

Wirth v Chambers-Greenwich Tenants Corp.

2010 NY Slip Op 30755(U)

March 23, 2010

Supreme Court, New York County

Docket Number: 107636/07

Judge: Marylin G. Diamond

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

PRESENT: MARYLIN G. DIAMOND

PART 48

Justice

Index Number : 107636/2007

WIRTH, JOHN

VS.

CHAMBERS-GREENWICH TENANTS

SEQUENCE NUMBER : 007

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this 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 is denied part of the attached decision and order -

ENTER

FILED

APR 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/23/10

MGD
MARYLIN G. DIAMOND J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 48

-----x
JOHN WIRTH and SYLVIE WIRTH,
Individually and as Shareholders of
CHAMBERS-GREENWICH TENANTS CORP.
on behalf of CHAMBERS-GREENWICH
TENANTS CORP.,

Plaintiffs,

Index No.: 107636/07

-against-

CHAMBERS-GREENWICH TENANTS CORP.,
MARILYN KLAUS, JANET CHECKMAN, JEAN
LOUIS GRAUBY & STEPHEN GABOURY,
Individually and as Officers and
Directors of CHAMBERS-GREENWICH
TENANTS CORP.,

Defendants.

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NEW YORK
COUNTY CLERK'S OFFICE

-----x
MARILYN G. DIAMOND, J.:

Motion sequence numbers 007 and 008 are consolidated for disposition.

In motion sequence number 007, plaintiffs John and Silvie Wirth (together, Wirth) move, pursuant to CPLR 3212 (e) and CPLR 3001, for partial summary judgment and/or declaratory judgment finding (1) that the individual defendants are liable for bad faith and breach of fiduciary duty by failing to process a purchase application for the sale of plaintiffs' cooperative residence unless plaintiffs complied with certain conditions; (2) that any or all of the aforesaid conditions constitute an unreasonable restraint on alienation; (3) that the "Artist Certification Requirement" constitutes a breach of plaintiffs'

proprietary lease and is in violation of Chambers-Greenwich Tenants Corp.'s certificate of incorporation; (4) enjoining defendants from imposing the aforesaid conditions on a future sale of plaintiffs' unit; (5) on behalf of Chambers-Greenwich Tenants Corp. (Co-op), enjoining defendant Marilyn Klaus (Klaus) from using Unit 3 as a dance studio; and (6) declaring that plaintiffs are not in violation of certain agreements and matters addressed by the aforesaid conditions, and that they may sell their unit for residential purposes only, pursuant to the proprietary lease.

In motion sequence number 008, defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Third Amended Complaint in its entirety, and granting defendants summary judgment on their counterclaims. Plaintiffs cross move for summary judgment dismissing the counterclaims and to consolidate these two motions for disposition.

In their Third Amended Complaint, plaintiffs assert 13 causes of action: (1) enjoining defendants from imposing the conditions discussed herein on any future sale of plaintiffs' shares; (2) damages for breach of fiduciary duty, causing the cancellation of the first contract for the sale of plaintiffs' unit; (3) damages for breach of fiduciary duty, causing the cancellation of the second contract for the sale of plaintiffs' unit; (4) a declaration that plaintiffs are in compliance with

the escrow agreement; (5) enjoining defendants from terminating plaintiffs' proprietary lease based on plaintiffs' failure to cure items appearing in the Notice to Cure; (6) damages as against the individual defendants for statements allegedly made to the attorney for the first prospective purchaser; (7) damages based on defendants' failure to process a purchase application; (8) vacating and annulling the action taken at the board meeting that ousted plaintiff John Wirth as a director and officer; (9) enjoining defendants to approve plaintiffs' renovation plans; (10) enjoining the use of Unit 3 as a dance studio; (11) money judgment on behalf of the Co-op against defendants Klaus and Checkman for alleged nonpayment of maintenance; (12) an accounting on behalf of the Co-op for all legal fees paid by the Co-op to its attorney; and (13) reasonable attorney's fees.

In their answer, defendants assert five counterclaims against plaintiffs: (1) a declaration that the Co-op is entitled to enter and examine the roof of the building and an injunction against plaintiffs from interfering with the Co-op's access to the roof, and that plaintiffs release the funds from escrow to the Co-op; (2) an injunction prohibiting plaintiffs from using the roof until such time as carry treads and other protective measures are installed; (3) breach of the proprietary lease by engaging in malicious and abusive conduct; (4) legal expenses incurred by defendants to defend against plaintiffs' malicious

and misleading statements to administrative agencies; and (5) reasonable attorney's fees.

The Co-op is the fee owner of the premises, a former commercial building that has been converted into loft residences. The building is divided into five units. Defendant Klaus is the owner of Unit 3 on the third floor of the building, and co-owner of Unit 1 on the ground floor with her husband, defendant Stephen Gaboury (Gaboury). Both Klaus and Gaboury are officers and directors of the Co-op. Defendant Janet Checkman (Checkman) is an owner-shareholder of the Co-op who resides in Unit 2 on the second floor of the premises, and is an officer and director of the Co-op. Defendant Jean Louis Grauby (Grauby) resides in Unit 4 on the fourth floor of the building, and is an officer and director of the Co-op.

Plaintiffs purchased Unit 5, which, allegedly according to the terms of the proprietary lease, includes the roof, on March 3, 2005. After the purchase, John Wirth became an officer and director of the Co-op until February 28, 2007, when, according to Wirth, he was removed without cause at a special shareholders' meeting at which the Co-op's by-laws were amended to reduce the number of directors from five to four.

According to plaintiffs, Unit 1 is used, not as a residence, but as a studio to create, produce, compose and participate in music projects. Plaintiffs assert that, pursuant to the

proprietary lease, Unit 1 may not be used for any purposes "other than a store [or] for residential purposes provided that the Lessee, at his own expense, complies with all legal requirements for the use of such for residential purposes." Motion, Ex. 10, ¶ 14. Units 2, 4 and 5 are used for residential purposes. According to plaintiffs, Unit 3 is used both as a residence and dancing school for children ages five through 18. Allegedly, the dancing school operates three times per week.

The premises are in a light manufacturing district designated M1-5, and is within the Special Lower Manhattan Mixed Use (LMM) District. At the time of the initial conversion to a cooperative, in 1979, the property could not be used for residential purposes without a certificate of occupancy; however, the units in the building were altered, and a certificate of occupancy was issued by the Department of Buildings in March, 1981, permitting the units on the second through fifth floors to be legally occupied as loft residences, and classifying them as a "Class 'A' Multiple Dwelling, Article 7-B (Multiple Dwelling Law)." Motion Ex. 14.

The prior owner-occupier of Unit 5 made several alterations to said unit, including the construction of a mezzanine and a skylight, which affected the fifth floor hallway leading to the roof. After the alterations were made, a second certificate of occupancy was issued for the building on December 8, 2004, which

indicates the use of the units on the second through fourth floors as loft residences, and the Unit 5 on the fifth floor as a "Loft Residence and Mezzanine." This certificate of occupancy states that the building is a "Class 'A' Multiple Dwelling Article 7-B (Multiple Dwelling Law)." Motion Ex. 15.

Plaintiffs contend that this certificate of occupancy zones units 2 through 5 for strictly residential purposes, whereas defendants maintain that the 7-B classification restricts the use of the units for artists only.

By writing dated January 19, 2005, the Co-op consented to the sale of Unit 5 to plaintiffs, subject to certain conditions, which included the following:

4. The Seller shall leave a sufficient escrow to deal with his improper alteration of the hallway owned by the co-op, leading to the roof. The amount shall be sufficient to restore, change or alter the hallway to the satisfaction of the co-op and Mr. Nakrosis, Jr., the building architect/engineer. See 1b above.

Section 1b estimated that the cost of the correction to the hallway would be under \$10,000,00. Motion Ex. 18.

As additional conditions of the sale of Unit 5 to plaintiffs, the Co-op required plaintiffs, as purchasers, to assume liability for any alterations made by the seller, and that "any and all future alterations are to be with the written approval of the co-op . . .," and no foot traffic was to be allowed on the roof until additional protective measures, such as carry treads, were placed over the roof membrane. *Id.* Further, no

garden, fires or barbeques are permitted on the roof, and plaintiffs, as purchasers, are required to allow periodic inspections of the roof by the Co-op's engineer. *Id.*

Following the closing on Unit 5, \$20,000.00 was placed in escrow, which provided that \$10,000.00 would be dedicated to fixing the hallway, as reflected in the Co-op's consent to the sale of the unit, and the remaining \$10,000.00 was to be used for the installation of a riser. All of the work contemplated by the escrow agreement was to be completed within 90 days of its execution, which was dated March 3, 2005. Motion Ex. 20.

The fifth floor hallway stairs connect to the bulkhead, which provides access to the roof, and is a common area controlled by the Co-op. Motion Ex. 6. The bulkhead is the extension of the stair above the roof line, encompassing the top portion of the stair above the roof line. Motion Ex. 17. Allegedly, when the alterations were made for the mezzanine and skylight, the fifth floor hallway was narrowed and the stair railing was removed, which is alleged to be a Building Code violation. Motion Ex. 19.

According to the deposition of John Daniel Nakrosis, Jr. (Nakrosis), the findings upon which the consent to the sale of Unit 5 were based included the correction of a lack of a railing on the upper portion of the stair and remedial repairs, if necessary, to the framing of the alteration as it affected the

hallway. Nakrosis Deposition, at 29, 38. Nakrosis further stated that the alteration of the bulkhead was not included in his findings, and that the alteration of the bulkhead would cause approximately 15 square feet of the open area of the roof to be taken. *Id.* at 18. Plaintiffs assert that this alteration of the bulkhead would cause the loss of approximately 15 square feet of the roof, constituting a taking of their property to which they did not consent.

At her deposition, Klaus maintained that the extension of the bulkhead to install a landing at the top of the stairs was needed for reasons of safety. Klaus Deposition, at 87. No landing existed at the top of the stairs when the second certificate of occupancy was issued. *Id.* at 87-88.

According to the proprietary lease,

[a]nything herein contained to the contrary notwithstanding, the Lessee of Unit 5 shall be solely responsible for the maintenance, repair and replacement of the main roof, the parapet wall, gutter and bulkhead on the roof.

Motion, Ex. 10.

As alleged by plaintiffs, because they refused to consent to the expansion of the bulkhead and their refusal to release funds in escrow, they were singled out for harmful treatment by defendants. The alleged harmful treatment includes: (1) the Co-op's refusal to approve plaintiffs' plans for alterations to Unit 5; (2) the removal of John Wirth from the board of directors; and

(3) the imposition of legal and professional fees preventing the sale of plaintiffs' interest in Unit 5.

In April of 2007, plaintiffs listed their unit for sale, and a written offer was forthcoming on May 7, 2007, from a potential purchaser named Chris Hoffman (Hoffman). However, after the potential buyer performed due diligence, he revoked his offer before any contract for sale was signed for the following reasons:

- 1) The building is an Artist in Residence Building (Which I was never informed of)
- 2) The seller [plaintiffs] has threatened a lawsuit against the building which has caused their insurance company to drop them resulting in significantly higher rates for the building
- 3) There are discussions about putting other apts air conditioners on the roof which would basically take away the private roof
- 4) The head of the board said that there are a lot of problems with them and the seller which could seriously delay any sort of closing.

Motion Ex. 24.

A second purchaser, Timothy Merrell (Merrell), was found for the unit, who entered into a written contract for the acquisition of Unit 5 on October 18, 2007. A purchase application package was put together for Merrell and was submitted to the board with a request that it be processed. According to paragraph 11 of the rider to this contract for sale, the "contract and the closing contemplated hereunder are specifically conditioned upon the complete resolution of the [ongoing dispute among plaintiffs and the Co-op]." Motion Ex. 25. On November 16, 2007, the Co-op's

counsel wrote to plaintiffs' attorney stating, among other things:

the Co-op will not commence processing any application for the sale of the Wirths' stock and lease until such time as the Wirths:

- (1) Cure objectionable conduct as per notice dated June 9, 2006 and resolution dated March 12, 2006;
- (2) Cure the monetary defaults referenced in the notice dated March 7, 2007 and otherwise reimburse the Co-op for the expenses they have caused;
- (3) Advise whether the proposed buyer is aware of the requirement for certification as an artist by the New York City Department of Cultural Affairs;
- (4) Instruct the 'escrow agent' to release the sums held in escrow for the repair of the fifth floor bulkhead and roof drain riser;
- (5) Permit the repairs to the fifth floor bulkhead to proceed; and
- (6) Provide such other assurances and covenants as the Co-op may reasonably request.

Motion Ex. 27.

The notice to cure referenced in the attorney's letter refers to plaintiffs' alleged refusal to allow the work to commence on the bulkhead, evidenced by a memorandum from John Wirth to the Co-op board stating that he would not allow work to commence because he believes that the work is in contravention of the escrow agreement, as the cost being higher than the initial estimate, and that the bulkhead is part of his property, pursuant to the proprietary lease. Motion Ex. 36. It is noted that the proprietary lease submitted with these papers is unsigned, does not designate to which unit it refers, and does not state that the roof is part of the proprietary lease of Unit 5. The March 12, 2007, resolution involves the board's decision to proceed

with repairs to the bulkhead, and the March 7, 2007, notice to plaintiffs contains an itemized statement that alleges that plaintiffs owe the Co-op \$6,851.85 in assessed charges. *Id.*

Plaintiffs maintain that the premises do not have to be occupied by an artist and, therefore, imposing such a condition on the sale of the unit is improper. Plaintiffs also assert that the board never held a special meeting to determine whether plaintiffs' refusal to comply with provisions of the consent to the purchase of their unit constitutes objectionable conduct, and therefore is an improper condition as violative of the requirements of the proprietary lease. Plaintiffs also say that, pursuant to the escrow agreement, they cannot unilaterally authorize the release of the escrow funds, but that the funds may only be released when the Co-op submits a letter indicating that the funds need to be released to comply with the terms specified in the escrow agreement. According to the escrow agent, no such letter was forthcoming from the Co-op. Motion Ex. 34.

In opposition, defendants submitted a letter dated February 28, 2007, to the escrow agent that references a letter sent to him by the Co-op on October 27, 2005, that meets the requirements of the escrow agreement. A copy of that letter is attached as well. Defendants' Motion Ex. N.

Lastly, plaintiffs aver that the amount that the Co-op claims that they owe includes the Co-op's attorney's bill, which

is "unproved, unsettled and unadjudicated." Aff of John C. Schnauffer, at 35.

On July 17, 2008, Merrell cancelled the contract of sale. Plaintiffs contend that the sale was lost because of the board's refusal to process Merrell's application without plaintiffs first fulfilling improper conditions imposed by the board. However, in Merrell's notice of cancellation, he specifically states that he is terminating the contract for the reasons stated in paragraph 11 of the rider to the contract, i.e., plaintiffs' failure to resolve their legal disputes with the Co-op. Motion Ex. 30.

In opposition, defendants state that plaintiffs did not lose the sale of their unit because of the allegedly improper conditions placed on the sale by the board but, as stated in Merrell's notice of termination, because the contract of sale was conditioned upon the resolution of plaintiffs' lawsuit with the Co-op, and, when the lawsuit failed to be resolved within nine months after the execution of the contract, the purchaser exercised his right to terminate the agreement. Further, defendants assert that the relief sought in the instant motion does not relate to the 13 causes of action specified in plaintiffs' Third Amended Complaint.

In their opposition, defendants include a determination from the Department of Buildings from March, 2007, that states that the third floor unit may be used as a ballet school because the

building is zoned and classified as subject to Article 7-B of the Multiple Dwelling Law. Opp. Ex. D. This, defendants aver, provides a factual basis for their opinion that the units may only be sold to certified artists.

Defendants also argue that, prior to the instant motion, plaintiffs never asserted a breach of contract claim nor disputed the specific items on the notice to cure monetary defaults, and therefore, cannot, at this juncture, assert these claims for the first time.

DISCUSSION

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of plaintiffs' cross motion to consolidate

motion sequence numbers 007 and 008 for disposition is granted.

Defendants' argument that the plaintiffs' motion for partial summary judgment should be denied as being based on unpleaded causes of action is unpersuasive. The causes of action enumerated in the Third Amended Complaint are sufficient to apprise defendants of the instant prayers for relief, and the court does not find that defendants have been unduly prejudiced thereby. *Fofana v 41 West 34th Street, LLC*, 62 AD3d 522 (1st Dept 2009); *Kramer v Danalis*, 49 AD3d 263 (1st Dept 2008).

Plaintiffs' motion for partial summary judgment is denied.

The landmark New York case concerning the individual liability of directors of co-operative and condominium residences is *Matter of Levandusky v One Fifth Avenue Apartment Corp.* (75 NY2d 530 [1990]), in which the Court of Appeals held that such directors are to be held to the same business judgment rule standard as are the directors of a commercial corporation. As stated by the Court,

the business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' So long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient' [internal citations omitted].

Id. at 537-538.

To determine whether the board members acted within their

authority, and are thereby protected from individual liability,

[a] primary focus of the inquiry is whether board action is in furtherance of a legitimate purpose of the cooperative or condominium, in which case it will generally be upheld.

Id. at 539.

[B]oard decisions concerning what residents may or may not do with their living space may be highly charged and emotional. A cooperative or condominium is by nature a myriad of often competing views regarding personal living space, and decisions taken to benefit the collective interest may be unpalatable to one resident or another, creating the prospect that board decisions will be subjected to undue court involvement and judicial second guessing. Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court, which---generally without knowing the property---may or may not agree with the reasonableness of the board's determination, threatens the stability of the common living arrangement.

Id. at 539-540.

To determine whether, in the instant matter, the individual board members acted in good faith, it is necessary to evaluate the conditions that the board placed on plaintiffs' sale of their unit.

Plaintiffs contend that the conditions place an unreasonable restraint on alienation, and that the restriction that the unit may only be purchased by artists is in violation of the proprietary lease. The court disagrees.

The two certificates of occupancy for the property specifically state that the property is classified under 7-B of the Multiple Dwelling Law.

[U]nder a zoning resolution passed pursuant to Multiple Dwelling Law article 7-B, [the Co-op's] loft apartments may lawfully be occupied as residences only if used as joint living and work quarters by artists certified by the New York City Department of Cultural Affairs.

Saul v 476 Broadway Realty Corp., 290 Ad2d 254, 254-255 (1st Dept 2002); *Matter of Mason v Department of Buildings of City of New York*, 307 AD2d 94 (1st Dept 2003).

Plaintiffs attempts to circumvent the clear and explicit classification appearing on the certificates of occupancy by defining the individual terms used in those documents, such as "residence" and "loft," is no more than a legal red herring. The Department of Buildings has twice classified the property as being subject to article 7-B of the Multiple Dwelling Law, and, therefore, the board's requirement that a purchaser of any of the property's units be an artist is no more than the board fulfilling its obligation to conform to zoning requirements. Consequently, plaintiffs' request that the court find that they may sell their unit for residential purposes only goes against the requirements of article 7-B of the Multiple Dwelling Law.

"As a general rule, the board of directors of a cooperative apartment corporation may withhold consent to the transfer of shares and the assignment of a proprietary lease for any reason absent bad faith or discriminatory practices. Here, there was no showing whatsoever that the co-op's refusal to approve the sale was predicated on either of those grounds [internal citation omitted]."

Matter of Folio (Hocker v 25 East 86th Street Corp.), 139 AD2d 456, 457-458 (1st Dept 1988); *Bernheim v 136 East 64th Street*

Corp., 128 AD2d 434 (1st Dept 1987).

The documents presented evidence that the board's actions were taken to ensure that the property conformed to the zoning laws and that the roof be maintained in a safe condition.

"[Plaintiffs] ha[ve] not shown the slightest indication of any bad faith, arbitrariness, favoritism, discrimination or malice on the cooperative's part, and the record reveals none."

40 West 67th Street Corp. v Pullman, 100 NY2d 147, 157 (2003).

Further, the action taken was unanimous by the other shareholder-directors, thereby expressing the collective will of the Co-op.

Id. Plaintiffs' mere conclusory assertion that the board was acting in a discriminatory manner, without providing the slightest evidence that other shareholders were being treated differently, is insufficient to sustain their motion for partial summary judgment. *Matter of Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d at 540.

The only conditions placed on plaintiffs by the board with respect to their processing Merrill's application are no more than reiterations of the conditions of sale to which plaintiffs originally agreed to abide by in order to purchase their unit in 2005. If plaintiffs truly believed that such conditions place an undue restraint on alienation of their property, they should never have agreed to those conditions as a prerequisite for their acquisition of their unit.

Finally, plaintiffs' request that Klaus be enjoined from using Unit 3 as a dance studio also goes against the administrative findings of the Environmental Control Board which found that such use was not a violation of the building's zoning classification.

Therefore, based on the foregoing, plaintiffs' motion for partial summary judgment is denied.

Defendants' motion for summary judgment dismissing the complaint is granted in part and denied in part.

Plaintiffs' first, fifth, ninth, and tenth causes of action seek injunctions, enjoining defendants from imposing conditions on the sale of plaintiffs' unit, enjoining defendants from terminating plaintiffs' proprietary lease based on their failure to cure items on the notice to cure, enjoining defendants to approve plaintiffs' renovation plans, and enjoining the use of Unit 3 as a dance studio. All of these causes of action are without merit.

As stated above, a cooperative board may impose any conditions on the sale of its shares that it wishes, provided such conditions are not imposed in bad faith or based on a discriminatory practice. *Matter of Folio (Hocker v 25 East 86th Street Corp.)*, 139 AD2d 456, *supra*. For the reasons previously discussed, the conditions imposed in the instant matter fall within the permitted authority of a cooperative board.

Pursuant to the proprietary lease, the board has the right to terminate a proprietary lease based on the objectionable conduct of a lessee. Defendants have alleged that plaintiffs' failure to allow access to the roof to make necessary repairs constitutes objectionable conduct. However, at the present time, the board has not moved to terminate plaintiffs' proprietary lease, rendering this cause of action untimely.

According to the escrow agreement, all renovations require the written prior approval of the board. Pursuant to the documents presented, plaintiffs failed to provide the Co-op's architect with the plumbing, electrical and mechanical drawings respecting their planned alterations, and the person in charge of the firm hired to make such alterations was alleged, by the Co-op's architect, to be unlicensed. Defendants' Motion Ex. U. Consequently, the board acted within its authority in denying approval at this point.

Lastly, as noted above, the use of Unit 3 is legally permissible, and so no grounds exist to impose an injunction on defendants.

"For an injunction to issue, the requesting party must demonstrate a likelihood of success on the merits, irreparable harm, and that a balancing of the equities tips in that party's favor [citation omitted]." *410 Sixth Avenue Foods, Inc. v 410 Sixth Avenue, Inc.*, 197 AD2d 435, 436 (1st Dept 1993).

Plaintiffs have failed to meet any of these requirements, and so defendants' motion to dismiss the complaint is granted with respect to the first, fifth, ninth and tenth causes of action.

The second and third causes of action are based on a breach of fiduciary duty on the part of defendants, which has already been addressed. Based on the foregoing discussion, defendants' motion for summary judgment dismissing the second and third causes of action is granted.

That portion of defendants' motion for summary judgment with respect to the fourth cause of action is denied. Material questions of fact exist as to what, if any, action is required of plaintiffs under the escrow agreement in order to release the escrowed funds to the Co-op, which preclude summary judgment.

The sixth cause of action seeks damages for statements made by the board to Hoffman's attorney, which caused Hoffman to rescind his offer on plaintiffs' unit. However, as detailed above, none of the statements made by the board was untrue, and, at the point that they were made, no contract existed between Hoffman and plaintiffs. Therefore, defendants' motion for summary judgment on the sixth cause of action is granted.

The seventh cause of action seeks damages based on the board's failure to process Merrell's application. However, as evidenced by Merrell's own notice of cancellation, the reason that he rescinded the contract was because plaintiffs had not

resolved their legal disputes with the board. Hence, there is no basis to support this cause of action, and the portion of defendants' motion seeking summary judgment to dismiss the seventh cause of action is granted.

Plaintiffs allege that the board meeting that ousted John Wirth from his directorship did not meet the requirements of the by-laws by having a written notice of the meeting. However, the documents provided by plaintiffs themselves in support of their motion for partial summary judgment include a notice of said meeting as an exhibit. Motion Ex. 45. Furthermore, according to the by-laws (Motion Ex. 13), notice may be waived, and there is no question that the meeting was attended by a quorum of the shareholders. Hence, plaintiffs' eighth cause of action seeking vacatur of this board action is without merit, and defendants' motion for summary judgment is granted with respect to the eighth cause of action.

The eleventh cause of action seeks a money judgment on behalf of the Co-op as against Klaus and Checkman for alleged nonpayment of maintenance. According to the depositions of Klaus and Checkman, Checkman did receive an abatement of approximately three months' maintenance between 1997 and 1999, many years prior to plaintiffs' purchase of their unit, and Klaus does not state that she ever failed to meet her maintenance charges. There is nothing to support plaintiffs' conclusory assertions that Klaus

and Checkman are not paying their maintenance. Therefore, defendants' motion for summary judgment is granted with respect to the eleventh cause of action.

Plaintiffs' twelfth cause of action seeks an accounting on behalf of the Co-op for all legal fees paid by the Co-op to its attorney. "The right to bring a shareholder's derivative action is 'secondary and contingent', and arises only in the event that the directors do not comply with a demand that the claims be brought directly [citation omitted]." *Bryan v West 81 Street Owners Corp.*, 186 AD2d 514, 515 (1st Dept 1992). There is no indication that a demand was ever made to the directors, nor is there any evidence that plaintiffs challenged the attorney's bill, except for their unwillingness to pay any charges, until the instant lawsuit. As a consequence, defendants' motion for summary judgment to dismiss the complaint is granted with respect to the twelfth cause of action.

The thirteenth, and final cause of action, seeks attorney's fees.

According to paragraph 28 of the proprietary lease, only the lessor (Co-op) is entitled to attorney's fees, based on any action instituted by the Co-op against a lessee or with respect to any counterclaim asserted by the Co-op in an action commenced by the lessee. Generally, "a prevailing party may not collect attorney's fees from the nonprevailing party unless such award is

authorized by agreement between the parties, statute or court rule." *TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 515 (2008). Since plaintiffs have not provided any legal support for this cause of action, that portion of defendants' motion for summary judgment dismissing the complaint is granted with respect to the thirteenth cause of action.

Based on the foregoing, defendants' motion for summary judgment dismissing the Third Amended Complaint is granted with respect to all but the fourth cause of action.

That portion of defendants' motion seeking summary judgment on their counterclaims is granted in part and denied in part. Similarly, plaintiffs' cross motion seeking summary judgment dismissing defendants' counterclaims is granted in part and denied in part.

Pursuant to the escrow agreement and the dangerous condition of the roof, that portion of defendants' counterclaim seeking a declaration that the Co-op is entitled to enter and examine the roof and that an injunction against plaintiffs from interfering with such access be issued is granted. The Co-op's right to access the roof is detailed in the proprietary lease and the escrow agreement, and the Co-op's architect has stated that, until certain problems are addressed, the roof and bulkhead constitute Building Code violations. Therefore such access is necessary, and that portion of plaintiffs' cross motion for

summary judgment dismissing this counterclaim is denied.

However, that portion of defendants' counterclaim requiring plaintiffs to release the escrow funds is denied, as is that portion of plaintiffs' cross motion for summary judgment dismissing this counterclaim, because, as previously stated, material questions of fact exist as to what, if any, obligations are imposed on plaintiffs with respect to the release of said funds.

That portion of defendants' counterclaim seeking to enjoin plaintiffs from using the roof until such time as carry treads and other protective measures are installed is granted, pursuant to the terms of the escrow agreement.

Those portions of defendants' motion and plaintiffs' cross motion for summary judgment on defendants' counterclaim with respect to plaintiffs' alleged breach of the proprietary lease by engaging in malicious and abusive conduct are denied, because such determinations raise questions of fact that cannot be decided on a summary judgment motion. *See generally Matter of Baldo*, 210 AD2d 848 (3d Dept 1994).

Those portions of defendants' motion for summary judgment on their counterclaim for legal expenses incurred by the Co-op to defend against plaintiffs' alleged malicious and misleading statements to administrative agencies is denied, because no legal basis exists for this cause of action. Hence, that portion of

plaintiffs' cross motion for summary judgment dismissing this counterclaim is granted.

Lastly, that portion of defendants' motion for summary judgment on their counterclaims for attorney's fees is granted, pursuant to the terms of the proprietary lease noted above. That portion of plaintiffs' cross motion for summary judgment on this counterclaim is denied. An assessment of the attorney's fees to which the defendants are entitled shall be made after the resolution of the remaining claims.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that the portion of defendants' motion for summary judgment dismissing the fourth cause of action asserted in the Third Amended Complaint is denied; and it is further

ORDERED that defendants' motion for summary judgment dismissing the Third Amended Complaint is granted with respect to the first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes of action; and it is further

ORDERED that the portion of plaintiffs' cross motion seeking consolidation of motion sequence numbers 007 and 008 for the purpose of disposition is granted; and it is further

ORDERED that the portion of defendants' motion for summary judgment on its first counterclaim is granted to the extent of granting them a declaration that they are entitled to access to examine the roof and an injunction against plaintiffs from interfering with such access is granted; and it is further

ADJUDGED and DECLARED that defendants are entitled to access to examine the roof on the premises known as 156 Chambers Street, New York, New York; and it is further

ORDERED that plaintiffs, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiffs, are enjoined and restrained from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of plaintiffs or otherwise, from denying access to the roof of the premises known as 158 Chambers Street, New York, New York, to defendants, their agents, servants, employees or other persons for the purpose of inspection and repair of said roof; and it is further

ORDERED that the portion of defendants' motion for summary judgment on their third and fourth counterclaims is denied; and it is further

ORDERED that the portion of defendants' motion seeking summary judgment on their second counterclaim is granted; and it is further

ORDERED that plaintiffs, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiffs, are enjoined and restrained from walking upon or otherwise utilizing the roof or suffering anyone, directly or through any attorney, agent, servant, employee or other person under the supervision or control of plaintiffs or otherwise, to walk upon or otherwise utilize the roof of the premises known as 158 Chambers Street, New York, New York; and it is further

ORDERED that the portion of defendants' motion for summary judgment on their fifth counterclaim is granted; and it is further

ORDERED that plaintiffs' cross motion for summary judgment dismissing defendants' counterclaims is denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on April 27, 2010 at 10:30 a.m. for a status conference.

The foregoing constitutes the order and decision of the court.

Dated: New York, New York
March 23, 2010



MARYLIN G. DIAMOND
J.S.C.

MARYLIN G. DIAMOND

FILED

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