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

PRESENT: JUDITH J. GISCHE, J.S.C. Justice

PART 10

Index Number : 107821/2007

KATZ, LAURIE

vs

ONE UNION SQUARE EAST

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ s motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 11/05/09

JUDITH J. GISCHE, J.S.C.

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 10

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LAURIE KATZ,

Plaintiff,

-against-

BOARD OF MANAGERS, ONE UNION SQUARE EAST CONDOMINIUM, NEW YORK, NEW YORK, AMERICAN INSURANCE COMPANY,

Defendant.

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Index No.: 107821/07
Seq. No. : 003/004

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers - Mot 003	**Numbered**
Pltf's n/motion [sj] w/LK affid, exhs	1
ALM affirm in opp, exhs	2

Papers - Mot 004	**Numbered**
Def's n/motion [sj] w/ALM affirm, TDE affid, exhs	1
LK affirm in opp, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from property damage caused to a condominium unit. Plaintiff and defendant Board of Managers, One Union Square East Condominium, New York, New York, each separately move for summary judgment.[1] CPLR § 3212.

Since issue has been joined, and the motions were made within the time provided under the CPLR, summary judgment relief may be considered by the court. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

[1] Upon motion, the court dismissed the action against American Insurance Company (see decision/order dated 8/7/08).

The following facts are undisputed. Plaintiff is the owner of a condominium unit Park 15A/B (the "unit") located in the building known as One Union Square East Condominium, New York, New York. The defendant is the Board of Mangers of the condominium.

On October 6, 2003, an electrical fire occurred at the unit, through no fault of the plaintiff or defendant. The damage that resulted therefrom was declared a "total loss" by both plaintiff and defendant's insurance companies. The unit was uninhabitable.

Under Article 6, Section 6.3-1 of the bylaws, the defendant is responsible to "arrange for the prompt repair and restoreation" of the unit. Both parties notified their insurance companies. Defendant's insurance covered the cost of cleaning and completely restoring the unit. Plaintiff's policy covered her personal property, improvements and betterments, and the cost of alternate living expenses in a comparable living situation for the reasonable period of time it would otherwise take to make the unit habitable.

Since the time of the fire, plaintiff has not returned to the unit. She claims that the unit remains uninhabitable. To date, plaintiff has paid all common charges, additional fees, homeowners insurance, taxes and other costs associated with the unit.

Plaintiff's remaining claims are sharply disputed. Plaintiff maintains that the defendant has failed to restore the unit in a timely fashion and a workmanlike manner, and, therefore, seeks damages for: [1] breach of the bylaws; [2] constructive eviction; [3] breach of the implied warranty of habitability; and [4] breach of the implied covenant of good faith and fair dealing.

The defendant, however, argues that it has acted properly and otherwise consistent the bylaws and has fulfilled its duties to plaintiff. It claims that plaintiff is solely responsible for delaying the completion of the repair work. Through the affidavit of Toni D'Egidio,

property manager of the condominium, the defendant makes the following claims. Shortly after the fire, the defendant promptly arranged for contractors to provide bids for repairs. The defendant claims that this process was stalled and delayed by plaintiff because she refused to provide access to the unit without prior consent and required her presence at the time of access, she refused to sign off on the restoration agreement, she was difficult to communicate with and spent and inordinate amount of time negotiating the costs of certain improvements she sought to make to the unit. The defendant has provided a time line of the various stages it went through in an attempt to timely complete the restoration of the unit.

On or about January 11, 2007, plaintiff was notified through her attorney that the unit was ready for inspection and possession. Plaintiff maintains in her verified bill of particulars that she inspected the unit in March 2007 and that the repairs were incomplete, including, *inter alia*, "there was no kitchen." Defendant claims that approximately ten months later, plaintiff requested a final walkthrough of the unit. Following the walkthrough, plaintiff submitted a further list of items to restore/repair. The defendant maintains that it has exercised best efforts to accommodate plaintiff's additional requests.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible

form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957). When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003). Since each party has moved for summary judgment, each bears the initial burden of establishing their respective motions or raising factual disputes that would defeat the other movant's motion.

The defendant argues that the second and third causes of action must be dismissed as a matter of law because they do not apply to the relationship that exists between a condominium unit owner and the board of managers. The court agrees. Condominium-unit owners are not protected by the warranty of habitability, since they do not hold a lease for the premises, but possess a fee-ownership interest in the subject premises. Linden v. Lloyd's Planning Service, Inc., 299 AD2d 217 (1st Dept 2002); see also Frisch v. Bellmarc Management, Inc., 190 AD2d 383 (1st Dept 1993); McCarthy v. Board of Managers of Bromley Condominium, 271 AD2d 247 (1st Dept 2000). Defendant is also entitled to summary judgment on plaintiff's claim for constructive eviction, because the parties do not

stand in a landlord/tenant relationship. See Meldrim v. Hill, 260 AD2d 836 (3d Dept 1999); see also Frisch, *supra*. Therefore, the second and third causes of action are hereby severed and dismissed.

Plaintiff's first cause of action alleges that the defendant breached the bylaws by "fail[ing] to properly insure that the repair of Plaintiff's Unit was completed in a timely fashion and a workmanlike manner." Article 6 Section 6.3-1 of the bylaws provides as follows:

> In the event that the Building or any part thereof is damaged or destroyed by fire or other casualty (unless three-fourths or more of the building is destroyed or substantially damaged and 75% or more in Common Interest of all Unit Owners do not duly and promptly resolve to proceed with repair or restoration) the Residential Board with respect to any damage or to destruction of the Residential Section, the Commercial Board with respect to any change or destruction of the Commercial section and the Condominium Board with respect to any damage to or destruction of the General Common Elements, shall arrange for the prompt repair and restoration thereof (including each Unit, but excluding fixtures, furniture, furnishing or other personal property not constituting a part of such Unit) and the applicable Board, Unit Owner or the insurance trustee, as the case may be, shall disperse the proceeds of all insurance policies to the contractors engaged in such repair and restoration in appropriate progress payments...

A condominium's by-laws constitute a contract with the unit owners. Lesal Assoc. v Board of Mgrs. of Downing Ct. Condominium, 309 A.D.2d 594 (1st Dept 2003). Two fundamental principles of contract construction are that: (1) agreements are to be construed in accordance with the parties intent; and (2) the best evidence of what the parties intend is what they provide in their writing. Greenfield v. Phillies Records, 98 N.Y.2d 562 (2002); Van Kipnis v. Van Kipnis, 840 N.Y.S.2d 36 (1st Dept. 2007). A written agreement that is complete, clear and unambiguous on its face, must be enforced according to the plain meaning of its terms.

Decisions made by the board of managers of a residential condominium are

reviewed according to the business judgment rule (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 NY2d 530 [1990]). Accordingly, courts must defer to good faith decisions made by a board of managers. Id. "To trigger further judicial scrutiny, an aggrieved [unit owner] must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith " (Pelton v. 77 Park Ave. Condominium, 38 AD3d 1, 8-9 [2006] [internal citations omitted]).

Here, plaintiff has failed to make a showing of any of the three elements that would trigger judicial scrutiny of the defendant's actions. Rather, the evidence shows that the defendant arranged for repairs of plaintiff's apartment and paid the contractor appropriately from the funds provided by the insurance proceeds. Plaintiff has failed to demonstrate that any of the alleged delays in effecting these repairs were the result of bad faith on the defendant's part in executing their obligations under the bylaws. The court cannot substitute its judgment for that of the defendant's, since the record shows that the defendant acted for the purposes of the condominium, within the scope of its authority and in good faith. See i.e. Schoninger v. Yardarm Beach Homeowners Ass'n, Inc, 134 AD2d 1 (2d Dept 1987); Frisch, *supra*; Blumberg v. Albicocco, 12 Misc3d 1045 (NY Sup 2006).

On the issue of the quality of the work performed by the defendant, the defendant maintains since the fire in 2003, that it has performed all of the necessary repairs to make the unit habitable. The defendant has provided the affidavit of its agent, Toni d'Egidio, the affidavit of Amadeo Mancusi, the president and owner of the contractor who performed the repair work on the unit, as well as numerous color photographs of the unit itself. Plaintiff has failed to demonstrate a triable issue of fact on this point. The only evidence that plaintiff has submitted on this record regarding the present condition of the unit are her own

affidavits, a memorandum from Mr. Edward Olmsted, CIH, CSP, detailing the results of an indoor environmental survey, which is unsigned and not sworn to, and correspondence between the parties, and plaintiff's insurance company regarding a water leak and associated damage which occurred on or about May 28, 2008. Plaintiff's affidavits are mostly conclusory on the issue of the present condition of the apartment. The only items that have specifically been identified by plaintiff as requiring further remedy are "windows" and "HVAC units" which plaintiff maintains are required to be replaced. Yet plaintiff has failed to establish that the defendant has violated the bylaws by failing to replace such items, or is otherwise required to perform such repairs.

As for Mr. Olmsted's memorandum, unsworn reports do not constitute evidentiary proof in admissible form and may not be considered in opposition to a summary judgment motion. See Bendik v. Dybowski, 227 AD2d 228 (1st Dept 1996). Therefore, Mr Olmstead's memorandum is not probative on the relevant issues.

Finally, plaintiff's documentation concerning the May 28, 2008 leak, which was apparently "caused when a speedy connector to a toilet broke" in either the unit, or another unit located above the subject unit, is irrelevant. Issues raised concerning the property damage associated with this water leak are not causally related to plaintiff's claims in this action.

For all of these reasons, the defendant is entitled to summary judgment dismissing the first cause of action.

As for the fourth cause of action, for breach of the implied covenant of good faith and fair dealing, the court rejects the defendant's argument that such a breach does not create an independent cause of action. While this implied covenant does not create new duties

under a contract, such a claim can remain, although a breach of contract claim does not otherwise exist. Richbell, 309 A.D.2d at 302. In such a situation, plaintiff must show that the defendant had exercised its contractual right malevolently, for its own gain, as part of a purposeful scheme designed to deprive the plaintiffs of the benefits of their contract. It follows, however, that since plaintiff has failed to establish that the defendant acted in bad faith, that the defendant is entitled to summary judgment dismissing this claim as well.

Accordingly, plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted in its entirety and the complaint is hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the complaint is hereby severed and dismissed; and it is further

ORDERED that the clerk is directed to enter judgment in accordance herewith

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
November 6, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.