[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Board of Managers

- v -

Isaac Levinson

INDEX NO. 117382/08

MOTION DATE 8/25/09

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

FILED
SEP 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of plaintiff Board of Managers of the Silk Building Condominium, on Behalf of All its Unit Owners, for an order, pursuant to CPLR §3212, granting plaintiff summary judgment against defendants Isaac Levenbrown and Jessica Klein, jointly and severally, is granted as to liability only; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and 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, by October 5, 2009 for a trial on damages, and appear for a trial on damages in Part 40 on November 2, 2009, 10:00 a.m.; no adjournments without consent of the Court; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3211(b), dismissing all of defendants' affirmative defenses pleaded is granted, and defendants' affirmative defenses are dismissed; and it is further

ORDERED that branch of plaintiff's motion for an order, pursuant to CPLR §6401(a), for the appointment of a receiver is denied as moot; and it is further

ORDERED that the branch of defendants' cross-motion seeking an order, pursuant to CPLR §3025(b), permitting defendants to serve an Amended Answer and Counterclaims is denied as to the counterclaims for negligence and breach of fiduciary duty; leave to serve an

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

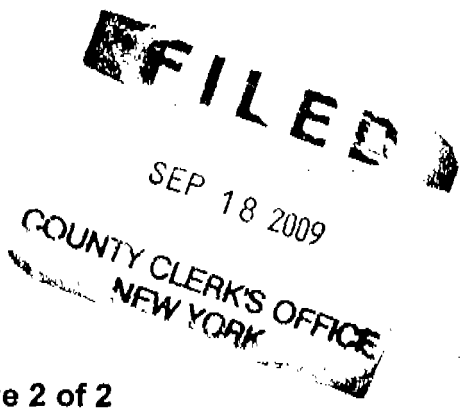
Amended Answer and Counterclaims is granted only as to the counterclaims for breach of contract and an accounting, and such Amended Answer and Counterclaims shall be served within 30 days of the date of this order; and it is further

ORDERED that defendants shall obtain a no-fee Index Number and file an RJI on the severed counterclaims; and it is further

ORDERED that the branches of defendants' cross-motion seeking an order, pursuant to CPLR §3214(b), lifting the automatic stay of discovery, and, pursuant to CPLR §§3212(f) and 3124, compelling plaintiff to comply within a reasonable period with defendants' pending first demand for the production of documents and first set of interrogatories are granted only to the extent that discovery shall proceed on defendants' severed counterclaims; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference on the severed counterclaim before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, December 8, 2009 at 2:15 p.m.

This constitutes the decision and order of the Court.



Dated 9/16/09 **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
COUNTY OF NEW YORK: PART 35

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BOARD OF MANAGERS OF THE SILK BUILDING CONDOMINIUM, ON BEHALF OF ALL ITS UNIT OWNERS,

Index No. 117382/08

Plaintiff,

-against-

DECISION/ORDER

ISAAC LEVENBROWN AND JESSICA KLEIN,

Defendants.

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

MEMORANDUM DECISION

In this action, plaintiff Board of Managers of the Silk Building Condominium, on Behalf of All its Unit Owners, ("plaintiff") seeks to recover against defendants Isaac Levenbrown ("Mr. Levenbrown") and his wife, Jessica Klein ("Ms. Klein") ("defendants") for breach of contract.

Plaintiff now moves for an order, pursuant to CPLR §3211(b), dismissing all of the affirmative defenses pleaded in defendants' March 15, 2009 Verified Answer (the "Answer"), and, pursuant to CPLR §3212, granting plaintiff summary judgment and awarding it a money judgment against defendants, jointly and severally, in the amount of $47,570.11 (which amount continues to accrue *pendente lite*), and/or granting plaintiff a money judgment for the sum of $5,500 per month from January 1, 2007 to date of entry of judgment herein, which reflects a reasonable rental for the subject unit for the period of defendants' default, along with the appointment of a receiver to collect same.

Defendants cross move pursuant to CPLR §3214(b) to lift the automatic stay of discovery triggered by plaintiff's summary judgment motion; pursuant to CPLR §§3212(f) and 3124, to

compel plaintiff to comply with defendants' pending demand for the production of documents and set of interrogatories; and, pursuant to CPLR §3025(b), to permit defendants to serve an Amended Answer and counterclaims.

Background[1]

Plaintiff is the governing body of the Unit Owners (the "Unit Owners") of 14 East 4th Street (the "Condominium"), an unincorporated association. Defendants are the owners of two units in the Condominium: Unit 1109 and Unit 1110 (collectively, the "Units"). The Declaration (the "Declaration") and the By-Laws (the "By-Laws") of the Condominium provide, *inter alia*, that Unit Owners are obligated to pay to the Condominium monthly assessments of the common charges of the Condominium (the "Common Charges") and additional common charges (the "Additional Common Charges") as determined by plaintiff from time to time. The Declaration and the By-Laws further provide, *inter alia*, that a Unit Owner who fails to pay Common Charges and/or Additional Common Charges when due shall be obligated to pay to the Condominium interest thereon, together with late charges imposed by the Condominium, and all expenses of collection, including, but not limited to the Condominium's attorneys' fees and expenses and Court costs and disbursements.

Pursuant to the By-Laws, plaintiff fixed the monthly assessment of Common Charges for the Units for each month through and including the date of the Complaint. It is alleged that defendants failed and refused to pay the monthly assessments of Common Charges and Additional Common Charges that became due and payable since January 1, 2007, and that said charges remain unpaid and owing although duly demanded. Pursuant to the By-Laws, plaintiff

[1] Information is taken from plaintiff's Verified Complaint and defendants' Verified Answer.

has imposed late charges and legal fees arising from defendants' failure to pay the monthly assessments of Common Charges and Additional Common Charges due to the Condominium.

In its first and second causes of action of its Verified Complaint ("Complaint"), plaintiff alleges that defendants owe the Condominium $6,822.31 and $18,823.52, for Units 1109 and 1110, respectively, as of December 1, 2008, as well as additional Common Charges, Additional Common Charges, late charges and plaintiff's attorneys' fees and expenses, all of which continue to accrue. Plaintiff also seeks the appointment of a receiver to collect all amounts due.

The Answer contains five affirmative defenses: (1) the Complaint fails to state a claim upon which relief may be granted, (2) plaintiff's claims are barred by reason of its own unclean hands, (3) plaintiff failed to plead the necessary elements for the appointment of a receiver, (4) plaintiff failed to mitigate damages, and (5) the amount of plaintiff's alleged damages equals or is exceeded by plaintiff's obligations to defendants by reason of repeated structural damage and flooding to the Units since defendants purchased them, damage that has originated in common areas and/or other units in the Condominium.

Plaintiff's Motion

First, plaintiff argues that defendants' first affirmative defense should be dismissed because it is pleaded in bald and conclusory fashion and plaintiff's Complaint properly states a claim upon which relief may be granted. Pleadings challenged for legal insufficiency must be construed liberally, and if, upon any theory, the pleader is entitled to recovery, a motion to dismiss must be denied. Moreover, plaintiff is not required to prove its case on the pleadings, but is only required to set forth sufficient allegations, which, after being accepted as true and afforded a liberal construction, sufficiently state a cause of action.

Plaintiff argues that the Complaint clearly sets forth a cause of action for breach of contract, as defendants have failed to pay common charges, which is a clear violation of the very Declaration and By-Laws by which they agreed to abide when they purchased the Units. Plaintiff further argues that the allegations in the Complaint are sufficiently particular to give this Court and defendants notice of the transactions and occurrences intended to be proved and the material elements of each cause of action. In addition, the Complaint clearly sets forth the amount of damages suffered by the Condominium as a result of defendants' default (Common Charges arrears which as of the date of this motion have ballooned to $47,570.11). Consequently, the Complaint states a claim and, as such, defendants' first affirmative defense should be dismissed, plaintiff argues.

Second, plaintiff argues that defendants' third affirmative defense should be dismissed because plaintiff is entitled to an appointment of a receiver. Courts routinely assign receivers to collect profits of a subject unit on behalf of a condominium board. Plaintiff argues that its Complaint sufficiently alleges that plaintiff is a condominium board and seeks to collect common charges and rents on the Unit. Thus, defendants' third affirmative defense lacks merit.

Third, plaintiff argues that defendants' fourth affirmative defense should be dismissed because plaintiff is under no duty to mitigate damages. Not only do defendants fail to allege any duty to mitigate damages, plaintiff cannot do so because plaintiff has nowhere else to turn, other than to defendants, to collect the Common Charges due on the Unit; no one else is obligated to pay such Common Charges, except for the Unit Owners (*i.e.* defendants) themselves. The only conceivable way for plaintiff to mitigate any damages is for plaintiff to rent the Units and apply the rental income toward the Common Charge arrears. However, clearly plaintiff has no right to

rent the Units, because the deeds to the Units are in defendants' name.

Fourth, plaintiff argues that defendants' second and fifth affirmative defenses should be dismissed because defendants are barred from raising warranty of habitability claims against a condominium seeking to collect arrears in common charges. Defendants allege as their fifth affirmative defense that they should somehow be entitled to an abatement due to alleged "structural damage and flooding" at the Condominium. However, pursuant to Property Law ("RPL") §339-x and caselaw, defendants are entitled to no such abatement. Thus, as defendants' abatement and warranty of habitability claims are without merit, such defenses should be dismissed. By extension, therefore, plaintiff does not and cannot have "unclean hands," as alleged in defendants' second affirmative defense. Further, defendants' one-sentence allegation contains no factual support. Although it is not clear whether defendants' "unclean hands" defense applies to their abatement allegations or some other circumstance, the vagueness of the defense is itself sufficient reason for this Court to dismiss this defense. Finally, unclean hands is an equitable defense that is not available in this action at law for damages.

Plaintiff argues that it is entitled to summary judgment because the following facts are undisputed: (1) plaintiff is the governing body, and fiduciary, of the Condominium; (2) defendants own, and at all relevant times herein have owned, the Units; (3) when defendants purchased the Units, they agreed to be bound by the Condominium's Declaration and By-Laws; (4) the Declaration and By-Laws require all Unit Owners (defendants are no exception) to pay Common Charges to the Condominium for maintenance, upkeep and enhancement; (5) defendants have failed to pay Common Charges and, as of the date of this motion, are in arrears in the amount of $47,570.11, which continue to accrue *pendente lite* (see defendants' "Payment

History"); (6) plaintiff duly demanded payment of the Common Charges arrears from defendants, but defendants have failed and refuse to pay same; (7) upon defendants' failure to pay, plaintiff commenced this action; and (8) defendants have no defense for their failure to pay. Thus, plaintiff argues, it is entitled to (a) $47,570.11, the amount in Common Charges arrears, and/or (b) $5,500 per month from January 1, 2007 to date of entry of judgment, which reflects a reasonable rental for the Units for the period of defendants' default, and (c) the appointment of a receiver to collect same.[2]

Defendants' Opposition and Cross-Motion

Defendants argue first that issues of fact exist, defeating plaintiff's motion for summary judgment. Mr. Levenbrown states in his affidavit (the "Levenbrown Aff.") that defendants have had problems with the Units since they purchased them in August 2006, including flooding damage caused by structural defects in the Condominium's common areas.[3] Plaintiff failed to inspect or timely repair the damage, in violation of its obligations under the By-Laws. Plaintiff also refused to reimburse defendants for the money they spent to repair the damage caused by these structural defects (see the "Estimates" and the "Invoices"). Further, defendants argue, an issue of fact exists as to plaintiff's calculation of the Common Charges. The Condominium's managing agent, Cooper Square Realty, Inc. ("Cooper Realty") has a history of failing to apply defendants' payments of Common Charges, resulting in erroneously charged late fees and

[2] Thomas Padilla ("Mr. Padilla"), assistant secretary of plaintiff and the managing agent for the Condominium, attests in an affidavit (the "Padilla Aff.") that defendants' Common Charge arrears, as of the date of plaintiff's motion, are broken down as follows: (a) $29,134.90 in arrears constituting Common Charges; (b) $3,432.39 in arrears constituting assessments; (c) $7,102.82 in arrears constituting late fees; and (d) $7,900 in arrears constituting attorneys' fees. Mr. Padilla further attests that "[b]ased on current real estate trends in the area, and based on the size, location and storied history of the [Units], the reasonable monthly rental amount for the [Units] is $5,500.00 per month" (Padilla Aff., ¶ 11).

[3] The Units are physically combined to constitute one residence.

penalties. As these erroneous charges were never corrected, plaintiff's claim of any alleged arrears is overstated, defendants contend. Defendants submit several photographs of the water damage to the Units (see the "Photographs"), and correspondence memorializing Cooper Realty's and plaintiff's "failed promises" to reimburse defendants for repairs and to correct errors in plaintiff's billing for Common Charges (see the "Correspondence").

Second, defendants argue that they have been deprived of fair discovery. Defendants served their Document Request and Interrogatories on March 16, 2009 (see the "Discovery Request"). Rather than comply or serve timely objections pursuant to CPLR §3122(a), plaintiff filed this motion, triggering the automatic stay of discovery prescribed in CPLR §3214(b). Plaintiff has since declined to make even a partial production of documents, despite defendants' effort to resolve the dispute informally, pursuant to 22 NYCRR §202.7. The stay should be lifted because this case is in its infancy, with issue having been joined for barely three weeks. Further, because defendants have met their burden of establishing triable issues with admissible evidence, denying them the ability to conduct full and fair discovery would prejudice their ability to prosecute their counterclaims.

Defendants also argue that plaintiff is in possession of probative, material facts, and, pursuant to CPLR §3212(f), summary judgment may be denied "where facts essential to justify opposition to [the] motion are exclusively within the knowledge and control of the movant." This case is not about simply tallying up a ledger of common charges. By its own conduct, plaintiff and Cooper Realty have severely complicated the math. Defendants have an absolute right to probe how and why plaintiff reneged on the promises of Cooper Realty to reimburse them for repairs necessitated by multiple common area leaks, and to ascertain how and why

Cooper Realty failed to take timely corrective steps to minimize the water damage, let alone fix it. Defendants are entitled to know how and why plaintiff reneged on Cooper Realty's promises to correct fictitious late fees, resorting instead to costly and wasteful litigation. Defendants are entitled to determine whether plaintiff's conduct was purposeful or inadvertent. In that regard, plaintiff's degree of willfulness bears upon the egregiousness of its "breach of fiduciary duty" to defendants, as Unit Owners, defendants argue. In order to evaluate plaintiff's conduct, defendants must have access to records in plaintiff's sole possession, *i.e.*, minutes of meetings and correspondence with Cooper Realty.

Defendants contend that they corresponded most regularly with Jason Griffith ("Mr. Griffith") of Cooper Realty. Mr. Griffith is the one who promised defendants that their repair expenses would be reimbursed and that the artificial late fees would be removed from their account. As Mr. Griffith no longer works for Cooper Realty, defendants are entitled to ascertain whether his promises were ever communicated to plaintiff; if so, why these promises were broken; and if not, then why these promises were not communicated to plaintiff, defendants argue. Defendants also are entitled to subpoena and depose Mr. Griffith, and if necessary, call him at trial. They are entitled to know why it took months for plaintiff to repair any of the water damage, and why it failed to take even interim protective measures. They are entitled to see correspondence between plaintiff, Cooper Realty and any engineer, consultant, contractor or other third party with respect to water leakage. They are entitled to discern whether Cooper Realty's "breach of its promises" was a produce of excessive turnover at Cooper Realty, or whether Cooper Realty was acting on orders from plaintiff. Defendants further argue that to make these evaluations, defendants must have access to records that address not just how

plaintiff has treated them in particular, but also how it has treated other Unit Owners similarly situated. It is entirely likely that, with water damage resulting from not one but three separate common areas, other units were also damaged. Finally, defendants are entitled to know whether they have been singled out for legal action, and if so, why.

Defendants argue that their ability to prove their affirmative defenses and prosecute their counterclaims should not be compromised by reason of a motion that, at best, is premature, and, at worst, futile in light of "pervasive factual issues."

Third, defendants argue that they are entitled to offsets against any amounts owed. Contrary to plaintiff's arguments, defendants did not plead any breach of a warranty of habitability, nor do they argue such here. Rather, defendants have claimed offsets to the alleged arrears by reason of plaintiff's failure to repair flooding caused by structural defects in the common areas of the Condominium, plaintiff's "breach of its agreement" *via* Cooper Realty and its legal obligation to compensate defendants for the necessary repairs, and plaintiff's "breach of its agreement" to remove inaccurate late charges. Defendant goes on to distinguish the caselaw plaintiff cites.

Fourth, defendants argue that plaintiff is not entitled to the appointment of a receiver because plaintiff offers no evidence or legal authority for such "extraordinary relief." Neither plaintiff's motion papers nor its Complaint contains the "requisite allegations" under CPLR §6401, which controls this provisional remedy, and provides for a temporary receiver "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." Plaintiff's pleadings and motion papers are devoted solely to the issue of common charges, and are silent as to the Units' physical condition, let alone the possibility (however

farfetched) that the Units are at risk of being "materially injured or destroyed." Plaintiff's unsupported, conclusory premise that "courts routinely appoint receivers to collect profits of a subject unit on behalf of a condominium board," is insufficient.

Defendants contend that since receivership is an equitable remedy, as with an injunction, plaintiff must demonstrate that the Units are in danger of irreparable loss. Here, plaintiff is suing for money damages in a precisely calculated sum certain. Presumably, this explains plaintiff's failure to allege irreparable loss, and/or the lack of an adequate remedy at law. Defendants go on to distinguish the caselaw plaintiff cites. The third affirmative defense, "which simply holds plaintiff accountable," should stand, defendants argue. Indeed, far from being in jeopardy of being "materially lost, injured or destroyed," the Units have been repaired and refurbished at defendants' expense, not plaintiff's, even though plaintiff is responsible for defendants' damages.

Defendants further contend that plaintiff offers no evidence for its "guesstimate" of $5,500 per month for use and occupancy, other than Mr. Padilla's "feel" for "current real estate trends in the area," and the "size, location and storied history of the Unit." This self-serving statement is supported by no appraisal, no sworn statement from a qualified real estate agent, no specifics as to size or location, and certainly no explanation as to the Units' "storied history," defendants argue. At most, the suggestion of a monthly rate raises more triable issues.

Finally, defendants argue that they should be afforded leave to amend their Answer. Defendants have submitted a Proposed Amended Answer ("Proposed Answer") that differs from their original pleading primarily to the extent that it adds four counterclaims based on plaintiff's actions: (1) breach of contract, (2) negligence, (3) breach of fiduciary duty, and (4) an accounting. Defendants argue that plaintiff cannot credibly claim that leave to amend would

prejudice it. Further, in addition to raising triable issues of fact and underscoring the need for full and fair discovery, the photographic and documentary evidence they provide supports defendants' proposed counterclaims. Further, these counterclaims would establish triable issues that likewise would require the denial of summary judgment. All of the proposed counterclaims are supported by proof in admissible form, defendants contend. Absent any credible claim of prejudice, leave to amend should be granted.

Plaintiff's Reply and Opposition to Cross-Motion

Plaintiff points out that since defendants failed to contest plaintiff's challenge to defendants' first, second and fourth affirmative defenses, these defenses should be dismissed. Further, plaintiff provides new affidavits from Anthony Loscalzo ("Mr. Loscalzo"), a member of plaintiff; Gloria D'Amura ("Ms. D'Amura"), an employee of Cooper Realty; and Thomas Capobianco ("Mr. Capobianco"), a professional engineer, for "a full recitation of the facts."

Regarding, defendants' third affirmative defense, plaintiff contends that defendants "seem to argue that a formal motion is required as a condition precedent to the appointment of a receivership." However, plaintiff's instant motion requests just such a remedy (see Notice of Motion). Thus, defendants' argument in this regard is moot, and the merits need not be debated. Next, plaintiff argues that defendants' suggestion that because plaintiff is seeking money damages in this action, plaintiff it is not entitled to the appointment of a receiver, lacks merit. Citing caselaw, plaintiff contends that a receiver can be appointed in a plenary action such as this, but only as a provisional remedy (for which plaintiff is asking herein), and not as the ultimate relief sought. With respect to defendants' contention that somehow plaintiff did not assert certain "key words" in the Complaint to entitle it to the appointment of a receiver, plaintiff

contends that the First Department has found that the appointment of a receiver to collect common charges as use and occupancy fees is appropriate.

Moreover, the collection of rent by the receiver would ensure that plaintiff does not sustain any further, likely unrecoverable, monetary loss in Common Charges. As stated above, defendants' arrears currently total $41,118.98 (in Common Charges alone), and plaintiff is left with little hope that (in light of the fact that defendants are in the midst of financial straits and foreclosure on the Units) it will ever be paid all of the arrears that it is owed. Further, a receiver, not plaintiff, is qualified to oversee a tenancy and collect rent; indeed, a condominium board would be out of its element in this regard. Finally, if the Court refuses to consider Mr. Padilla's statement regarding the rental value of the Units, then plaintiff is willing to have the issue set down for hearing on the reasonable market value of the Units. Thus, plaintiff is entitled to the appointment of a receiver, and defendants' third affirmative defense should be dismissed.

Plaintiff argues that defendants' fifth affirmative defense is merely a "disguised warranty of habitability claim" and should be dismissed. Plaintiff further argues that the caselaw defendants cite is inapplicable and distinguishable from the instant facts.

Plaintiff argues that defendants' opposition comprises only inadmissible hearsay, in that it is based on out-of-court statements and unauthenticated documents from others, offered for the truths of the matters asserted. Such inadmissible statements include those allegedly made by John Fallon ("Mr. Fallon"), the Condominium's superintendent, in asserting that plaintiff initially misdiagnosed the location of the leak in question; an engineer, in asserting that the leak was emanating from a common area of the building; Mr. Griffith, in asserting that plaintiff agreed to address the conditions in question, plaintiff was supposed to reimburse defendants the amounts

allegedly expended in addressing the leaks in question, and plaintiff acknowledged its error and was supposed to have credited defendants' account certain charges that were allegedly erroneously billed to defendants; and Ms. D'Amura, in asserting that plaintiff acknowledged defendants' position on the billing discrepancies.

Plaintiff argues that the unattached and unauthenticated Estimates and unauthenticated Invoices are inadmissible hearsay. Furthermore, the Photographs fail to demonstrate any liability, have no probative value, and merely depict the mild effects of water damage allegedly suffered by defendants. The Photographs also are inadmissible as a matter of law because they, too, constitute inadmissible hearsay. Thus, after subtracting all of the inadmissible hearsay that clouds defendants' opposition papers, nothing is left except for plaintiff's clear entitlement to summary judgment, plaintiff argues.

In opposition to the branch of defendants' cross-motion seeking to stay disclosure, plaintiff argues defendants have furnished the Court with no reason to depart from CPLR §3214(b). First, this case can best be disposed of without the need for the parties and this Court to expend exorbitant amounts of resources conducting and overseeing discovery. Conservation of resources is an important value that Courts generally seek to uphold, plaintiff contends. Second, defendants' allegation that they have met their burden of establishing triable issues with admissible evidence constitutes a mere hope, the veracity of which remains to be determined by this Court. If this Court decides that defendants have met their burden of establishing triable issues, then plaintiff would be denied summary judgment and would, as it is required to do, engage in discovery. Until such time, however, that defendants prove that they have bona fide defenses and claims in this action, CPLR §3214(b) sensibly guarantees a stay of discovery.

Third, a stay of discovery is not the same as a denial of discovery altogether, plaintiff contends. No one has threatened to take away defendants' right to discovery; CPLR §3214(b) merely stays that right pending determination of the instant dispositive motion. Moreover, since defendants' cross-motion is being decided contemporaneously with plaintiff's summary judgment motion, defendants' request for a stay is moot, plaintiff contends. If plaintiff is granted summary judgment, then this case is over; if plaintiff is denied summary judgment, then defendants would, at that time, be entitled to engage in discovery. Plaintiff goes on to distinguish the caselaw plaintiff cites, and asserts that defendants are bound by 3214(b) pending determination of plaintiff's motion for summary judgment. Further, as defendants have furnished the Court with no compelling reason to lift the stay, the branch of their cross-motion should be denied, and plaintiff should not be compelled to comply with defendants' discovery demands, at least until after a hearing and determination of the instant pending summary judgment motion.

Finally, plaintiff argues that defendants' failure to provide proof in admissible form necessitates that their motion for leave to amend their answer be denied. Defendants' opposition consists merely of non-admissible hearsay allegations. Since defendants' proposed counterclaims are based on the same allegations of hearsay, they necessarily lack merit. Should, however, this Court allow defendants to amend their Answer, then, for the reasons explained above, defendants' affirmative defenses should be dismissed from said Amended Complaint.

Defendants' Reply

Defendants argue that the new affidavits from Ms. D'Amura (the "D'Amura Aff."), Mr. Loscalzo (the "Loscalzo Aff."), and Mr. Copabianco (the "Copabianco Aff.") raise more triable issues than they purport to resolve, and support defendants' opposition and cross-motion.

Regarding plaintiff's opposition to defendants' cross-motion to Amend, defendants contend that the cross-motion meets all applicable standards under CPLR §3025. Defendants argue that plaintiff does not allege any prejudice from the proposed amendments, does not deny the content of the proposed amendments on the merits, and cannot possibly claim undue delay. Defendants further argue that plaintiff's breaches of fiduciary duty continue, as plaintiff continues to withhold information about the external water damage in the unit adjacent to defendants' Units, and the minutes of plaintiff's regular monthly meetings. Thus, the cross-motion should be granted, as well.

Analysis

Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v*

Rovello, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Breach of the Condominium's Declaration and By-Laws

To prevail on a breach of contract action, plaintiff must establish an agreement between the parties, the performance by plaintiff, defendants' failure to perform, and resulting damages

(*Howard v Baxter Street Development Co., LLC,* 24 Misc 3d 1225 [Sup Ct New York County 2009]; *see also Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 [Sup Ct County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" must be established (*see Volt Delta Resources LLC v Soleo Communications Inc.*, *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

Here, it is undisputed that defendants agreed to be bound by the Condominium's Declaration and By-Laws when they purchased the Units in August 2006. It is undisputed that the Declaration and By-Laws require defendants, as Unit Owners, to pay Common Charges and Additional Common Charges for the maintenance, upkeep and enhancement of the Condominium (By-Laws, Article 6.4-1), and the payment of late charges, interest and plaintiff's attorneys' fees and expenses incurred to collect such charges (By-Laws, Article 6.6 and 6.7). Further, the evidence in the record establishes that defendants breached the Declaration and By-Laws by failing to pay all of the Common Charges and Additional Common Charges due since January 1, 2007 as they became due. Mr. Levenbrown attests that after he received an e-mail from Cooper Realty on September 4, 2007, advising him to review the "tenant profile" containing his billing and payment history, "*in lieu of a check for the monthly charges*, [he] submitted the 2 invoices for the floors that had been damaged" (Levenbrown Aff., Exh. 18) (*emphasis added*). Further, on July 24, 2008, Mr. Levenbrown received an e-mail from Ms. D'Amura advising him to make "full payment" of all the common charges and other fees by July 27, 2008 (Levenbrown Aff., Exh. 23). Mr. Levenbrown responded to Ms. D'Amura by stating

that he would forward her e-mail to his attorney (Levenbrown Aff., Exh. 24). Defendants do not provide any evidence that they made the payment for common charges. Finally, Mr. Levenbrown provides copies of the August 12, 2008 Collection Notices from plaintiff, advising defendants that unless they pay their "debt consisting of common charges and other amounts due" to plaintiff within 30 days from the date of receiving the Collection Notices, plaintiff would take legal action against them (Levenbrown Aff., Exh. 25). Defendants have provided no proof that they paid the debt within 30 days of receiving the Collection Notices.

Finally, plaintiff has demonstrated that it has been damaged in the amount of $47,570.11, damages that continue to accrue *pendente lite* (see the Padilla Aff. ¶10, the Payment History and the "Client Ledger Report" from plaintiff's attorneys).

Therefore, plaintiff has demonstrated a *prima facie* case for summary judgment in its favor. Further, defendants' allegations concerning plaintiff's failure to make required repairs is insufficient to raise an issue as to defendants' liability *(Board of Managers of the 200 West 109 Condominium v Baker*, 244 AD2d 229 [1st Dept 1997][stating "Defendants, owners of a condominium unit, which they rent for profit, 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"]; *Matter of Abbady (Mailman)*, 216 AD2d 115, 115 [1st Dept] [warranty of habitability (Real Property Law § 235-b) does not apply to an individual unit within a condominium, and an individual unit owner cannot withhold payment of common charges and assessments in derogation of the condominium's bylaws based on defective conditions in his or her unit or in the common areas]).

However, defendants raise a material issue of fact as to the amount of damages owed.

Contrary to plaintiff's arguments, defendants have provided evidentiary proof in admissible form, *i.e.* the Levenbrown Aff., wherein Mr. Levenbrown attests to the merits of the evidence defendants offer. Further, the First Department makes clear that "[e]vidence that would not be admissible at trial may be considered in opposition to a summary judgment motion only 'as long as it does not become the sole basis for the court's determination'" (*In re New York City Asbestos Litigation*, 800 NYS2d 388, 389 [1st Dept 2005]; *see also*, *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002] ["Hearsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted"]).

Here, Mr. Levenbrown attests that Cooper Realty, on behalf of plaintiff, promised defendants that their account would be credited $7,067.43 for the repairs they made to the Units after the Units were damaged from flooding in the common areas (Levenbrown Aff, ¶ 21). According to Mr. Levenbrown, despite a series of letter and e-mail exchanges with Cooper Realty, defendants' account was never credited for the repairs (*id.* at 22; see also Exhs. 5,7-11). Mr. Levenbrown states:

> Based on Mr. Griffith's assurances I submitted the two flooring invoices (Exhs. 12-13) in connection with the water damage. *Based on Mr. Griffith's assurances that we would be credited for those amounts, I made only a partial common charge payment of $ 1,404.92.* For whatever reason, however, the invoices were not credited as he had represented, and the artificial late charges continued to mount.
> (Levenbrown Aff., ¶ 33) (*emphasis added*)

Mr. Levenbrown also attests that plaintiff failed to correct errors in billing for the Common Charges (*id* at 25). Defendants provide an e-mail from Mr. Griffith (the "June 1, 2007 E-mail") in which Mr. Griffith states:

> I will remove all your late fees. I will review your account on Monday from when you moved in to determine everything is correct . . . . Again I apologize for the confusion in billing and the lack of response. I have included Jose my new assistant on the response

and we will have an answer for you on Monday.

Mr. Levenbrown further attests that despite a series of letter and e-mail exchanges between defendants and Cooper Realty, the alleged errors were never credited to defendants' account (Levenbrown Aff, ¶¶ 29-39; Exhs. 16-26).

In its reply, plaintiff contests defendants' contentions on the ground that defendants rely on statements that are "inadmissible hearsay" (reply, ¶ 13). Further, Mr. Loscalzo, Ms. D'Amura and Mr. Capobianco dispute the accuracy of defendants' contentions. Mr. Loscalzo states:

> [T]he Condominium denies the accuracy of the statements purportedly made on behalf of the Condominium by Jason Griffith. Inasmuch as such statements were actually made, if at all, they were totally unauthorized by the Condominium and do not reflect the Condominium's position.
> (Loscalzo Affirmation, ¶ 6)

Ms. D'Amura states:

> [I]nasmuch as Defendants allege that I somehow assented to any offset to their arrears, such an allegation is patently false. While I did engage in discussions with Defendants about the alarming rate at which their arrears were accruing, I did not agree, nor did I even imply, that Defendants were not obligated to pay the entire amount of their arrears to [plaintiff].
> (D'Amura Affidavit, ¶ 6).

Based on the parties' dispute concerning the amounts plaintiff (or plaintiff's agent) allegedly agreed to credit defendants' account and the amount defendants owe in arrears, an issue of material fact exists as to plaintiff's damages. However, none of defendants' arguments defeat plaintiff's *prima facie* case establishing defendants' *liability* for breach of the Declaration and By-Laws.

Defendants cite *Residential Bd. of Managers of Century Condominium by Simons v Berman* (213 AD2d 206 [1st Dept 1995]) for the proposition that the First Department "affirmed denial of a condominium association's motion for summary judgment against a unit owner who

had failed to pay certain common charges" (Opp., p. 11). *Century* affirmed the denial of a condominium board's motion for *summary judgment for foreclosure* on the defendants' unit. In its holding, the *Century* Court held that the Supreme Court properly held that *Frisch v Bellmarc Management, Inc.* (190 AD2d 383 [1st Dept 1993]), which held that an "individual unit owner . . . 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" since plaintiff's claims "cannot be based on a breach of the statutory warranty of habitability," does not mean that a unit owner is precluded from interposing any defenses at all to an action for foreclosure (*Frisch* at 389) (*emphasis added*). The Court continued:

> The record indicates that it is plaintiff, not the unit owner, who is in violation of the obligations imposed by *the bylaws*. Therefore, [*Frisch*] is distinguishable from the matter herein.
> (*Century* at 207) (*emphasis added*)

Century involved the unit owners' ability to defend a foreclosure action where facts indicated that the condominium breached the bylaws. However, plaintiff herein does not seek to foreclose on the Units, and caselaw holds that a unit owner cannot rely on a condominium's failure to make repairs or breach of warranty of habitability as a defense to a claim of nonpayment of common charges.

Defendants also cite *Granada Condominium I v Morris* (225 AD2d 520 [2d Dept 1996]), which also is distinguishable from the instant case. In *Granada*, the defendant unit owner informed the plaintiff condominium board of damage to her unit caused by water leakage.

> The plaintiff and the defendant entered into an agreement, whereby the defendant would have her monthly common charge payments held in escrow until the matter was remedied. Certain repairs were eventually made, and the plaintiff commenced this action to recover unpaid common charges. The defendant asserted a counterclaim for an offset of damages to her unit. The trial court granted judgment in favor of the plaintiff and

awarded the defendant an offset of damages to her unit.
(*Granada* at 521)

Granada only reviews the *damages awarded* to the plaintiff condominium board. The issue on appeal was whether the trial court's decision, after a *non-jury trial*, to "award the defendant an offset of $12,200 for repairs to her two bathrooms *was a fair interpretation of the evidence and in accord with the plaintiff's Offering Plan*" (*id.* at 521). Herc, the Court does not reach the issue of *awarding* damages, as the damages are disputed; issues of fact exist for the trier of fact to determine the amount, if any, plaintiff should be awarded.

Therefore, this Court proceeds to address whether defendants' proposed affirmative defenses raise an issue of fact regarding plaintiff's liability.

Dismissal of Affirmative Defenses

According to CPLR §3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The "standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense. (*See, Winter v Leigh-Mannell,* 51 AD2d 1012 [1976]). Further, statements that will not defeat, mitigate or reduce the plaintiff's remedy are insufficient as a defense (*see* NY Jur, Pleading §138; *Walsh v Judge,* 223 AD 423, 425 [1st Dept 1928]). Thus, allegations of a plaintiff's wrongdoing are insufficient as defenses if the alleged wrongdoing is unrelated to the claim made against the defendants; instead the plaintiff's actions must in some way justify the defendant's actions to be properly pleaded as defenses (*TNT Communications Inc. v Management Television Systems, Inc.*, 32 AD2d 55 [1st Dept 1969], *order affd*, 26 NY2d 639 [1970] [plaintiff's alleged violation of antitrust laws did not justify defendant's appropriation of trade secrets and hence was not a proper

defense]). Finally, "[g]eneral denials in an answer are insufficient to raise triable issues" (*Iandoli v Lange*, 35 AD2d 793, 793 [1st Dept 1970]).

Here, none of defendants' five affirmative defenses has merit; as such, none defeats plaintiff's *prima facie* case establishing defendants' liability for breach of the Declaration and By-Laws.

Failure to State a Cause of Action

Defendants' first affirmative defense alleges that the Complaint fails to state a claim upon which relief may be granted. The standard in determining whether a pleading fails to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]). However, where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275

[1977]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Here, defendants fail to allege any facts in either its Answer or its opposition to support their claim that plaintiff has failed to state a cause of action. Further, as discussed above, plaintiff has sufficiently pleaded and established that defendants have breached the Declaration and By-Laws. Accordingly, the first affirmative defense is dismissed.

Unclean Hands

Defendants' second affirmative defense alleges that plaintiff's claims are barred by reason of its own unclean hands. It is well settled that unclean hands is an equitable defense that is not available in an action at law exclusively for damages, as here (*Manshion Joho Center Co., Ltd. v Manshion Joho Center, Inc.*, 24 AD3d 189 [1st Dept 2005]). Further, defendants fail to allege any facts in either its Answer or its opposition to support their claim that plaintiff has unclean hands. Accordingly, defendants' second affirmative defense is dismissed.

Appointment of a Receiver

Defendants' third affirmative defense, alleging that plaintiff failed to plead the necessary elements for the appointment of a receiver, lacks merit. CPLR §6401(a) provides in relevant part that "[u]pon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where *there is danger that the property will be removed from the state, or lost, materially injured or destroyed*" *(emphasis added)*. The First Department explains that the "drastic remedy of the appointment of a receiver is to be invoked only where necessary for the

protection of the parties to the action and their interests . . . .'There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established'" (*Di Bona v General Rayfin Ltd*, 45 AD2d 696, 696 [1st Dept 1974]; *In re Armienti*, 309 AD2d 659, 661 [1st Dept 2003]). The Court in *Di Bona* went on to hold that the petitioners had not established such necessity: "There is an insufficient demonstration that the corporation is insolvent, or that its assets are being diverted or wasted to warrant the drastic remedy of a receivership" (*id.*; *see also In re Harrison Realty Corp.*, 295 AD2d 220 [1st Dept 2002] [affirming the denial to appoint a receiver on the grounds that the movant "did not demonstrate danger of irreparable loss, and resort to a receivership is appropriate only when necessary for the protection of the interests of the parties"]).

Regarding a condominium board's right to collect common charges, *Fairbanks Capital Corp. v Nagel* (289 AD2d 99, 101 [1st Dept 2001]) is instructive. In *Fairbanks*, the First Department held that a condominium board's motion for the appointment of a temporary receiver [to collect common charges as use and occupancy] . . . was properly granted, "given that [the co-defendant] does not dispute that he has not paid common charges for the unit for years." Here, the record establishes defendants have not paid all of the common charges due. Contrary to defendants' argument, the facts that the Unit Owner in *Fairbanks* did not object to the appointment of a receiver and that "years" have not lapsed here since the common charges were paid as they had in *Fairbanks* do not render *Fairbanks* inapplicable.

Prudential Home Mortgage Co. Inc. v Salgado (NYLJ, August 1, 1994, at 29, col 2) is also instructive. In *Prudential Home Mortgage Co. Inc.*, a bank was involved in a second

attempt to foreclose on the mortgage of a condominium unit. The condominium board sought an appointment of a receiver to rent the unit and apply the proceeds first to the common charges and then to the mortgage, to which the bank opposed. The Court held that the bank's opposition "raises the specter of the wasting away of the asset and the accrual of needless common charges." It continued: "A denial of this application would be to the detriment of the interests of the Board *because it is unlikely that these common charges will be paid out of the proceeds of the foreclosure sale*" (*emphasis added*).

Here, plaintiff contends in its reply that defendants are "in the midst of financial straits and foreclosure of the Unit" (plaintiff's reply, ¶ 32). Plaintiff further contends that, because of plaintiff's financial problems, it is "left with little if any hope that it will ever be paid all of the arrears that it is owed" (*id.*). In their reply, defendants do not contest plaintiff's averments or even address plaintiff's concerns.

Defendants' contention that *Prudential Home Mortgage Co. Inc.* is distinguishable because it was an action for foreclosure is unpersuasive, since such a factor is not dispositive. In the case of *Eastbank, N.A. v Malneut Realty Corp.* (180 AD2d 442 [1st Dept 1992]), also a mortgage foreclosure action, the First Department reversed the Supreme Court's order for the appointment of a receiver, stating, *inter alia*, that the plaintiff "did not satisfy its burden of making a clear evidentiary showing that appointment of a receiver was necessary to conserve the property and to protect plaintiff's interests" (*id.* at 442-443; *see also Societe Generale v Charles & Co. Acquisition, Inc.* (157 Misc 2d 643, 649 [NY Sup Ct 1993] [denying a request that a receiver be appointed in a mortgage foreclosure action on the ground that "[a]ppointment of a receiver may be denied where *the property is sufficient security for the debt and the property is*

not in danger" (*emphasis added*)). Thus, defendants' third affirmative defense is dismissed.

Failure to Mitigate Damages

Defendants' fourth affirmative defense alleges that plaintiff failed to mitigate damages. Here, as defendants fail to allege any facts in either its Answer or its opposition to support such claim, the fourth affirmative defense is dismissed.

Fifth Affirmative Defense

Defendant's fifth affirmative defense alleges that the amount of plaintiff's damages equals or is exceeded by plaintiff's obligations to defendants by reason of repeated structural damage and flooding to the Units. Such an allegation addresses only the amount of damages owed to plaintiff; it is no defense to liability. Thus, the fifth affirmative defense is dismissed.

As each of defendants' five affirmative defenses lacks merit, plaintiff's motion seeking dismissal of such defenses is granted, and plaintiff's motion for summary judgment against defendants for breach of contract is granted on the issue of liability only.

Appointment of a Receiver

As discussed above, plaintiff has sufficiently alleged facts that would justify the appointment of a receiver, pursuant to CPLR §6401(a). However, in light of this Court's ruling (*infra* at 32-33), directing a hearing on damages, the appointment is unwarranted; damages will be assessed for the period up to the date of the hearing, and defendants have a continuing obligation to pay all future Common Charges and Additional Common Charges thereafter.

Defendants' Cross-Motion

Leave to Amend Answer

It is well settled that leave to amend a pleading, pursuant to CPLR §3025(b), should be

freely granted provided there is no prejudice or surprise to the nonmoving party *(Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]).

It also is well settled that the party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, this does not mean that those facts need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Here, defendants' Proposed Amended Answer contains the five affirmative defenses in its original Answer, discussed above, and four counterclaims: (1) breach of contract, (2) negligence, (3) breach of fiduciary duty and (4) an accounting.[4] Therefore, the Court addresses the issue of

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[4] The Court notes that plaintiff opposes the amendment by making only a general, conclusory statement that the counterclaim is supported by the same "allegations of hearsay" used to support defendants' opposition (reply, ¶ 85). However, as stated above, defendants have provided evidentiary proof in admissible form to support its arguments. Further, plaintiff fails to dispute any of the specific allegations of defendants' counterclaims or

whether the plaintiff's proposed counterclaim have merit.

Breach of Contract

Based on the elements required to allege breach of contract as noted above, defendants sufficiently allege that plaintiff breached the By-Laws and oral and written promises to defendants. Defendants allege that the By-Laws require that plaintiff promptly address any structural damage arising in common areas, at its expense rather than that of the Unit Owners whose dwellings may be affected by such damage. Defendants further allege that plaintiff failed to address the structural damage that caused flooding in the Units, even when Mr. Levenbrown pointed out it out to plaintiff repeatedly. Therefore, plaintiff allegedly violated the By-Laws. Defendants further contend that plaintiff reneged on promises made orally and in writing by Cooper Realty to Mr. Levenbrown, that defendants would be reimbursed for expenses incurred in repairing damage to the Units, and that defendants' account would be credited for all late fees and other charges incorrectly applied to their Common Charges account. Finally, defendants alleged that they have been injured in an amount to be proven at trial. Therefore, leave to add breach of contract as a counterclaim is granted.

Negligence

It is well established that in some cases tort liability may arise from a breach of a duty *independent of* a breach of contract (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 -390 [1987] [holding that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . . This legal duty must spring

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demonstrate that the facts alleged and relied upon are unreliable or insufficient to support the amendment (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007] *supra*).

from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract"]). The Court of Appeals in *Sommer v Federal Signal Corp.* 79 NY2d 540 [1992], *supra*) explains:

> A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties . . . . In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care (see, Prosser, Torts, at 613 [4th ed]).
> (*id.* at 551-552)

Here, defendants fail to sufficiently allege that plaintiff violated a legal duty independent of the Declaration and Bylaws. Defendants allege that plaintiff had a duty of care with respect to the maintenance and upkeep of all common areas in the Building, "as described and defined in the By-Laws, Offering Plan and all other governing documents" (Amended Answer, ¶ 12). Defendants further allege that plaintiff, acting directly and through the conduct of Cooper Realty, its managing agent, breached its duty of care to defendants by permitting the structural faults within the Common Areas to fester and worsen while taking no curative action, even after the condition was diagnosed and brought to its attention by Mr. Levenbrown (Amended Answer, ¶ 13). Finally, defendants allege that as a result of plaintiff's breach of its duty, defendants have been injured in the form of physical damage to the Units, in an amount to be proven at trial, and that plaintiff has refused to reimburse defendants for the expense of repairing the flood damage, although it initially agreed to do so.

As defendants' negligence cause of action sounds in contract and not tort, it is duplicative of its breach of contract claim (*see Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 122 [1st Dept 1999] [holding that "motion court properly deemed plaintiffs' cause of action against Bankers Trust Company to sound in contract, not tort" since

the duty arose out of the parties' Custodian Account Agreement]). Therefore, leave to add negligence as a counterclaim is denied.

Breach of Fiduciary Duty

To assert a cause of action for breach of fiduciary duty, a movant must allege (1) the existence of a fiduciary duty between the parties, (2) the breach of that duty, and (3) damages suffered by the movant as a result of the breach (*see* 4A NY Prac, Com Litig in New York State Courts §70:17 [2d ed]; *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278 [1st Dept 2002]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 184-185 [1st Dept 2000]).

Here, defendants allege that, as a matter of law, plaintiff and its members stand in a fiduciary relationship to defendants (Amended Answer, ¶ 24), and that "by reason of its conduct as described above," plaintiff breached this fiduciary obligation (Amended Answer, ¶ 25). Further, defendants allege that as a result of plaintiff's breach, defendants have been damaged in an amount to be proven at trial (Amended Answer, ¶ 26). However, for the reasons noted above, to the extent that defendants' breach of fiduciary duty counterclaim is duplicative of their breach of contract counterclaim, such counterclaim lacks merit (*see Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461, 463 [1st Dept 2007] [holding that "causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed"]). Therefore, leave to amend the Answer to add a counterclaim for breach of fiduciary duty is denied.

Request for an Accounting

Here, defendants allege that "[p]ursuant to the By-Laws and applicable law, [defendants] are entitled to an accounting of all monies believed to be owed by them." According to the First Department, "whenever there is a fiduciary relationship between the parties . . . there is an

absolute right to an accounting" (*Koppel v Wien, Lane & Malkin*, 125 AD2d 230, 234 [1st Dept 1986]). It is well settled that the board of managers of a condominium has a fiduciary relationship with a Unit Owner (*see Odell v 704 Broadway Condominium*, 284 AD2d 52, 59 [1st Dept 2001]; *Kaung v Board of Managers of Biltmore Towers Condominium Ass'n*, 22 Misc 3d 854, 873-874, 873 NYS2d 421, 436 [Sup Ct New York County 2008] ["Individual board members have fiduciary duties owed to the Condominium and its unit owners"]).

Here, in its proposed Amended Answer, defendants allege that plaintiff stands in a fiduciary relationship to defendants. Further, in its motion, plaintiff acknowledges that at "all times relevant, plaintiff was, and still is, the governing body *and fiduciary* of the Condominium" (Padilla Aff., ¶ 4) (*emphasis added*). Further, plaintiff does not oppose defendants' request for an accounting. Accordingly, defendants' counterclaim for an accounting has merit, and leave to assert this counterclaim is granted.

Trial on Damages and Counterclaims

According to CPLR §3212(c), if the only issues of fact that exist in a case relate to damages rather than to liability, summary judgment will be granted on the liability question. As discussed above, all of defendants' arguments in opposition only raises an issue as to how much defendants' owe plaintiff in damages, not liability. A counterclaim that is not "inextricably intertwined with, or inseparable from" plaintiff's main claim cannot serve as a setoff against plaintiff's main claim, or otherwise forestall judgment thereon (*European American Bank v Surgical Consultants, P.C.*, 764 NYS2d 693, 694 [1st Dept 2003]). As demonstrated above, defendants have an obligation to pay the Common Charges and Additional Common Charges due under the Bylaws notwithstanding plaintiff's alleged failure to make repairs. Accordingly, in the

exercise of the Court's discretion, the breach of contract and accounting counterclaims are severed.

Discovery

As the Court has granted plaintiff's motion for summary judgment on the issue of liability and has allowed a trial to go forward on defendants' counterclaims for breach of contract and an accounting, the branches of defendants' cross-motion for a stay of discovery and an order compelling plaintiff to comply with defendants' discovery demands are granted only to the extent that discovery shall proceed on the defendants' severed counterclaims.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of plaintiff Board of Managers of the Silk Building Condominium, on Behalf of All its Unit Owners, for an order, pursuant to CPLR §3212, granting plaintiff summary judgment against defendants Isaac Levenbrown and Jessica Klein, jointly and severally, is granted as to liability only; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and 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, by October 5, 2009 for a trial on damages, and appear for a trial on damages in Part 40 on November 2, 2009, 10:00 a.m.; no adjournments without consent of the Court; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3211(b), dismissing all of defendants' affirmative defenses pleaded is granted, and defendants' affirmative defenses are dismissed; and it is further

ORDERED that branch of plaintiff's motion for an order, pursuant to CPLR §6401(a), for the appointment of a receiver is denied as moot; and it is further

ORDERED that the branch of defendants' cross-motion seeking an order, pursuant to CPLR §3025(b), permitting defendants to serve an Amended Answer and Counterclaims is denied as to the counterclaims for negligence and breach of fiduciary duty; leave to serve an Amended Answer and Counterclaims is granted only as to the counterclaims for breach of contract and an accounting, and such Amended Answer and Counterclaims shall be served within 30 days of the date of this order; and it is further

ORDERED that defendants directed to obtain a no-fee Index Number and file an RJI on the severed counterclaims; and it is further

ORDERED that the branches of defendants' cross-motion seeking an order, pursuant to CPLR §3214(b), lifting the automatic stay of discovery, and, pursuant to CPLR §§3212(f) and 3124, compelling plaintiff to comply within a reasonable period with defendants' pending first demand for the production of documents and first set of interrogatories are granted only to the extent that discovery shall proceed on defendants' severed counterclaims; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference on the severed counterclaim before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, December 8, 2009 at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: September 16, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

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