SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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STAN NATT, JERRY COOPER, VIC LEVENSON and FRANKLIN KARP,

Plaintiffs,

-against-

THE WHITE SANDS CONDOMINIUM, THE BOARD OF MANAGERS OF THE WHITE SANDS CONDOMINIUM, on behalf of the unit owners, MOZAFARA SHOKRIAN, MOUSSA SHOKRIAN, IRAJ SHOKRIAN, MOUSSA RAYHANIAN AND SUN AMERICA LLC,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 03543/2009
Motion Seq. Nos.: 4 & 5

Papers Read on this Motion:

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Defendants Sun America and White Sands LLC's Affirmation	xx

In motion sequence number four, the Defendants move by notice of motion for an order pursuant to CPLR §3211(a)(7) dismissing the Plaintiffs' amended complaint in its entirety. In motion sequence number four, the Plaintiffs move for an order declaring the election, voting and designation rights of the parties under the condominium's governing documents, and setting this matter down for an election date to determine the Board of Managers.

The underlying facts giving rise to the dispute between the parties are set forth in this Court's short form order dated July 1, 2009. In the July 1, 2009 order, the Court granted the Plaintiffs' motion

for a preliminary injunction enjoining the Defendants from holding and conducting an election for the Board of Managers of the White Sands Condominium until the Court declares the elections, voting and designation rights of the parties under the White Sands Condominium governing documents.

The underlying dispute concerns the number of sponsor-designated board members to be elected to the Condominium Board of Directors. Counsel for the respective parties entered into a stipulation dated October 13, 2009. The stipulation provided that the Plaintiffs had the right to supplement the summons and amend the complaint to add and join "White Sands LLC" to the action as a Defendant pursuant to CPLR §305, §1033 and §3025, as of right and without leave of the Court White Sands LLC's time to answer the supplemental summons and amended complaint or otherwise appear after service was in accordance with the CPLR. On or about September 29, 2009, Plaintiffs served a supplemental summons and an amended complaint joining White Sands LLC as a party Defendant. On or about December 9, 2009, rather than serve an answer to the amended complaint, the Defendants brought the within motion to dismiss the complaint on the ground that the Plaintiffs lack standing to bring this action citing *Caprer v Nussbaum* 36AD3d 176 (2d Dept 2006) for the rule that the owner of an individual condominium unit is without standing to assert a claim for damages to the common interest of the condominium. In *Caprer, supra*, the Plaintiffs sued the board of managers, its managing agent and its accountant for an assortment of alleged torts arising out of alleged improprieties with the condominium's finances. The Court held that the Plaintiffs lacked standing to sue individually since the condominium's finances, profits and expenses were a common interest of the condominium (*RPL §339-m*), and "exclusive authority to manage the common elements and joint finances of the condominium is vested with the board of managers." *supra at 184. Caprer* is not applicable or controlling in the instant action since the claims here do not seek relief for alleged damage to the

common elements or joint finances of the Condominium. An individual unit owner's vote is not a common interest or common element of the condominium. The complaint does not seek relief for damages to those common elements or interests, but rather a declaration as to the voting and designation rights under the governing documents. In *Stein v Garfield Regency Condominium* ,65 AD3d 1126 (2d Dept 2004) *and Nuzzo v Board of Mangers of Jefferson Village Condominium,* 228 AD2d 568 (2d Dept 1996), individual shareholders brought declaratory judgment actions against the condominium. In fact, there are numerous cases brought by individual unit owners for a declaratory judgment where the Court declared and interpreted broad provisions in the condominium governing documents. See *Towers Associates v Boulevard Towers Condominium,* 295 AD2d 525 (2d Dept 2002); *Timmerman v Board of Managers of the Anchorage Condominium,* 212 AD2d 523 (2d Dept 1995).

The supplemental summons and amended complaint were served on or about September 29, 2009. The Defendants time to answer has expired. The time to answer was not extended by the Court or stipulation of the parties. Instead of interposing a timely answer, the Defendants made the within frivolous motion to dismiss the complaint for lack of standing. Rather than move for summary judgment before the service of the answer, the Plaintiffs could have moved for a default judgment against the Defendants for failing to serve a timely answer. The Plaintiffs argue that not only are the Defendants wrong on the law in bringing the motion to dismiss on the grounds of lack of standing, they appear to be engaged in dilatory tactics to delay the resolution of this matter on the merits. The Plaintiffs directed the Court's attention to the fact that the board, the condominium and the individual Defendants have, for almost an entire year, actively participated in this action, litigated the issues, answered the original complaint, filed papers in opposition to Plaintiffs' order to show cause for injunctive relief, filed papers in opposition to Plaintiffs' prior motion for summary judgment, filed a

prior cross-motion for summary judgment, attended several conferences before the Court and entered into a preliminary conference order and a stipulation. The motion by the attorneys for the Defendants for an order dismissing the amended complaint is **denied**.

In light of the fact that the Defendants have not yet interposed an answer and the Plaintiffs have not moved for a default judgment, the Court is constrained to deny the Plaintiffs' motion for summary judgment. Failure of the Defendants to serve an answer within 10 days of service of a copy of this order with notice of entry shall be deemed a default by the Defendants on the merits.

The Court will not countenance dilatory tactics or litigation by obstruction.

For example, the attorney for Defendants in his affirmation states:

> 14. The court is called upon to determine, as a matter of law, whether or not Defendant, **White Sands LLC, which is the sponsor-designee of Defendant, Sun America, LLC within the meaning of the relevant documents, should be considered the sponsor itself** and, if so, determine the voting and appointment rights of such sponsor or sponsor-designee. (emphasis added)
> 41. In the event that the court should find, as a matter of law that Defendant, White Sands LLC, is not the sponsor, there are no issues whatsoever.
> 45. By virtue of the two deeds that were recorded and are a matter of public record, **Defendant, White Sands LLC is clearly the sponsor-designee and must be treated as such.** (emphasis added)

By their own admission, Defendants affirm that White Sands LLC is the sponsor-designee and must be treated as such. (see par. 45 above)

With the aforesaid acknowledgments, Defendant White Sands Inc. would now be hard pressed to demonstrate that the obligations of the sponsor do not extend to White Sands as the sponsor-designee. See *West Gate House, Inc., v. 860-870 Realty LLC*, 7 AD3d412 (1st Dept 2004).

Indubitably, if Defendants concede that White Sands LLC is the "sponsor-designee," then the

"sponsor and/or sponsor-designees" may be precluded from controlling the condominium board. In construing the condominium documents as they apply to the voting rights of **all** the unit owners, the Court must consider the consequences, if any, of the sponsors omitting the following special risk language from the offering plan. 13 NYCRR 20.3 (c)(2) provides

> "If the bylaws of the condominium to do not include a provision that, after an initial sponsor voting control period a majority of the board of managers must be owner-occupants or members of an owner-occupant's household who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk and if either of these special risks exist, the cover of the plan must state in bold print.
>
> **Purchasers for their own occupancy may never gain control of the board of managers under the terms of this plan. (see Special Risks section of the plan.)**
>
> Disclose further that owner-occupants and non-resident owners, including sponsor, may have inherent conflicts on how the condominium shall be manager because of their different reasons for purchasing, i.e., purchase as a home as opposed as to an investment."

The relief requested in the respective motions are **denied** except that this action shall be given a trial preference due to the fact that Plaintiff Jerome Cooper is over 70 years of age, see CPLR §3403(a)(4).

A Certification Conference shall be held before me on March 15, 2010 at 10:00 a.m. at which time counsel for each party familiar with the case must be present and certify to the Court that discovery has been completed, settlement discussions have been unsuccessful and the case is ready for trial.

This constitutes the Decision and Order of the Court.

DATED: March 1, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\DECISION - DISMISS\Natt v White Sands Condo.wpd