaired without draining all of the water from either the High Zone or Low Zone. Thus, to avoid draining an entire zone to repair leaks, plaintiff needs access to defendant's unit to reach the shut-off valves. According to plaintiff, draining the entire system is time-consuming, a costly waste of water, and puts stress on the system, which can weaken the pipes and increase the likelihood of future leaks.

The condominium bylaws, which generally set forth the manner in which the condominium will operate, and the rights and obligations of the unit owners and the Board, grant plaintiff and its employees the right to access individual units in order to maintain and repair common elements of the building. Section 6.17 of the bylaws provides, in pertinent part:

> A Residential Unit Owner shall grant a right of access to his Unit to the Board, the managing agents, managers, superintendents, and/or any other person authorized by any of the foregoing ... for the purpose of performing installations, alterations or repairs to the mechanical or electrical service or other portions of the Common Elements within a Unit or elsewhere in the Building ... provided, that requests for such entry are made not less than one (1) day in advance and that any such right shall be exercised in such a manner as will not reasonably interfere ... with the use of the Residential Units for their permitted purposes. In case of an emergency, such right of entry shall be immediate, without advance notice, whether or not the Unit owner is present.

By-Laws of the Waterford Condominium, Ex. 6 to Colbert Aff. in Support of Plaintiff's Motion, § 6.17-1.

Protocols regarding access in both emergency and non-emergency situations also were adopted by the Board, "[i]n an effort to ensure that The Waterford's right of access is exercised in a manner as will not reasonably interfere with the use of the Residential Units" (*see* The Waterford Condominium: Protocol for Utilizing the Right of Access into Residential Units, Ex. 7 to Colbert Aff. in Support, at 1). The protocols

define an "Emergency Situation" as "a situation requiring immediate access to a Unit in order to prevent a presently existing or imminent threat of damage to a Unit or to the Common Elements as defined in the By-Laws." *Id.*

Records, including log books maintained by the building from January 1998 through December 2007, show that there were over 300 leaks in the building during that almost 10-year period (*see* Log Book entries, Exs. 8-17 to Potter Aff. in Support of Defendant's Cross Motion). Some of the leaks were caused by burst heating coils and the failure of "dialectic unions," devices which connect vertical and horizontal pipes within the plumbing system. More particularly, of the more than 300 recorded leaks, defendant identifies 12 leaks related to problems with heating coils (Potter Aff. in Support, ¶ 26), and 17 related to problems with the dialectic unions (*id.*, ¶ 45). The cause of the vast majority of the other leaks was not noted in the records, although defendant claims that it is likely that many more of the leaks were caused by problems with the heating coils and dialectic unions, because plaintiff did not address these problems in a systemic way (*id.*, ¶¶ 35-42).

Documents also show that building staff sought access to defendant's apartment on 22 occasions during the six-year period from January 2001 through September 2007, and that defendant denied access the majority of those times (*see* Potter Aff. in

Support, ¶ 61, and exhibits referenced). According to defendant, from the time that Freddy Alvarez became superintendent, in 2000, through October 2003, there were at least 20 demands for access to her apartment in the middle of the night (Samii Aff. in Support of Cross Motion, ¶ 4). After a damaging leak in her apartment in October 2003, defendant decided she would no longer give access to the building staff, except when requested by plaintiff's attorney or one of the building managers (*id.*, ¶ 12; Samii Dep., Ex. 4 to Colbert Aff. in Support, at 104). Defendant has acknowledged that demands for access have decreased since 2006 (Samii Reply Aff., ¶ 11), estimated that there were about 10 requests during 2007 (Samii Dep., Ex. 19 to Colbert Aff. in Support, at 114), and stated that, as of September 2008, there were practically no requests (Samii Reply Aff., ¶ 8).

In support of its motion, plaintiff contends that defendant has repeatedly refused access to her apartment in emergency situations in violation of her obligation under the condominium bylaws, and argues that the express authority granted by the bylaws to enter defendant's apartment, as well as defendant's testimony that she will continue to refuse access to the building staff, entitle plaintiff to an injunction ordering defendant to provide access to her unit.

"'A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer

irreparable harm absent the injunction.'" *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 (2d Dept 2009), quoting *Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 (2d Dept 2005); *see Kane v Walsh*, 295 NY 198, 205-206 (1946); *Forest Close Assn., Inc. v Richards*, 45 AD3d 527, 529 (2d Dept 2007). Irreparable harm means injury for which money damages would be insufficient. *See Klein, Wagner & Morris v Lawrence A. Klein, PC*, 186 AD2d 631 (2d Dept 1992). "[T]he extraordinary relief of an injunction is protection for the future and is not proper unless the injury is imminent." *Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, 565 (1959); *see also Merkos L'Inyonei Chinuch, Inc.*, 59 AD3d at 408, quoting *Exchange Bakery & Rest. v Rifkin*, 245 NY 260, 264-265 (1927); *Golden v Steam Heat, Inc.*, 216 AD2d 440, 442 (2d Dept 1995). Where a practice sought to be enjoined has been discontinued, and there is no intent to resume the practice, an injunction is "unnecessary and inappropriate." *Electrolux Corp.*, 6 NY2d at 565.

Defendant does not dispute that the bylaws permit plaintiff to enter defendant's unit to make emergency repairs to common elements, and she does not deny that she has refused to permit building staff access to the plumbing valves in her apartment (*see* Samii Dep., Ex. 4 to Colbert Aff. in Support, at 104), although there is some dispute about the number of times that access was denied.

Nonetheless, defendant asserts that plaintiff is not entitled to an injunction because it is seeking immediate access in situations that are not emergencies. Defendant argues, both in opposition to plaintiff's motion and in support of her cross motion for a declaration, that an "emergency" is an event that is outside of one's control, and cannot "include an occurrence which the Plaintiff has failed to attempt to prevent, despite prior notice" (Memo of Law in Support of Cross-Motion and in Opposition to Motion, at 17). Defendant further argues that the water leaks in the building were the result of plaintiff's negligent maintenance of the common elements, including the plumbing system, and therefore do not qualify as emergencies.

Relying chiefly on cases interpreting the "emergency doctrine," defendant contends that "emergency," as used in the bylaws, must be defined as "an occurrence not created by the negligence of the Plaintiff" (Defendant's Memo of Law in Support of Cross-Motion, at 17). Contrary to defendant's argument, the "emergency doctrine," which generally provides that a defendant cannot be held liable for damages resulting from actions taken during an emergency situation, as long as the actions are reasonable and the emergency situation was not created by defendant, is not applicable here; the cases on which defendant relies do not define "emergency" for all purposes, but only in the particular context of determining damages in certain

negligence cases. *See, e.g., Caristo v Sanzone*, 96 NY2d 172, 174-175 (2001). Rather, as defendant notes, "emergency" has long been defined as a "sudden or unexpected occurrence or condition, calling for immediate action" *(see Brooklyn City R.R. Co. v Whalen*, 9 App Div 737, 742 [2d Dept], *affd* 229 NY 570 [1920]; *International Bhd. of Teamsters v Local Union No. 810*, 19 F3d 786, 793 [2d Cir 1994]; *see also* Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/emergency [2009]), and does not rest on the cause of the emergency, but on whether a circumstance needs immediate attention. Similarly, the protocols implemented by the Board also clearly define an emergency situation as one requiring immediate attention to prevent an existing or imminent threat of damage to a unit or to the common elements.

Therefore, defendant's request that this court limit the meaning of "emergency" to an event not caused by plaintiff, will be denied, and is an insufficient basis to avoid her obligation under the bylaws to provide access. Moreover, in her reply affidavit in support of her cross motion, defendant appears to withdraw her request for a declaration of the meaning of "emergency," acknowledging that she cannot deny access to her apartment based on her belief that an event is not an emergency (*see* Samii Reply Aff., annexed to Potter Aff. in Reply, ¶ 22).

Defendant also fails to raise a triable issue of fact as to

whether the board acted beyond its authority, or in bad faith, in seeking access to make emergency repairs. The bylaws expressly grant plaintiff the authority to have immediate access in case of an emergency. Nor, even if the cause of the leaks is disputed, is there a real dispute that, for the benefit of all the unit owners, there was a need to make plumbing repairs, or that there was a need to make repairs without delay.

With respect to irreparable harm, plaintiff claims that, under section 339-j of New York's Condominium Act (Real Property Law § 339-j), and cases interpreting it, the violation of a condominium's bylaws, by itself, constitutes irreparable harm warranting injunctive relief. Real Property Law § 339-j provides that unit owners are required to strictly comply with the bylaws and other rules and regulations adopted by a condominium, and the failure to comply with the bylaws is a basis for an action seeking, among other things, injunctive relief. Courts have accordingly granted permanent injunctions in cases involving ongoing violations of condominium bylaws. *See e.g. 1036 Park Corp. v Rubin*, 92 AD2d 452 (1st Dept), *affd* 59 NY2d 877 (1983); *Board of Mgrs. of Stewart Pl. Condominium v Bragato*, 15 AD3d 601 (2d Dept 2005); *Board of Mgrs. of Ocean Terrace Towne House Condominium v Lent*, 148 AD2d 408 (2d Dept 1989).

However, it is not clear on this record that there is a continuing violation or imminent harm, in view of defendant's

apparent concession, in her reply affidavit, that she must provide immediate access to plaintiff and its employees "whenever they claim there is an emergency," without contesting whether "a given leak is actually an emergency" (Samii Reply Aff., ¶ 22). She further acknowledges that she "cannot impose limitations on the ability of the Staff to enter the Unit" (*id.*, ¶ 23), explains that her deposition testimony that she would not allow the building staff access to the valves in her apartment was "a momentary expression of indignity" (*id.*, ¶ 25), and concludes that she "no longer has any interest in proposing limitations on the ability of the Staff to enter the Unit" (*id.*, ¶ 33).

Under these circumstances, the court finds that there is a triable issue of fact as to whether defendant has discontinued the practice sought to be enjoined and thereby rendered injunctive relief unnecessary and inappropriate. *See Electrolux Corp.*, 6 NY2d at 565; *Van Laak v Malone*, 92 AD2d 964, 966 (3d Dept 1983). The branch of plaintiff's motion seeking summary judgment granting a permanent injunction, therefore, is denied.

The court reaches a different result with respect to plaintiff's claim for a declaratory judgment. Generally, the function of a declaratory judgment action is "to determine justiciable controversies between parties which either are not yet ripe for adjudication by conventional forms of remedy, or which, for other reasons, are not conveniently amenable to the

usual remedies." *Krieger v Krieger*, 25 NY2d 364, 366 (1969). The "'general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.'" *Id.* at 366, quoting *James v Alderton Dock Yards*, 256 NY 298, 305 (1931).

Here, considering defendant's past conduct and the issues of fact regarding defendant's future compliance with the access provisions of the bylaws, a declaration "'will have the immediate and practical effect of influencing [defendant's] conduct'". *M&A Oasis, Inc. v MTM Assocs., L.P.*, 307 AD2d 872, 872 (1st Dept 2003), quoting *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 (1977). The court has considered defendant's arguments in opposition, that plaintiff's bad faith precludes equitable relief, and that there is no justiciable controversy, and finds them without merit. Accordingly, this branch of plaintiff's motion will be granted, declaring that plaintiff has a right of access to defendant's apartment.

To the extent that plaintiff seeks an injunction and a declaratory judgment regarding defendant's use of an alarm system, plaintiff fails to submit any support for such relief, or to even address the matter, and that branch of the motion is denied.

Plaintiff also moves for summary judgment dismissing

defendant's first and second counterclaims. The first counterclaim seeks a declaration and order requiring plaintiff to repair the common elements causing leaks, remediate the mold in her apartment and repair walls and ceilings damaged by mold and water, and modify or relocate the control valves in her ceiling. Plaintiff argues that this counterclaim should be dismissed because the mold condition has been remediated, and because its decisions with respect to the maintenance of the building's common elements, including the plumbing system, and the location of the water control valves, are protected from judicial scrutiny under the business judgment rule.

"The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings." *40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153-154 (2003) (internal citations omitted). The rule has been long recognized in New York, and applied to cooperative and condominium boards. *See Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 (1990); *Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 (1st Dept 2008). In adopting this rule, while recognizing the potential for abuse in a board's broad powers, courts have aimed to avoid undermining "the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of

residents in an environment managed by the board for the common benefit." *Matter of Levandusky*, 75 NY2d at 537; *see 40 W. 67th St. Corp.*, 100 NY2d at 153-154.

As applied to condominium boards, the business judgment rule "prohibits judicial inquiry into the actions of the board as long as the board acts for the purpose of the condominium, within its authority and in good faith." *Acevedo v Town N Country Condominium, Section I, Bd. of Mgrs.*, 51 AD3d 603, 604 (2d Dept 2008); *see Matter of Levandusky*, 75 NY2d at 538. "Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision." *Schoninger v Yardarm Beach Homeowners' Assn., Inc.*, 134 AD2d 1, 9 (2d Dept 1987); *see also Levine v Greene*, 57 AD3d 627, 628 (2d Dept 2008).

Here, plaintiff makes a prima facie showing that it acted in good faith, within its authority, and for the benefit of the condominium, when it made decisions pertaining to maintenance of the plumbing system, including the location of the control valves in defendant's apartment, and in its response to particular plumbing problems. Contrary to defendant's argument, plaintiff did not refuse to investigate the cause of the recurring leaks, or to consider the possibility of installing a device outside her apartment to remotely operate the valves. Freddy Alvarez, the building superintendent, testified that he sought advice from

plumbers about the dialectic unions (Alvarez Reply Aff., Ex. 2 to Schwartz Aff. in Reply, ¶¶ 4-5), and that a plumbing company was hired to address problems with the heating coils (Alvarez Dep., Ex. 20 to Colbert Aff. in Support, at 59). Neither the failure to eliminate the water leak problem, nor the consequent continuing need to access defendant's apartment for repair of the valves shows that plaintiff did not act in good faith. Nor does defendant dispute plaintiff's assertion that the mold condition has now been addressed.

Further, plaintiff did consider alternative ways to operate the valves without entering defendant's apartment. An engineer hired by the Board investigated whether it was possible to relocate the valves outside defendant's apartment, or whether new electric valves could be installed and operated remotely. The engineer concluded that it was not possible to move the valves, and that electric remote control was possible, but costly and problematic. *See* Report of Frederick Dean, P.E., Ex. 18 to Colbert Aff. in Support. After discussion of the engineer's report, the Board determined that electrifying the valves was not feasible (*see* Abourjeili Dep., Ex. 10 to Colbert Aff. in Support, at 64-65, 68). There is no evidence that this decision was not made in good faith for the benefit of the condominium, or otherwise based on fraud or self-dealing.

Plaintiff also moves to dismiss defendant's second

counterclaim, which seeks damages for the diminution of the value of her apartment as a result of a private nuisance created by plaintiff's constant entry into her apartment. Plaintiff contends that its demand for access is not a nuisance, as it has the right and obligation under the bylaws to enter defendant's apartment for purposes of repairs. Plaintiff further argues that defendant cannot show any diminution in value of her apartment as a result of any actions by the condominium, and that, based on defendant's own testimony and documents submitted on the motion, defendant's apartment has increased, rather than decreased, in value since it was purchased in 1998.

The elements of a private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." *Copart Indus., Inc. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977)(internal citations omitted). The measure of damages for private nuisance is, where the injury is permanent, "the diminution of the market value of the property, or where the injury is temporary, the reduction of the rental or usable value of the property." *Guzzardi v Perry's Boats, Inc.*, 92 AD2d 250, 254 (2d Dept 1983)(citation omitted).

Defendant's claim of nuisance rests chiefly on allegations that plaintiff made excessive demands for access to her

apartment, and that plaintiff's failure to diagnose and address the condition of the building's plumbing system led to the excessive demands for access. Defendant does not show, however, that access was not necessary to perform repair work, that plaintiff was not acting in the interest of the condominium, or that there otherwise was any bad faith in plaintiff's requests for access. There is no evidence that plaintiff's efforts to obtain access were intended to interfere or were unreasonable, that plaintiff did not respond to defendant's concerns, or that defendant was prevented from using her property. *See generally Anderson v Elliott*, 24 AD3d 400 (2d Dept 2005); *Christienson v Gutman*, 249 AD2d 805 (3d Dept 1998). To the extent that defendant claims that plaintiff's failure to correct problems with the common elements has created a nuisance, plaintiff's decisions with respect to maintenance of the common elements were, as noted above, made for the purpose of the condominium, within its authority and in good faith, and are protected by the business judgment rule.

Nor has defendant submitted any evidence to establish a diminution of the value of her apartment, either temporary or permanent. It is not disputed that defendant's husband purchased the two units that were combined into unit 28AF for $430,000. According to defendant's deposition testimony, she was offered $1,350,000 for the apartment in 2003, before taking it off the

market, and a few months later listed it for $1,500,000 (Samii Dep., Ex. 17 to Colbert Aff. in Support, at 63). While defendant submits an affidavit from a real estate appraiser to explain that a listing price is not the same as market value, his conclusory assertions that there was both a temporary and permanent diminution in value, are insufficient to demonstrate any actual reduction in value as a result of plaintiff's activities. *See Guzzardi v Perry's Boats, Inc.*, 92 AD2d 250, *supra*.

Turning to defendant's cross motion, to the extent that it seeks dismissal of plaintiff's causes of action for injunctive relief and a declaratory judgment, it is denied, for the reasons discussed above. Similarly, the branch of the motion that seeks a declaration as to the meaning of "emergency" is also denied.

Defendant further moves to dismiss plaintiff's breach of contract cause of action, on the basis that plaintiff has failed to submit evidence of damages. The complaint alleges that plaintiff seeks damages for breach of contract "including damages to the Building's plumbing system, increased water bills, increased plumbing repair bills ... in an amount to be determined after trial" (Complaint, ¶¶ 31-32). In opposition, however, plaintiff essentially concedes that it is not seeking monetary damages, submitting only that it need not show monetary damages to sustain a breach of contract claim, and instead argues that it is entitled to injunctive relief.

It is well settled that, in breach of contract actions, "'general damages which are the natural and probable consequence of the breach'" are recoverable. *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 (2008), quoting *Kenford Co. v County of Erie*, 73 NY2d 312, 319 (1989). "Only where the remedy is inadequate may the equitable remedy of … an injunction to prevent a breach of the contract" be invoked. *Wirth & Hamid Fair Booking, Inc. v Wirth*, 265 NY 214, 222 (1934). "[A] suit for injunction against a breach of contract is inconsistent with a claim for damages caused by the same breach." *Id.*

Here, plaintiff fails to demonstrate any basis for now seeking injunctive relief after asserting a demand for general damages for breach of contract. Nor, in any event, does plaintiff show that its request for injunctive relief is not duplicative of the relief sought in the cause of action for an injunction. The cause of action based on breach of contract therefore should be dismissed.

Accordingly, plaintiff's motion, and defendant's cross motion, are denied in part and granted in part, and it is

ORDERED that plaintiff's motion for summary judgment on its second cause of action for a permanent injunction is denied; and it is further

ORDERED that plaintiff is granted summary judgment on its

third cause of action for a declaratory judgment; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff has a right of access to defendant's unit as provided by § 6.17 of the bylaws of the Waterford condominium; and it is further

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Dated: 5/7/09

CAROL EDMEAD, J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT

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