Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

DOUGLAS MANOR ASSOCIATION, INC.

- against -

EDWARD BURKE a/k/a EAMON BURKE, et al.

Index Number 17052 2007

Motion Date December 1, 2009

Motion Cal. Number 5, 6 and 7

Motion Seq. No. 1, 2 and 3

The following papers numbered 1 to 30 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment in its favor against defendants, permanently enjoining defendants from violating Section "Thirteenth" of the restrictive covenants applicable to the premises known as 36-18 West Drive, a/k/a 3 Alston Place, Douglaston, New York Block 8044, Lot 13 (the Property), and from conducting various activities, and dismissing, with prejudice and in their entirety, the counterclaims for breach of fiduciary duties and unlawful discrimination, and for an award of costs and disbursements, including reasonable attorneys' fees; this motion by defendants Eamon Burke s/h/i/a Edward Burke a/k/a Eamon Burke and Mary Burke for summary judgment dismissing the complaint asserted against them; this motion by plaintiff pursuant to CPLR 3212 for summary judgment dismissing the counterclaims.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-13
Answering Affidavits - Exhibits.....	14-25
Reply Affidavits.....	26-30

Upon the foregoing papers it is ordered that the motions numbered 5, 6 and 7 on the motion calendar for December 1, 2009 are joined together for determination as follows:

Plaintiff is a not-for-profit domestic corporation, and an association of real property owners located in a subdivision in Douglas Manor, New York, organized for, among other

things, the purposes of caring for the common property and ensuring adherence to the deed restrictions governing the privately owned properties in the subdivision. Defendants are owners of 3 Alston Place a/k/a 36-18 West Drive, residential real property located in the subdivision. Defendants' property is subject to the covenants and restrictions set forth in the original grant from Douglas Manor Company, the original developer of the subdivision, dated September 26, 1907 and recorded on October 10, 1907, in Liber 1534, Page 133 (the Indenture). Douglas Manor Company imposed a covenant and restriction on the lots in Douglas Manor by means of Section Thirteenth of the Indenture (the Restrictive Covenant), which provides:

> "No lot or building erected thereon shall be used for any manufacturing or business purpose whatsoever, except that block 21 shall be exempt from said prohibition so long as it is used for the purpose of an inn, hotel or club house."

The Indenture further provides:

> "The aforesaid covenants are covenants running with the land and shall bind the heirs and assigns and the successors of the said party of the second part."

Plaintiff brought this action by filing the summons and complaint on July 9, 2007 with the County Clerk. Plaintiff seeks to permanently enjoin defendants from operating a construction contracting business and a boat mooring service business from the Property within Douglas Manor, and for an award of costs and disbursements, including reasonable attorneys' fees. In its complaint, plaintiff alleges that such operation and maintenance of these businesses at the Property violates the Restrictive Covenant. Plaintiff also alleges that defendant Eamon Burke has refused its demand that he cease and desist from operating or maintaining his businesses from his residence, and that defendant Mary Burke has wrongfully permitted defendant Eamon Burke to conduct his businesses from the property. Plaintiff further alleges that it is authorized to maintain this suit to enforce the Restrictive Covenant.

Defendants served an answer to the complaint, denying certain allegations of the complaint, asserting various affirmative defenses, and interposing counterclaims sounding in unlawful discrimination and breach of fiduciary duties of good faith and fair dealing based upon selective enforcement of the Indenture restrictions by plaintiff. Plaintiff served a reply denying the material allegations of the counterclaims, and asserting various affirmative defenses including ones based upon the protection of the business judgment rule, and failure to afford notice of this suit to proper authorities.

At the outset, the court notes that it appears plaintiff is represented by different counsel with respect to its main claims and in defense of the counterclaims. Such representation appears to have resulted in the service of separate notices of motion by

plaintiff. One of the notices of motion (motion no. 5 on the motion calendar for December 1, 2009) by plaintiff indicates that the relief sought is summary judgment in favor of plaintiff and against defendants, and dismissing the counterclaims. The relief sought in the other notice of motion (motion no. 7 on the motion calendar for December 1, 2009) is only for summary judgment dismissing the counterclaims. In support of its motions, plaintiff asserts that defendants are using the Property in violation of the Restrictive Covenant insofar as they are using it for the purpose of operating a construction contracting business known as "Edward Burke Contracting, Inc.," "Burke Construction," and "Burke Contracting," and that the activities related to such use include those which are readily discernible to other residents of Douglas Manor and which increase traffic, commercial and otherwise. Plaintiff seeks to permanently enjoin defendants from violating the Restrictive Covenant, and in particular, from conducting various specified activities, including among other things, storing construction materials and equipment at the Property, parking any business-related vehicles at the Property except vehicles unaffiliated with defendants in connection with work being performed at the Property, permitting any business name to be displayed at the Property or on any vehicle parked at the Property, permitting workers to assemble at the Property in connection with defendants' business, except to perform work at the Property, displaying the Property address on any vehicle owned or operated by defendants except as required by law on a commercial vehicle, and using the Property address in connection with any advertisement or promotion of any business in which defendants have a direct or indirect interest.

In addition, plaintiff asserts that its decision to litigate the issue is within the scope of its authority as authorized by its by-laws, and was taken in good faith and in furtherance of its purpose of enforcing the Restrictive Covenant so as to maintain its residential nature. It argues its decision to litigate is not subject to judicial review, and therefore, the counterclaim based upon breach of good faith and fair dealing must be dismissed. Plaintiff also asserts that defendants have failed to allege and prove that it has violated any statute prohibiting unlawful discrimination based upon race or national origin. In support of its motion, plaintiff offers, among other things, copies of the pleadings, the affirmation of its counsel, various affidavits, including those of Gregory Mason, the current president of plaintiff and former chairperson of the legal committee for plaintiff, Stallworth McGowin Larson, a resident of Douglas Manor, and Loretta L. Finck, a resident of Douglas Manor, and a member of the board of directors of plaintiff, and copies of defendants' deed, the Indenture, the deposition transcripts of defendants and Bernard Haber, former president of plaintiff, and Kay McDermott, a resident of Douglas Manor and former member of the board of directors of plaintiff, and an excerpt of its bylaws.

The Burke defendants oppose both motions by plaintiff and move for summary judgment dismissing the complaint. They offer, among other things, the affirmation of their counsel, and affidavits of defendant Eamon Burke, Luis Lazo, Oscar Gonzalez and John

Yepes, employees of Edward Burke Contracting, Inc., and Linda Wolfe, the former secretary of plaintiff, and the deposition transcript of Albert R. Kelly, plaintiff's past president.

Plaintiff opposes the motion by the Burke defendants.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman v City of New York*, 49 NY2d 557, *supra*).

Section 5 of plaintiff's by-laws provides:

> The purposes of the Association are to:
>
> (a) Care for the common property, providing such services as are necessary for its maintenance, enhancement, and peaceful and responsible enjoyment;
> (b) Ensure adherence to the deed restrictions governing the privately-owned properties in Douglas Manor;
> (c) Take other appropriate action to sustain and improve the quality of life in Douglas Manor.

> " 'Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy' (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 431 [2004]; *see 9394 LLC v Farris*, 10 AD3d 708, 709 [2004]). '[A] party seeking to enforce a restriction on land use must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction' (*Greek Peak v Grodner*, 75 NY2d 981, 982 [1990])" (*Perrin v Bayville Village Bd.*, __ AD3d __, 894 NYS2d 131, 133 [2010]).

Any ambiguity in a covenant restricting use must be strictly construed against the party seeking to enforce it, and the court must interpret the covenant to limit, rather than extend, its restriction (*see Witter v Taggart*, 78 NY2d 234, 237 [1991]; *see 9394 LLC v Farris*, 10 AD3d 708, 709 [2004], *supra*). "A covenant is ambiguous when it is capable of more than one interpretation or, in other words, when it does not unequivocally prohibit a use (*see Turner v Caesar*, 291 AD2d 650, 652 [2002]). The question of whether a restrictive covenant is ambiguous is a question of law to be resolved by the court." (*See Rautenstrauch v Bakhru*, 64 AD3d 554, 555 [2009]).

The Restrictive Covenant herein clearly aims to preserve the residential character of the neighborhood by prohibiting the use of those properties subject to the Indenture for any "business purpose." Such limitation clearly does not offend public policy (*see Forest Hills Gardens Corp. v 150 Greenway Terrace, LLC*, 37 AD3d 759 [2007]). The phrase "business purpose," is subject to various interpretations, but is generally understood in common speech and usage as including any particular occupation or employment habitually engaged in for livelihood or gain (*see* 11-121 Warren's Weed, New York Real Property § 121.32). It is beyond question that defendant Eamon Burke operates Edward Burke Contracting, Inc. for livelihood or gain.

A permanent injunction may be warranted for breach of a restrictive covenant which prohibits "business use" of a property. For example, in the case *Trustees of Columbia Coll. v Lynch* (70 NY 440 [1877]), the restriction against the use of premises for "any manufactory, or business whatsoever" was held to prohibit the use of a portion of the premises as a real estate office, and as an office for receiving orders for a painting business, where business signs were displayed. In *Launer v Hecht* (15 AD2d 843 [1962]), property owners were found to have violated a restrictive covenant which provided "no business, trade or profession shall be carried on or operated upon the premises," by conducting, from the basement of their private dwelling house, a business involving the storage of films. The plaintiffs in *Launer* presented uncontradicted proof that films were procured and returned daily to the premises by up to 15 employees, often at night, and film equipment was adjusted and repaired at the premises. In addition, the premises address was listed as the business address in the classified section of the telephone directory and in a resort publication.

More recently, the Appellate Division, Second Department, had the opportunity in *9394 LLC v Farris*, (10 AD3d 708 [2004], *supra*) to consider the parameters of a restrictive covenant, in an action for a permanent injunction, which provided, in relevant part, "that no manufactory, trade or business of any kind whatsoever shall at any time hereafter be erected, maintained or permitted upon the premises" and "[t]he term 'business' shall be deemed to prohibit the operation or maintenance of a school, hotel, or boarding or lodging house." The Appellate Division determined that such covenant "cannot be said unambiguously to prohibit the activities engaged in by the defendants." It also determined that it would be unreasonable to interpret the covenant to preclude the defendants owners in the privacy of their own home, from conducting certain incidental business-related activities, such as reading work-related documents or using the telephone, fax, or e-mail for incoming or outgoing communications, where those activities are not readily discernible to the public at large, or to other residents of the particular community. The Appellate Division also determined that the owners' admitted use of the premises as the nominal corporate headquarters of the company, did not, standing alone, violate the covenant as a matter of law or raise a triable issue of fact regarding the owners' compliance with the covenant. The Appellate Division noted that there was uncontradicted evidence that such use did not create any increase in traffic, commercial or otherwise. It found that neither the letter nor the spirit of the covenant was

offended so long as the business-related activities of the owners remained subordinate to the primary use of the premises as the owners' residence and provided that such activities are not readily discernible by other residents of the community.

In this case, defendant Eamon Burke admittedly uses the Property as the nominal corporate headquarters of "Edward Burke Contracting, Inc." a/k/a "Burke Contracting," "Eamon Burke General Contracting," a general contracting business of which he is the sole shareholder. He maintains the Property's address as the corporation's business address for various purposes, including corporate and vehicle registration, licensing, receipt of business mail, and insurance and tax purposes. Defendants testified at their examinations before trial that Edward Burke Contracting, Inc. maintains its books and records at the Property, and sends and receives business correspondence there. Defendant Mary Burke also testified that the telephone number for Edward Burke Contracting, Inc. is the Burkes' home telephone number.

Defendant Eamon Burke testified that he does not have a business sign on his property, advertise the business in the telephone directory, on a website or on flyers, or meet clients at his house. He also testified he uses a Chevrolet van and Chevrolet Suburban in connection with the business and that the van and Suburban are parked in the driveway at the Property when not in use. In his affidavit, he denies that his driveway and garage are visible from West Drive.

Defendant Eamon Burke admitted during his deposition that the van and Suburban previously displayed the business name and Property address on them, and bore commercial license plates. Defendant Eamon Burke testified, in effect, however, that in response to letters sent by plaintiff to him, he removed the company name and Property address from the vehicles, registered those vehicles in his own name and replaced the commercial license plates with noncommercial license plates. Defendant Eamon Burke denies in his affidavit that he stores any business tools anywhere on the Property, but nevertheless testified that company tools are stored in the van (which is parked at the premises) and at another location. He avers that he stores no business material or equipment in the house or garage, and testified that building materials are delivered directly to the job site. He also testified that a dump truck used by Edward Burke Contracting, Inc. displays the company name and the Property address on its doors, but stated such truck is parked elsewhere overnight. He admitted, however, that he parked the dump truck at his home at various times over the past five years during periods when he was renovating his own home. Defendant Eamon Burke additionally admitted that sometimes one to three of his Hispanic employees report to work by driving to his house, and parking their cars on the (public) street, typically arriving at 8:00 A.M. on weekdays. He stated that the employees then drive together to the job site in the van or in their car, and return to his house at the end of the day. Defendant Eamon Burke also stated that sometimes, when the employees leave their own tools in their car, they drive the van to the parked car and remove the tools. He admitted he advertised his business in the "club

book" issued by the Douglaston Club, wherein he listed the Property address as the business address. Defendant Eamon Burke testified that one Ed Ferry told him that an unidentified board member told him (Ferry) that the board did not like Hispanics going to Burke's house.

Stallworth McGowin Larson states in his affidavit, that he lives across from the Burkes, and observes workmen, who appear to be employees of Eamon Burke's general contracting business, arriving at the Burkes' house at about 8:00 A.M. virtually every work day that he (Larson) is home. Mr. Larson also states that the workmen go into the Burkes' garage, frequently retrieving equipment and other materials and loading the equipment and materials into a white panel van, with extension ladders on its roof, which is parked in the Burkes' driveway. Mr. Larson further states that the van then departs from the Burkes' driveway (with the workmen), and at times, returns to the Burke residence during the day, sometimes multiple times, with the workmen. According to Mr. Larson, the workmen park the white van in the Burkes' driveway for a period of time, and then depart again. Mr. Larson asserts he observed that the workmen move equipment and material from the Burkes' garage and basement into the van, during these mid-day visits. He states that at the end of virtually every work day, the workmen depart after returning the van to the driveway of the Burke residence, where it remains overnight and on Sundays. Lastly, Mr. Larson states that the van previously had the words "Burke Company, 3 Alston Place, Douglaston, NY" printed on its doors.

Loretta L. Finck states in her affidavit that on 8-10 occasions, over the past three years, at approximately 7:45 A.M. to 8:15 A.M. she has observed several people, who appear to be workmen, congregating in the Burkes' driveway, and also observed workmen crossing West Drive and walking in the direction of the Burke home. She also states that on at least four occasions, she observed the workmen moving tools and materials, including what appeared to be roofing shingles, into either a white van or a red pickup truck parked in the Burkes' driveway.

Kay McDermott testified at her deposition on April 16, 2009, that she observed a male employee of defendant Eamon Burke, who appeared to be a Hispanic person, park his private vehicle in front of her home, on the public street, almost daily, leave the car there all day, and then return at the end of the work day. She also testified that on at least one occasion, she followed him from the car to defendants' home. She further testified that one day in the week prior to her deposition, she saw defendant Eamon Burke leaving the Property in the "opened pickup truck" and that it appeared to have lumber or construction material in its bed.

Bernard Haber testified that he took photographs which depict Burke's van in the driveway of the property, and observed the business name on the van. The photographs show numerous ladders on the roof of the van.

Gregory Mason avers that the race, ethnicity or national origin of the employees of defendant Edward Burke Contracting, Inc. were not a motivating factor in plaintiff's decision to take legal action to enforce the restrictive covenant against the Burke defendants.

Edward Ferry, a member of the Douglaston Club, but not a member of Douglas Manor, states he never has spoken to anyone, including Eamon Burke or any board member, prior to the lawsuit being commenced, regarding Burke's employees and or their race or ethnicity.

Luis Lazo, Oscar Gonzalez and John Yepes state in their respective affidavits that defendant Eamon Burke has never received deliveries for jobs of Edward Burke Contracting, Inc., at the Property, and does not store equipment or materials for jobs in his garage or basement in Douglas Manor. They also state that all deliveries are made directly to the job, and they have not retrieved equipment or material from the garage or basement of defendant Eamon Burke's home. They further state that they do not perform any carpentry or other construction work related to the business at his home. They admit that depending on the day or job, they meet defendant Eamon Burke at his house and drive together to the job site.

Linda Wolfe states in her affidavit that the driveway and garage of defendants is not visible from West Drive.

Under such circumstances, it is clear that defendant Eamon Burke has used the Property for business purposes insofar as he has engaged in business activities, with respect to Edward Burke Contracting, Inc., i.e. maintaining books and records, using the Property address for licensing, registrations, insurance and tax purposes, receiving business mail, and telephone use, within the privacy of his own home and which are not readily discernible to the public at large or to other Douglas Manor residents, and which do not increase traffic, commercial or otherwise. However, it would be unreasonable to interpret the covenant to preclude defendants from conducting such incidental business-related activities were they considered alone (*see 9394 LLC v Farris*, (10 AD3d 708 [2004], *supra*). Nevertheless, questions of fact exist as to whether defendant Eamon Burke has also engaged in business activities of Edward Burke Contracting, Inc. which may be considered to violate the Restrictive Covenant when taken together and which are readily discernible to the public and other Douglas Manor residents, and which increase traffic, commercial or otherwise, i.e. the parking of the van and Suburban overnight in the Property driveway, storing tools and materials and equipment at the Property, retrieving tools, materials and equipment from the structures at the Property or the van parked at the Property driveway, allowing up to three employees to meet daily at the Property to car pool to and from job sites, and annually advertising the business in the Douglaston Club book.

To the extent plaintiff seeks to permanently enjoin defendants from performing any business-related carpentry or other construction work by Edward Burke Contracting, Inc. at

the Property, plaintiff has failed to demonstrate by admissible proof that defendants have performed any business-related carpentry or construction work for customers of Edward Burke Contracting, Inc. at the Property. Furthermore, plaintiff has failed to demonstrate that defendants have continued to display any business name at the Property except when parking the business's dump truck at the Property during the period of renovations performed at defendants' residence. The admitted parking of the dump truck at the Property during such periods of renovation cannot be considered evidence of a business purpose use in violation of the Restrictive Covenant.

In addition, plaintiff has failed to establish a basis for its claim that defendants are using the property for a business purpose related to the mooring service business, "Brian's Mooring Service." Defendant Eamon Burke testified that he serviced and installed moorings using a boat which is moored in Little Neck Bay, and that when mooring tackle is removed for the winter, it is stored in the boat. He also testified he serviced 10-15 moorings for friends in 2006 and 2007 and never received any payments from them other than for the cost of the materials involved. Albert R. Kelly's testimony regarding a statement allegedly made by Mr. Burke to someone else that mooring tackle was on his (Burke's) lawn is inadmissible hearsay.

Summary judgment dismissing those portions of the complaint based upon violation of the Restrictive Covenant due to defendant Eamon Burke's use of the Property for the business purposes of performing any business-related carpentry or construction work for customers of Edward Burke Contracting, Inc. at the Property, parking the Edward Burke Contracting, Inc. dump truck in the Property driveway while performing renovations at the Property itself and for operating his mooring service business is warranted.

Summary judgment, however, is inappropriate with respect to the remaining portion of plaintiff's claim for injunctive relief based upon violation of the Restrictive Covenant arising out of the use of the Property for business purposes related to Edward Burke Contracting, Inc.

With respect to the second counterclaim for unlawful discrimination based upon race or national origin, defendants have failed to allege or prove that they filed a discrimination claim with the Equal Employment Opportunity Commission, and therefore, have failed to establish any basis for a federal claim for unlawful discrimination premised upon race or national origin under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (*see Patrowich v Chemical Bank*, 98 AD2d 318 [1984]).

To the extent defendants assert a claim under New York law (*see e.g.* the New York State Human Rights Law [Executive Law § 296] or the New York City Human Rights Law [Administrative Code of the City of New York § 8-107) based upon unlawful discrimination based upon race and national origin, they do not claim they themselves are members of a

protected class. Rather, defendants assert that plaintiff's decision to enforce the restrictive covenant against them is the result of racial animus directed against the Hispanic individuals hired by Edward Burke Contracting, Inc., who car pool from the Burke defendants' home.

A claim based upon unlawful racial or national origin discrimination can be maintained only in the context of 1) an employment relationship, 2) the refusal to sell, rent, lease or withhold a housing accommodation because of race or national origin, 3) the discrimination in the terms, conditions or privileges of the sale, rental or lease of any housing accommodation or in the furnishing of facilities or services therewith, because of one's race or national origin, or 4) the denial of access to a public accommodation (*see* Executive Law § 296, *et seq.*; New York City Commission on Human Rights § 8-107).

Defendants, however, make no claim that they are employed by plaintiff, or have been denied by plaintiff of the right to buy, sell, rent or lease a housing accommodation, have been discriminated against by plaintiff in the terms, conditions or privileges of the sale, rental or lease of a housing accommodation, or have been denied any service or access by plaintiff to any facility or public accommodation. In addition, defendants have failed to offer any admissible evidence that racial animus or animus against Hispanics motivated any member of the board of directors of plaintiff in voting to bring suit to enforce the restrictive covenant against them.

With respect to the first counterclaim based upon breach of fiduciary duty, plaintiff asserts it was authorized to bring the suit, and that the suit was commenced in good faith, and in furtherance of the legitimate interests of the corporation. Plaintiff offers evidence, by means of the affidavit of Mr. Mason, a copy of the excerpted portion of the bylaws, the copies of the deposition transcripts of Mr. Haber and Ms. MacDermott, copies of various board minutes, and an unsigned letter dated July 26, 2005 addressed to Mr. Haber, to show that prior to suit, oral and written complaints were made to members of the board of directors regarding the purported business activities of defendant Eamon Burke at the Property.

Plaintiff asserts it contacted defendant Eamon Burke requesting that he halt his business activities at the Property before commencing suit, and that although defendant Eamon Burke painted over the business name and Property address on the van and Suburban, he did not cease using the Property for the general contracting business purpose. Plaintiff contends that the legitimate interests of the association were served by its bringing this action, because his activities are visible to the public and Douglas Manor residents and impact negatively on the residential nature of the community.

When reviewing actions of a homeowners' association or its board, absent claims of fraud, self-dealing, unconscionability or other misconduct, a court should apply the business judgment rule and limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association (*see*

Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530 [1990]; *Walden Woods Homeowners' Assn. v Friedman*, 36 AD3d 691 [2007]; *Renauto v Board of Directors of Valimar Homeowners Assn, Inc.*, 23 AD3d 564 [2005]; *Gillman v Pebble Cove Home Owners Assn.*, 154 AD2d 508 [1989]).

Plaintiff has made a prima facie showing that their decision to sue defendants is shielded by the business judgment rule, and thus, is not incompatible with good faith and the exercise of honest judgment.

Defendants make no allegation that plaintiff engaged in fraud, self-dealing, unconscionability or other misconduct when deciding to bring this action. Nor do defendants allege the decision by plaintiff to commence suit was ultra vires or unauthorized by the board of directors. In any event, the bylaws authorize plaintiff to ensure adherence to the deed restrictions. Furthermore, to the extent defendants claim that plaintiff engaged in misconduct by virtue of unlawful discrimination based upon race or national origin, such claim has been rejected herein.

Defendants assert that plaintiff's decision to sue for enforcement of the Restrictive Covenant was not based upon any evidence of its violation by them. However, as discussed above, questions of fact exist regarding whether defendant Eamon Burke was, or is, engaged in a number of purported business use activities in relation to Edward Burke Contracting, Inc.

Defendants also assert, to the extent plaintiff believed it had evidence of their violation of the Restrictive Covenant, that the decision to sue nevertheless constituted selective enforcement of such covenant. Defendants claim that other residents of Douglas Manor, including, George Schmidt, Michel Fiechter, Quentin Thomas, and Lidia Bastianich are known by plaintiff to use their properties for business purposes, and yet plaintiff has failed to act to stop such residents from such use. Defendants, however, have failed to show that plaintiff received complaints against other residents, who routinely, rather than occasionally, used their properties for business purposes, and failed to cease all activities which were discernible to their neighbors in Douglas Manor when asked to do so. Under such circumstances, to the extent selective enforcement may constitute a breach of a fiduciary duty (*see Captain's Walk Homeowners Assn v Penney*, 17 AD3d 617 [2005]; *W.O.R.C. Realty Corp. v Carr*, 207 AD2d 781 [1994]; *cf. Trump Village Section 3, Inc. v Moore*, 84 AD2d 812 [1981]), defendants have failed to establish a basis for the first counterclaim.

To the extent defendants assert Mr. Haber and Ms. MacDermott influenced the board of directors of plaintiff to commence suit against them, as a means of carrying out personal vendettas each harbored against defendant Eamon Burke, such assertion is insufficient to establish a basis for the counterclaim based upon breach of fiduciary duty. Again, questions of fact exist as to whether defendants are in violation of the Restrictive Covenant. In

addition, defendants have failed to show the manner in which either Mr. Haber or Ms. MacDermott controlled board members in voting to take legal action against defendants.

Accordingly, that branch of the motion numbered 5 on the motion calendar for December 1, 2009 by plaintiff for summary judgment in its favor and against defendants is denied. That branch of the motion numbered 5 on the motion calendar for December 1, 2009 by plaintiff for summary judgment dismissing the counterclaims is granted. The motion numbered 7 on the motion calendar for December 1, 2009 by plaintiff for summary judgment dismissing the counterclaims is denied as moot. The motion by defendants for summary judgment dismissing the complaint against them is granted only to the extent of granting them summary judgment dismissing those portions of the complaint based upon defendants' alleged violation of the Restrictive Covenant due to defendant Eamon Burke's use of the Property for the business purposes of performing any business-related carpentry or construction work for customers of Edward Burke Contracting, Inc. at the Property, parking the Edward Burke Contracting, Inc. dump truck in the Property driveway while performing renovations at the Property itself, and operating a mooring service business.

Dated: March 22 , 2010

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J.S.C.