

Schottenstein v Windsor Tov LLC

2009 NY Slip Op 31407(U)

June 15, 2009

Supreme Court, New York County

Docket Number: 600661/07

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

SARAH SCHOTTENSTEIN,

Plaintiff,

- v -

WINDSOR TOV, LLC, a Delaware Limited Liability Corporation, BELLMARC PROPERTY MANAGEMENT SERVICES, INC., a New York Corporation, and DOUGLAS ELLIMAN, LLC, a Delaware Limited Liability Company,

Defendants.

FILED
JUN 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 600661/07

MOTION DATE 1/21/09

MOTION SEQ. NO. 005

MOTION CAL. NO. 115

The following papers, numbered 1 to 20 were read on this motion for summary judgment; cross motion to dismiss; cross motion to dismiss and for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavit — Exhibits 1-15; Exhibit 2	<u>1-2</u>
Notice of Cross Motion— Affirmation — Exhibits A-J; Affidavit; Affidavit—Exhibit A; Affidavit; Affidavit—Exhibits A, B; Affidavit	<u>3-9</u>
Answering Affirmation – Exhibits A-I	<u>10</u>
Notice of Cross Motion— Affirmation — Exhibits A-Z	<u>11-12</u>
Opposition to Notice of Cross Motion — Exhibits 1-12; Affidavit; A; Opposition to Notice of Cross Motion — Exhibits 1-12	<u>13-15</u>
Affidavit	<u>16</u>
Replying Affirmations	<u>17-18</u>
Supplemental Affirmations	<u>19-20</u>

Cross-Motions (2): Yes No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

Copies to plaintiff pro se and all counsel.

Dated: 6/15/09
New York, New York

[Signature]
HON. MICHAEL D. STALLMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 7

SARAH SCHOTTENSTEIN,

Plaintiff,

INDEX NO. 600661/07

-against-

MOTION SEQ. NO. 005

WINDSOR TOV LLC, a Delaware Limited Liability Corporation, BELLMARC PROPERTY MANAGEMENT SERVICES, INC., a New York Corporation, and DOUGLAS ELLIMAN, LLC, a Delaware Limited Liability Company,

Defendants.

FILED
JUN 17 2009
COUNTY CLERKS OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

This case (*Schottenstein I*) stems from a dispute over condominium unit 2C (the unit) at Windsor Park Condominium (the condominium), located at 100 West 58th Street, New York, New York 10019 (the building), between the purchaser of the unit, plaintiff Sarah Schottenstein (plaintiff) and the sponsor of the condominium conversion, defendant Windsor Tov LLC (Windsor Tov), the manager of the building, defendant Bellmarc Property Management Services, Inc. (Bellmarc), and the broker for the sale of the unit, defendant Douglas Elliman, LLC (Douglas Elliman). The claims against Douglas Elliman were withdrawn by stipulation, dated June 18, 2008 and entered on June 19, 2008.

Plaintiff also commenced a related action against the condominium's Board of Managers, *Schottenstein v Board of Mgrs. of Windsor Park Condominium*, index No. 106555/2008, Sup Ct, NY County (*Schottenstein II*).

Plaintiff moves (1) pursuant to CPLR 3212, for summary judgment on all of the remaining

causes of action in *Schottenstein I*, (2) seeking consolidation of *Schottenstein I* and *Schottenstein II*, (3) seeking preferential treatment to expedite the proceedings, because this case is a “public petition,” and (4) for punitive damages, attorney’s fees, and costs. Windsor-Tov cross-moves for an order dismissing plaintiff’s complaint based on plaintiff’s alleged destruction of material evidence.

In *Schottenstein II*, the defendant Board of Managers of Windsor Park Condominium (the Board) cross-moves (1) for partial summary judgment on its first, second, and third counterclaims, (2) seeking an order directing plaintiff to pay the Board the past due monthly common and electric charges for the unit, as well as ordering her to pay such charges pendente lite, and (3) seeking dismissal of plaintiff’s action against the Board based upon plaintiff’s alleged destruction of material evidence. This decision addresses the motion and both cross motions.

BACKGROUND

On or about August 8, 2005, plaintiff and Windsor Tov entered into a purchase agreement (the Purchase Agreement) for the purchase of the unit for \$1,646,000.00. The Purchase Agreement incorporates by reference the Offering Plan for the Condominium, dated November 19, 2004 (the Offering Plan). The affairs of the condominium are governed by the By-Laws (the By-Laws). Plaintiff closed on the unit on or about March 27, 2006.

In her seven-count Second Supplemental and Amended Complaint (the Complaint), plaintiff alleges that after she moved into the unit, she discovered numerous defects in it, as well as throughout the building, in violation of the representations made by defendants and obligations in the Offering Plan and By-Laws. Plaintiff claims that defendants failed to disclose the existence of the defects and, despite her giving notice, failed to repair them. Plaintiff hired an environmental inspection company to conduct a microbiological indoor air quality assessment, which revealed that her entire unit

required mold remediation (Complaint, ¶¶ 30-31).

Winsor Tov previously moved to dismiss the complaint in *Schottenstein I*, which was partially granted by decision and order dated March 4, 2009. The following causes of action remain: (1) breach of the Offering Plan and By-Laws, as limited by decision on the prior motion, seeking money damages; (2) breach of express warranties, seeking money damages; (3) fraud, seeking money damages; (4) rescission of the sale of the unit, and seeking the return of the security deposit, purchase price, and closing costs; [(5) dismissed;] (6) an injunction directing defendants to repair defects in the unit and the building; and (7) an injunction directing Winsor Tov and Bellmarc to produce books and records pertaining to the finances of the condominium for inspection.

In *Schottenstein II*, plaintiff alleges in the verified complaint (Verified Complaint) that the Board (1) breached its contractual obligation to deliver and maintain the unit in a condition prescribed by the Offering Plan and By-Laws and failed to compel Winsor Tov to perform necessary repairs, (2) breached its fiduciary obligation to maintain the building and the unit in proper condition, (3) breached its obligation to maintain the building and the unit in a condition that complies with the Offering Plan and By-Laws and make repairs; (4) failed to provide plaintiff with accounting books and records for inspection.

In its answer, the Board counterclaimed, alleging that plaintiff (1) failed to pay monthly common charges, (2) owes interest on unpaid common charges; (3) owes late charges for failure to pay common charges; (4) failed to remit electrical charges; (5) owes costs incurred by the Board in connection with collecting unpaid charges and fees, (6) failed to keep the unit in first-class condition and posted unauthorized signs in her windows. The Board also seeks attorneys' fees.

Plaintiff moves for summary judgment on all of the remaining causes of action in the

Complaint. Plaintiff filed the motion only under the index number for *Schottenstein I*. However, she placed the index numbers from both *Schottenstein I* and *Schottenstein II* on her motion papers and served them on the attorneys for the Board as well as the defendants in *Schottenstein I*. The Board opposes plaintiff's motion and cross-moves, inter alia, for partial summary judgment. Despite the fact that plaintiff did not properly file the motion in *Schottenstein II*, because the Board submitted opposing papers and a cross motion, and the Court is granting consolidation of the two actions, the Court will consider that cross motion as well.

DISCUSSION

Plaintiff's Motion

Although plaintiff states that her motion pertains to the defendants in *Schottenstein I* and the defendant in *Schottenstein II*, plaintiff's motion seeks summary judgment only on the causes of action stated in the Complaint in *Schottenstein I*. Accordingly, the Court will consider plaintiff's motion as it pertains only to the defendants in *Schottenstein I*.

Pursuant to CPLR 3212 (a), a motion for summary judgment may not be made before issue is joined, "and the requirement is strictly adhered to" (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]; see also *Sonny Boy Realty, Inc. v City of New York*, 8 AD3d 171, 172 [1st Dept 2004]). In *Schottenstein I*, only Bellmarc had served an answer to the Complaint before plaintiff moved for summary judgment (01/05/09 Paek Aff., ¶ 9, exhibit F). Accordingly, as to Windsor Tov, issue was not joined, and, hence, plaintiff's motion is denied as premature (see e.g. *Valentine Tr. v Kernizan*, 191 AD2d 159, 160 [1st Dept 1993]).

Plaintiff's Motion With Respect to Bellmarc

To obtain summary judgment, the movant must tender evidentiary proof that would establish

the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff moves for summary judgment on all the remaining causes of action in the Complaint. In the first cause of action, plaintiff alleges that defendants breached the Offering Plan and By-Laws, because they failed to deliver, repair, and maintain the unit and the building in the condition prescribed by these two documents (Complaint, ¶¶ 37-46). A cause of action for breach of contract must allege "the nature of the contractual obligation alleged to have been violated" (*see Sebro Packaging Corp. v S.T.S. Indus.*, 93 AD2d 785, 785 [1st Dept 1983]). Plaintiff, however, does not point to any specific provision part of the By-Laws and excerpts of the Offering Plan that obligates Bellmarc to deliver, repair, and maintain the unit and the building in a proper condition (*see e.g.* By-Laws¹, § 5.1 [A] [ii], [iii] [the Board is obligated to maintain and repair the common elements]; *see also* Offering Plan, Rights and Obligations of Sponsor, § m [subject to specific time limitations and proper notice, Windsor Tov is obligated to correct and repair latent and patent defects in the units and common elements]).

In the second cause of action, plaintiff alleges that defendants breached express warranties with respect to the compliance of the building and the unit with the terms of the Offering Plan and By-Laws. Plaintiff fails to show, and review of the case record does not reveal, that Bellmarc made any express warranties (*see e.g.* Offering Plan, Rights and Obligations of Sponsor, § m [it was Windsor Tov that gave an express warranty to plaintiff]).

The third cause of action sounds in fraudulent omission, alleging that the defendants knew that

¹ Although not fully reproduced as part of this motion, the County Clerk's file in *Schottenstein I* contains a copy of the By-Laws (*see e.g.* 05/29/08 Pollack Aff., exhibit C).

the building and the unit did not comply with the terms of the Offering Plan and By-Laws (Complaint, ¶¶ 54-58). Again, defendant does not show that Bellmarc had knowledge of a particular defect (*see* Court Order in *Schottenstein I*, entered on March 10, 2009 [03/10/09 Order]), at 11-12), or that it, as a managing agent, was under an obligation to disclose it to plaintiff.

In the fourth cause of action, plaintiff seeks rescission of the purchase agreement. Bellmarc did not enter into the Purchase Agreement with plaintiff.

The fifth cause of action was previously dismissed in its entirety (*see* 03/10/09 Order, at 13-14).

In her sixth cause of action, plaintiff seeks an injunction directing defendants to repair the defects in the unit and the building, based on their violation of their contractual duty to repair such defects (Complaint, ¶¶ 70-75). As already discussed, plaintiff fails to establish, and review of the record does not show, that Bellmarc owes her this contractual duty.

In the seventh cause of action, plaintiff alleges that defendants refused to let plaintiff inspect books and records regarding the condominium's finances, and seeks access to such records (Complaint, ¶¶ 76-82). The Court previously sustained this cause of action to the extent that it alleges a violation of Real Property Law § 339-w and the By-Laws and seeks an order directing access to the condominium's books and records (*see* 03/10/09 Order, at 15-16). However, plaintiff fails to show, and review of the record does not reveal, that Bellmarc is contractually obligated to maintain and make available such records for inspection (*see e.g.* By-Laws, § 2.4 [iii] [it is the Board that is obligated is "to maintain ... books and records with respect to the finances and the operation of the Condominium ..."]). Additionally, it appears that on or about July 9, 2008, the Board provided plaintiff with an opportunity to inspect the accounting and finance records of the condominium (*see*

01/07/09 Pittinsky Aff., exhibits M-O, Q).

Accordingly, plaintiff failed to establish a prima facie showing of entitlement to judgment as a matter of law and her motion with respect to Bellmarc is denied (*see e.g. Pirrelli v Long Is. R.R.*, 226 AD2d 166, 167 [1st Dept 1996]). In light of the denial of plaintiff's request for summary judgment, her request for punitive damages, attorney's fees, and costs is denied as well.

Plaintiff seeks consolidation of *Schottenstein I* and *Schottenstein II*. The defendants in both actions do not oppose plaintiff's request. Pursuant to CPLR 602, where different actions involve common questions of law or fact, the court, in its discretion, "may order the actions consolidated" (CPLR 602 [a]; *see also Mars Assoc. v New York City Educ. Constr. Fund*, 126 AD2d 178, 184-185 [1st Dept 1987]). Consolidation results in a new action that displaces all of the affected prior ones and culminates in one judgment (*see Mars Assoc.*, 126 AD2d at 185). Here, there are clearly common issues of fact that pertain to all defendants in both actions, and, hence, consolidation would provide a practical advantage. Accordingly, plaintiff's request for consolidation is granted.

Finally, plaintiff requested, pursuant to New York Civil Rights Law, Article 7, § 76-a (1) (a), that this case be placed on an expedited track because it is a "public petition." As Windsor Tov correctly points out, Civil Rights Law § 76-a (1) (a) defines "[a]n action involving public petition and participation" as "an action ... for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to ... challenge or oppose such application or permission" before a government agency (*see e.g. Gill Farms v Darrow*, 256 AD2d 995, 997 [3d Dept 1998]; *see also Bell v Little*, 250 AD2d 485, 485 [1st Dept 1998]). Plaintiff does not allege any actions by defendants that would qualify this action for the treatment by this statute. Neither has plaintiff demonstrated that this case qualifies for a trial preference, pursuant to CPLR 3403.

Moreover, a request for a trial preference is premature. Accordingly, plaintiff's request is denied.

Windsor Tov's Cross Motion

A. Timeliness of Service of Cross Motion

Plaintiff argues that Windsor Tov failed to timely serve its cross motion. Windsor Tov contends that upon its application, the Court adjourned the original return date on plaintiff's motion from November 24, 2008 to January 6, 2009 and directed that the opposition papers be served on January 6, 2009.

In her motion papers, plaintiff demanded that reply papers be served no later than seven days before the return date. Pursuant to CPLR 2103 (b) (2) and 2215, Windsor Tov was supposed to mail its cross motion no less than ten days before the adjourned return date of January 6, 2009 (*see* CPLR 2103 [b] [2], 2215). Windsor Tov mailed its cross motion by regular mail on December 23, 2008, (*see* 12/23/08 Horowitz Aff. of Service). Therefore, Windsor Tov's service was timely.

B. Spoliation of Evidence

Windsor Tov alleges that plaintiff continually refused to grant Windsor Tov's representatives access to the unit to conduct inspections or undertake repairs, and that, by the time they were granted access, she removed sheetrock from the walls as well as wooden floors. This, allegedly, deprived Windsor Tov of the ability to inspect evidence that forms the basis of plaintiff's claims.

Windsor Tov posits that after plaintiff's prior attorneys provided it with a list of items that needed repair in the unit, dated April 10, 2008, Windsor Tov determined that an inspection was necessary and by letters, dated May 19, 2008 and May 29, 2008, requested a number of proposed dates for an inspection. Plaintiff's prior counsel allegedly did not respond until June 11, 2008, when it advised Windsor Tov that, on June 16, 2008, plaintiff would commence mold remediation, and

agreed to schedule an inspection. On June 16, 2008, an attorney for Windsor Tov and a mold expert appeared at the unit and discovered that a wall of sheetrock had been removed before their arrival (12/23/08 Horowitz Aff., exhibit G). The same day, Windsor Tov made a demand upon plaintiff to cease and desist from any further destruction of evidence (*id.*). By way of a so-ordered stipulation, dated June 19, 2008, plaintiff was directed to provide defendants “with unfettered access” to the Unit, commencing June 20, 2008 (*id.*, exhibit H). On June 20, 2008, Windsor Tov accessed the unit and discovered that additional portions of the Unit had been gutted.

Windsor Tov alleges that prior to its inspection on June 20, 2008, plaintiff removed (1) the floor board in the master bedroom, (2) the sheetrock from the walls in the master bedroom, and (3) the majority of the sheetrock from the walls in the second bedroom (*id.*, exhibit I). Windsor Tov contends that, as a result, it is now impossible to verify plaintiff’s allegations of warped floors, damaged walls, mold permeating wall tiles, and water leaks, and other construction defects.

Typically, New York courts impose strict sanctions, including dismissal of a pleading, where a party destroys “crucial items of evidence ... before the adversary has an opportunity to inspect them” (*see e.g. Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). However, the facts in the cases that Windsor Tov relies on in support of its cross motion are readily distinguishable from the facts in this case.

For example, in *Squitieri v City of New York* (248 AD2d 201 [1st Dept 1998]), the defendant failed to preserve a street sweeper, thereby prejudicing the third-party defendants, manufacturer and distributor of the machine. In *Kirkland* (236 AD2d 170, *supra*) the third-party plaintiff failed to preserve a stove for the third-party defendant’s inspection. In *New York Cent. Mut. Fire Ins. Co. v Turnerson’s Elec.* (280 AD2d 652 [2d Dept 2001]), the plaintiff destroyed a circuit panel, where the

plaintiff alleged that the fire that destroyed her house was caused by the defendant's negligence in performing electrical work on the residence.

By contrast, here, the piece of evidence in question is not an item of personal property or a piece of machinery that can be stored for an extended period of time until an adversary can inspect it. Rather, the piece of evidence at issue is plaintiff's apartment itself, which, until recently, was allegedly plaintiff's primary place of residence. The issue, therefore, is whether plaintiff gave notice to Windsor Tov of the alleged defects, provided it with reasonable opportunity to conduct inspections, and whether Windsor Tov availed itself of an opportunity to inspect the unit (*see Kirkland*, 236 AD2d at 176).

Plaintiff moved into the unit at some point between March 27, 2006, the day of the closing, and June 12, 2006, the day of one of her first letters to Windsor Tov. In June and October 2006, plaintiff notified Windsor Tov of, among other defects, water infiltration into, and from, her unit and inadequate ventilation (*see* 11/10/08 Schottenstein Aff., exhibit 6, 06/12/06 and 10/03/06 letters). Plaintiff also informed Windsor Tov that she has lupus, "an autoimmune disease[,] a[s] well as chronic sinusitis," and that it was crucial for her health to breath clean air (*see* 11/10/08 Schottenstein Aff., exhibit 6, 10/03/06 letter, ¶ 3). Additionally, the record in this case shows that plaintiff's original complaint, filed on March 2, 2007, alleged leaks from the unit above, water infiltration from outside, loose bricks and damaged mortar joints, inadequate ventilation, and possibility of mold in the unit.

Michael Butler, a Windsor Tov representative, claims that on two occasions plaintiff failed to provide access to the unit (Butler Aff., at 2-3). However, the "Work Orders" from Flintrock Construction Services, which is associated with Windsor Tov, indicate that on many other occasions

plaintiff provided access to Windsor Tov's representatives to inspect the unit and fix particular defects (*see* 11/10/08 Schottenstein Aff., exhibit 14).

By its own admission, Windsor Tov took no steps to inspect the unit until May 2008. After it received notice from plaintiff on June 11, 2008 about mold remediation work on June 16, 2008, Windsor Tov waited until June 16, 2008 to inspect the unit. On June 16, 2008, when Windsor Tov and its mold expert visited the unit and observed that plaintiff had started removing sheetrock from the walls (12/23/08 Horowitz Aff., ¶ 27, exhibit G; Millhouse Aff.), Windsor Tov did not direct its expert to inspect those areas that were still intact. Instead, Windsor Tov demanded that plaintiff cease and desist from continuing mold remediation. Neither did Windsor Tov offer to compensate the workers of Insurance Restoration Specialists, Inc., for any delay in their work (*see* 11/10/08 Schottenstein Aff., exhibit 12; *see also* Powell Aff.). Windsor Tov continued to wait until June 19, 2008 to enter into a so-ordered stipulation and did not attempt to inspect the unit until June 20, 2008. Accordingly, Windsor Tov waited for at least a year and a half to schedule an inspection of the unit, knowing well that the alleged defects could have been hazardous to plaintiff's health. Unlike the cases involving a discrete item that could have been stored away indefinitely, plaintiff could not have been expected to continue to reside in the unit for a year and a half until Windsor Tov inspected it.

Furthermore, it does not appear that Windsor Tov was totally precluded from inspecting the pertinent pieces of evidence and arriving at conclusions with respect to the levels of mold contamination and water infiltration in the unit. For example, Windsor Tov provides an expert report of Marc Rutstein, who apparently was able to conduct a mold inspection of the unit, by measuring mold levels in its different areas and examining the sheetrock that was removed by plaintiff's workers and stored in the basement of the building (*see* Rutstein Aff.). John Rolka, a wall and roofing expert,

was also able to inspect the walls of the unit and determine the extent of water infiltration into the unit (*see Rolka Aff.*). Furthermore, Bellmarc's expert inspected the debris from the remedial work and was able to make specific conclusions as to the levels of mold contamination (*see* 01/05/09 Paek Aff., exhibit I). Aside from water infiltration and mold, the other major alleged defects included malfunctioning ventilation systems and absence of individual electric metering (*see* Complaint, ¶ 28). Windsor Tov was able to inspect the unit with respect to the first two allegations, and does not claim that plaintiff destroyed evidence with respect to the other two claims (*see* Paek Aff., exhibit I). Therefore, it does not appear that Windsor Tov was significantly prejudiced by the remediation work that plaintiff did in her unit (*cf. Kirkland*, 236 AD2d at 175-176; *Squitieri*, 248 AD2d at 204). Accordingly, Windsor Tov's cross motion is denied.

Cross Motion of the Board

In *Schottenstein II*, the Board moves for partial summary judgment on the first three counterclaims, for an order directing plaintiff to pay monthly common and electric charges pendente lite, and for an order dismissing plaintiff's complaint based on plaintiff's destruction of key evidence.

Section 6.2 of the By-Laws provides that the unit owners are obligated to pay monthly common charges on the first day of every month (By-Laws, § 6.2 [A]). If unit owners fail to pay common charges, the Board is authorized to impose a \$150 late charge, institute an action to collect late fees, and charge 1.5% monthly interest on unpaid common charges (*id.*, §§ 6.4 [A], [B]). The unit owners are not exempt from liability for the payment of the common charges, unless a casualty, such as fire, "render[s] ... Units wholly or partially unusable ...," in which case they are entitled to an abatement of the common charges (*id.*, §§ 5.6 [A], [E]; 6.2 [D]). Plaintiff does not allege that damage to the unit was caused by casualty (*see* Verified Complaint, ¶ 22).

“[T]he warranty of habitability of Real Property Law § 235-b does not apply to an individual unit within a condominium. An individual unit owner, such as the plaintiff, cannot withhold payment of common charges and assessments in derogation of the by-laws of the condominium based on defective conditions in his unit or in the common areas.”

(*Frisch v Bellmarc Mgt., Inc.*, 190 AD2d 383, 389 [1st Dept 1993]; *Board of Managers of the 200 West 109 Condominium v Baker*, 244 AD2d 229, 229 [1st Dept 1997][owners of a condominium unit were not entitled to withhold the payment of common charges and special assessments owing to the Board of Managers because of a water leak within their unit]). Additionally, the By-Laws provide that individual unit owners are responsible for the maintenance, repairs, and replacements in their units (Bylaws, § 5.1 [A] [i]). Accordingly, plaintiff is liable to pay monthly common charges, late fees, and interest on the amount due. The monthly amount of common charges for plaintiff's unit is \$1,077.21 (*see* Pittinsky Affirm., exhibit T). The Board's records indicate that common charges have not been paid since May 2006 through January 2009, when this motion was submitted, which amounts to \$35,547.93 (33 months of unpaid common charges at \$1,077.21/month). The Board also assessed plaintiff \$2800 in late fees from September 2006 through December 2008.

Therefore, the Board is granted partial summary judgment against plaintiff in the amount of \$38,347.93, for unpaid common charges and late fees from September 2006 through January 2009. Pursuant to CPLR 5001 (a), the Board is entitled to prejudgment interest on the common charges and late charges. Because the common charges and late charges accrued monthly, the Court chooses August 15, 2007 an intermediate date for interest, pursuant to CPLR 5001 (b). Prejudgment interest shall accrue at the rate of 1.5% per month (i.e., 18% per annum), as provided in Section 6.4 (B) of the By-laws.

The Board also seeks to collect electric charges, in its fourth counterclaim. However, it failed

to establish how those charges have been computed. Plaintiff alleges that there is no individual electric metering for her unit (Verified Complaint, ¶ 22). On this motion, the Board does not dispute that allegation. The Board provides no bills from Con Edison or any other documentation that would explain how it arrived at the electric charges that the Board claims that plaintiff owes it. Accordingly, the Board failed to make a prima facie showing of entitlement to summary judgment as to its counterclaim for electric charges (*see e.g. Pirrelli*, 226 AD2d at 167). Therefore, that part of the Board's cross motion that seeks payment of electric charges is denied.

Finally, the Court grants the part of the Board's cross motion to require plaintiff to pay common charges while the action is pending. Real Property Law § 339-j provides that "Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted thereto." Under Real Property Law § 339-j, the failure to comply with the by-laws is a ground for injunctive relief. Thus, the Court directs plaintiff to pay common charges that shall become due after the date of this decision while this action is pending, by the first day of every month as provided in the By-laws. For unpaid common charges and late charges that may have accrued during the period after the submission until the date of this decision, the Board may move again for summary judgment against plaintiff as to these claims.

The part of the Board's cross motion that seeks dismissal of the Verified Complaint on the ground of plaintiff's spoliation of evidence is denied, for the same reasons for which Windsor Tov's motion to dismiss was denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Sarah Schottenstein

(1) for summary judgment (Index No. 60061/07) as against defendant Bellmarc Property Management Services, Inc., is denied and as against defendant Windsor Tov LLC is denied as premature, and

(2) for expedited treatment is denied,

(3) for consolidation is granted and the above-captioned action is consolidated in this Court with *Sarah Schottenstein v Board of Mgrs. of Windsor Park Condominium*, Index No. 106555/2008, under index No. 600661/2007, and the consolidated action shall bear the following caption:

SARAH SCHOTTENSTEIN,

Plaintiff,

-against-

WINDSOR TOV LLC, a Delaware Limited Liability Corporation, BELLMARC PROPERTY MANAGEMENT SERVICES, INC., a New York Corporation, DOUGLAS ELLIMAN, LLC, a Delaware Limited Liability Company, and BOARD OF MANAGERS OF WINDSOR PARK CONDOMINIUM,

Defendants.

and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the cross motion of defendant Windsor Tov LLC to dismiss the Second Supplemental and Amended Complaint (Index No. 600661/07) is denied; and it is further

ORDERED that the cross motion of defendant Board of Managers of Windsor Park Condominium for partial summary judgment and to dismiss the Verified Complaint (Index No. 106555/08) is granted as to the first, second, and third counterclaims, for common charges, late fees, and interest from September 2006 through January 2009, and is otherwise denied; and it is further

ORDERED that the first, second, and third counterclaims are partially severed as to claims for unpaid common charges and late fees during September 2006 through January 2009, and the Clerk is directed to enter judgment in favor of defendant Board of Managers of Windsor Park Condominium against plaintiff in the amount of \$38,347.93, together with interest as prayed for at the rate of 18% per annum from the intermediate date of August 15, 2007 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, and it is further

ORDERED that, during the pendency of the action, plaintiff is directed to pay monthly common charges to defendant Windsor Park Condominium as they become due, by the first of each month; and it is further

ORDERED that the remainder of the consolidated action shall continue.

Dated: June 15, 2009
New York, New York

ENTER:


J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
JUN 17 2009 16
COUNTY CLERK'S OFFICE
NEW YORK