

**Residential Bd. of Mgrs. of the Columbia  
Condominium v Alevy**

2010 NY Slip Op 32299(U)

August 25, 2010

Supreme Court, New York County

Docket Number: 105846/09

Judge: Doris Ling-Cohan

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: Hon. Ling-Cohan

PART 36

Index Number : 105846/2009  
COLUMBIA CONDOMINIUM  
VS.  
ALEVY, STEVEN M.  
SEQUENCE NUMBER : 002 (003, 004)  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1, 2  
3  
4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits Memo

Replying Affidavits Memo

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by third-party defendants Blue Woods Mgmt Corp to dismiss is granted in accordance with the attached memorandum & decision.

(consolidated for disposition with motion sequence see numbers 003 + 004)

**FILED**  
AUG 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/25/10

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):

J.S.C.

HON. DORIS LING-COHAN

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X

THE RESIDENTIAL BOARD OF MANAGERS OF  
THE COLUMBIA CONDOMINIUM ON BEHALF  
OF THE UNIT OWNERS,

Plaintiff,

Index No.: 105846/09  
DECISION/ORDER

-against-

STEVEN M. ALEVY, DEANNA ALEVY and  
ALLEN ALEVY,

Defendants.

Motion Seq. No.:  
002, 003 & 004

-----X

STEVEN M. ALEVY, DEANNA ALEVY and  
ALLEN ALEVY,

Third-Party Plaintiffs,

Index No.: 590669/09

-against-

BLUE WOODS MANAGEMENT CORP., INC.,  
CARA JUDOVITS, ARTHUR KIMMELFIELD,  
BOBBY LIU, CANDY MIDDLETON, DOUG MILLES,  
LAURA MOSS, ALEX SCHLESINGER,  
RICHARD SOBELSOHN, SREE SREENIVASAM,  
TOM SUNDERLAND, SHERRIE THOMPSON,  
LOUIS ZURITA, BARBARA FRIEDLANDER and  
SANDRA LIPKIND,

Third-Party Defendants.

**FILED**  
AUG 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X

HON. DORIS LING-COHAN, J.S.C.:

In this residential foreclosure action, two sets of third-party defendants move separately to dismiss the third-party complaint and certain counterclaims (motion sequence numbers 002 and 003), while plaintiff moves for summary judgment on the complaint (motion sequence number 004). For the following reasons, the motions are granted.

## BACKGROUND

Defendants/third-party plaintiffs Steven M. Alevy, Deanna Alevy and Allen Alevy (the Alevys) are the owners of condominium apartment 5E, in a residential building (the building) located at 275 West 96<sup>th</sup> Street in the County, City and State of New York. *See* Notice of Motion (motion sequence number 002), Exhibit A (third-party complaint), ¶¶ 1-3. The plaintiff Residential Board of Managers of the Columbia Condominium (the board) is the building's board of managers. *Id.*, ¶ 19. Third-party defendants Cara Judovits (Judovits), Arthur Kimmelfield (Kimmelfield), Bobby Liu (Liu), Candy Middleton (Middleton), Doug Milles (Milles), Laura Moss (Moss), Alex Schlesinger (Schlesinger), Richard Sobelsohn (Sobelsohn), Sree Sreenivasam (Sreenivasam), Tom Sunderland (Sunderland), Sherrie Thompson (Thompson), Louis Zurita (Zurita), Barbara Friedlander (Friedlander) and Sandra Lipkind (Lipkind) (collectively, the individual third-party defendants), all New York residents, are owners of other condominium units in the building, and some of them either serve or have served on the board. *Id.*, ¶¶ 5-18. Third-party defendant Blue Woods Management Corp., Inc. (Blue Woods), a New York State licensed corporation, is the building's management company. *Id.*, ¶ 4.

The Alevys allege that, on May 18, 2007, a joint in the branch line of the building's hot water riser that served apartment 7F failed, with the result that it and 15 other apartments, as well as the building's lobby and basement, were severely flooded. *Id.*, ¶ 21. The Alevys further allege that Blue Woods improperly delayed in retaining non-party Maxons Restoration (Maxons) to remediate the extensive water damage, and that Maxons itself also improperly delayed the start of its work. *Id.*, ¶¶ 24-30. The Alevys also allege that Maxons performed its work improperly,

with the result that apartment 5E suffered extensive mold damage that rendered it uninhabitable for a protracted period. *Id.*

The Alevys claim that they contacted Blue Woods in June of 2007 to inquire whether they should continue to pay their common charges for apartment 5E, since the apartment was uninhabitable. *Id.*, ¶¶ 31-33. The Alevys further claim that, in a phone conversation on June 7, 2007, Blue Woods's president, Donald Wilson (Wilson), informed them that they did not need to pay the common charges for as long as the apartment was uninhabitable because the building had insurance to pay those charges until such time as the apartment was deemed safe to enter. *Id.*, ¶¶ 34-35. The Alevys produced a letter from Wilson, dated July 13, 2007, that stated, in pertinent part:

At the time of our conversation, I advised Mrs. Alevy that the Condominium possessed loss of rent insurance. The insurance is meant to reimburse the Condominium in the event a unit owner does not pay his common charges because the apartment is uninhabitable. However, the insurance company will only reimburse the Condominium for the period of time that the owner is legitimately unable to reside in the apartment. If the unit owner does not provide access for repairs or delays the ability to make the apartment habitable, the insurance rebate would be prorated accordingly and the unit owner would be responsible for payment of the balance.

*See* Notice of Motion (motion sequence number 004), Exhibit J. The Alevys also state that they received permission not to pay their common charges, until their apartment had been repaired in a conversation that took place on June 1, 2007 with the building's insurance adjuster, Charles Reilly (Reilly). *See* Steven Alevy Affidavit in Opposition to Motion (motion sequence number 004), ¶¶ 4- 6. In any case, the Alevys do not dispute that they have not paid common charges since May 2007. *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 35-36.

The Alevys claim that, in September of 2007, Blue Woods retained Leighton Associates,

Inc. (Leighton), a hygienics company, to perform a mold evaluation on apartment 5E, and that Leighton's report, dated September 21, 2007, found the apartment habitable. *Id.*, ¶¶ 39-56. The Alevys contend, however, that Blue Woods improperly refused to provide them with a copy of the report until November 9, 2007, and that the report's conclusion of habitability was flawed, because the report itself noted that the apartment still contained unacceptably high levels of certain kinds of mold which would become disturbed and spread if any renovation work were done in the apartment. *Id.*, ¶¶ 43, 49-52. The Alevys state that the apartment was uninhabitable because of mold contamination until late 2008. *Id.*, ¶ 46.

The Alevys also claim that, in September of 2007, Blue Woods gave them the option of either using workmen retained by Blue Woods to repair tile damage in apartment 5E, or to use their own workmen, and apply later to Blue Woods for reimbursement. *Id.*, ¶¶ 57-67. The Alevys contend that they chose to pay for the repair work themselves, but that Blue Woods improperly submitted a low estimate to the insurance company, rather than the estimate that the Alevys had obtained from their repairmen, in an attempt to have the insurance company under-reimburse the Alevys. *Id.* The Alevys further contend that, after they had obtained both the estimate and the building's approval for the repair work in September of 2007, Blue Woods arbitrarily canceled the approval and required the Alevys to resubmit their repair application, thus delaying the Alevys' ability to render the apartment habitable. *Id.*, ¶¶ 68-75.

Finally, the Alevys claim that the board and Blue Woods have improperly stopped them from using any of the building's amenities (e.g., gym and childrens' playroom), as a result of their non-payment of their common charges. *Id.*, ¶¶ 76-82.

The board filed a notice of lien for unpaid common charges on February 1, 2008. *See*

Notice of Motion (motion sequence number 004), Exhibit C. Thereafter, on April 1, 2009, the board served the Alevys with a notice of pendency, and filed a complaint that seeks a judgment to foreclose the aforementioned lien. *Id.*; Exhibits B, A. The Alevys served an answer on June 23, 2009 that included the affirmative defenses of: 1) “deficient pleadings”; 2) failure to state a cause of action; 3) the doctrines of estoppel/waiver/laches; 4) the doctrine of unclean hands; and 5) “plaintiff’s permission not to pay common charges”; and counterclaims for: 1) personal liability (against the individual board members for money damages as a result of bad faith and willful misconduct in violation of the building’s by-laws); 2) negligence (in the maintenance of the building against the board, the individual board members and Blue Woods); and 3) fraudulent misrepresentation (in the September 2007 mold report against the board, the individual board members and Blue Woods). *Id.*; Exhibit D.

The Alevys commenced a third-party action on July 20, 2009, by filing a complaint that sets forth causes of action for: 1) personal liability (against all board members); 2) negligent maintenance of the building (against Blue Woods); 3) negligent hiring of repair workers (against Blue Woods and the board members); 4) “deceit” (against Blue Woods and the board members); 5) fraudulent misrepresentation (against Blue Woods); and 6) negligent infliction of emotional distress (against Blue Woods and the board members). *See* Notice of Motion (motion sequence number 002), Exhibit A. On September 1, 2009, the parties executed a stipulation whereby the Alevys agreed to discontinue their counterclaims in the underlying action as against the individual board members and Blue Woods, but not as against the plaintiff board. *Id.*; Exhibit D.

Rather than answer, Blue Woods now moves, pursuant to CPLR 3211, to dismiss the Alevys’ second, third, fourth, fifth and sixth third-party causes of action (motion sequence

number 002). The individual defendants also move separately to dismiss the third-party complaint as against them, and to dismiss the third counterclaim to the original complaint as against the board (motion sequence number 003). Finally, the board moves for summary judgment on the complaint in the underlying action (motion sequence number 004).

Subsequent to the filing of the within motions, various portions of this case have settled, rendering several of the motions and/or portions of the motions moot. [See June 16, 2010 letter from Counsel for the board]. Specifically, the affirmative claims and affirmative defenses set forth in the main action have settled, rendering plaintiff board's motion for summary judgment on the affirmative claims asserted in the main action moot. What remains of the main action are the second counterclaim for negligence and third counterclaims for fraudulent misrepresentation asserted by the Alevy's against plaintiff board; the third counterclaim for fraudulent misrepresentation remains the subject of the board's motion to dismiss, to be addressed below.

Additionally, all claims asserted in the third-party action against the individual third-party defendants have settled and been discontinued, rendering the individual third-party defendants' motion to dismiss moot. What remains of the third-party action are the claims asserted by the Alevys against third-party defendant Blue Woods, which are the subject of Blue Woods' motion to dismiss, to be addressed below.

## DISCUSSION

### Blue Woods' Motion

As previously mentioned, Blue Woods moves to dismiss the Alevys' second through sixth third-party causes of action. When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but

whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained’.” *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. *See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994). Here, Blue Woods has demonstrated that all of the Alevys’ third-party claims as against it fail, as a matter of law. The court will review each claim in turn.

The Alevys’ second cause of action alleges that Blue Woods was negligent in its maintenance of the building. *See* Notice of Motion (motion sequence number 002), Exhibit A (third-party complaint), ¶¶ 87-100. Pursuant to New York law, “the traditional common-law elements of negligence” are: “duty, breach, damages, causation and foreseeability.” *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218 (1st Dept 2005). Here, with respect to the element of “duty of care,” the third-party complaint alleges that “Blue Woods breached that duty by its failure to take the proper measures to prevent floods and/or take measures to make sure in the event of a flood, proper protocol is adhered to and necessary measures are taken to minimize damage.” *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶ 96. Blue Woods

argues that the Alevys' claim regarding duty of care is legally deficient because, as "a managing agent, acting on behalf of a disclosed principal, it is not liable to a third party for nonfeasance, but only for affirmative acts of negligence." See Blue Woods Memorandum of Law, at 12. Blue Woods' statement of the law is accurate. See e.g. *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 6 (1<sup>st</sup> Dept 2006). The court notes that the Alevys do not address this argument in their opposition papers, but merely reply that they "have set forth a very detailed and lengthy account of the wrongs committed by Blue Woods." See Third-Party Plaintiffs' Memorandum of Law in Opposition, at 4. However, the third-party complaint does not in fact sufficiently detail the Alevys' claim and is patently deficient. In fact, the only specific negligence alleged in the third-party complaint is that Blue Woods' superintendent and building manager "failed to locate the shut-off valves for the hot water riser for over an hour." See Notice of Motion (motion sequence number 002), Exhibit A, ¶ 93. In its reply papers, Blue Woods argues that this allegation describes an incident of nonfeasance, but not an affirmative act of negligence. See Blue Woods Reply Memorandum, at 7. The court agrees, and concludes that the Alevys' allegations regarding duty of care are deficient, as a matter of law. See *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 6 (1<sup>st</sup> Dept 2006). Therefore, the Alevys have failed to state a cause of action for negligence and Blue Woods' dismissal motion is granted with respect to the Alevys' second third-party claim.

The Alevys' third cause of action alleges that Blue Woods negligently hired Maxons. See Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 101-115. As the Appellate Division, First Department, observed in *White v Hampton Mgt. Co. L.L.C.* (35 AD3d 243, 244 [1<sup>st</sup> Dept 2006]), [r]ecovery on a negligent hiring and retention theory requires a showing that the

employer was on notice of a propensity to commit the alleged acts.” Blue Woods argues that the third-party complaint contains no such allegations, but, rather, asserts that Maxons were “experts in the field of mold removal.” *See* Blue Woods Memorandum of Law, at 16-17. Once again, the Alevys fail to address this argument in their opposition papers, except to make the blanket assertion that they “have set forth a very detailed and lengthy account of the wrongs committed by Blue Woods.” *See* Third-Party Plaintiffs’ Memorandum of Law in Opposition, at 4. The court notes that the third-party complaint actually states that “Maxons, despite being experts in the field of mold removal, did not begin its remediation until a full week after the incident,” and that “Blue Woods mismanagement by not ensuring that the vendor they hired would complete the remediation job expeditiously and efficiently amounts to a negligent hiring.” *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 103, 111. This, clearly, is *not* an allegation that Blue Woods was on notice that Maxons had a “propensity to commit negligent acts.” Therefore, the complaint is patently deficient as the foregoing does *not* state a legally viable cause of action and Blue Woods’ dismissal motion is granted with respect to the Alevys’ third third-party cause of action.

The Alevys’ fourth cause of action alleges “deceit,” by Blue Woods in failing to turn over the Leighton report to them expeditiously. *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 116-125. In their opposition papers, the Alevys acknowledge that this is actually a claim for “fraud.” *See* Third-Party Plaintiffs’ Memorandum of Law in Opposition, at 7-9. The proponent of a claim for fraud “must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury.” *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). Here, the complaint

alleges that “Blue Woods refused to provide a copy of the Leighton report”; that “the Alevys refused to move back into the apartment without being furnished the report”; and that “the mold that was still present in the apartment would have been harmful.” *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 119, 120, 123. Blue Woods argues that the foregoing allegations fail to disclose the elements of either detrimental reliance or damages, since they can only be read to indicate that the Alevys did *not* accept the purportedly false conclusions in the Leighton report and that they did *not* actually suffer ill health from mold in the apartment. *See* Blue Woods Memorandum of Law, at 17-18. The court agrees that the complaint does not allege either detrimental reliance upon an alleged misrepresentation or damages with respect to the Alevys’ fraud cause of action; since the Alevy’s did not return to the apartment, it cannot be said that they relied on any allegedly fraudulent statements contained in the report. Therefore, Blue Woods’ motion is granted with respect to the Alevys’ fourth third-party claim.

The Alevys’ fifth cause of action alleges fraudulent misrepresentation by Blue Woods in “mischaracterizing the May 18, 2007 flood as a water leak to its insurance companies,” and “misrepresenting that the [Alevys’] apartment was habitable to live in.” *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 126-145. As the Appellate Division, First Department, noted in *P.T. Bank Central Asia v ABN AMRO Bank N.V.* (301 AD2d 373, 376 [1<sup>st</sup> Dept 2003]):

To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant’s misrepresentation. A cause of action for fraudulent concealment requires, in addition to the four foregoing elements,

an allegation that the defendant had a duty to disclose material information and that it failed to do so. In addition, in any action based upon fraud, “the circumstances constituting the wrong shall be stated in detail” [internal citations omitted].

Blue Woods argues that the complaint fails to allege detrimental reliance with respect to either of the two purported instances of fraudulent misrepresentation. *See* Blue Woods Memorandum of Law, at 19-23. With respect to the first instance, Blue Woods notes that the complaint alleges that Blue Woods made a misrepresentation to an insurance company which purportedly relied on it, and *not* that the Alevys relied on this misrepresentation. *Id.* With respect to the second instance, Blue Woods asserts that the Alevys have failed to allege how they relied on Blue Woods’ purported assertions that their apartment was mold-free and habitable. *See* Blue Woods Reply Memorandum, at 13-16. In their opposition papers, the Alevys merely note that their fraudulent misrepresentation claim differs from their fraud claim because they have alleged two instances of fraud rather than one. *See* Third-Party Plaintiffs’ Memorandum of Law in Opposition, at 10. However, this alone does not make up for the third-party complaint’s patently deficient allegations regarding the element of detrimental reliance in the Alevys’ fraudulent misrepresentation cause of action. Therefore, Blue Woods’ motion is granted with respect to the Alevys’ fifth third-party claim.

The Alevys’ sixth cause of action alleges negligent infliction of emotional distress by Blue Woods. *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 146-159. In *Stamm v PHH Vehicle Management Services, LLC* (32 AD3d 784, 786 [1<sup>st</sup> Dept 2006]), the Appellate Division, First Department, held that:

In order to recover for an alleged emotional injury based on the zone of danger theory of liability, a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member's

death or serious injury while in the zone of danger. The emotional injury must be not only serious and verifiable but also “tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant [internal citations omitted].”

Here, Blue Woods argues that the Alevys’ claim is barred by CPLR 1007, because the original complaint does not include a cause of action for negligent infliction of emotional distress. *See* Blue Woods Memorandum of Law, at 10-11. The Alevys admit this in their opposition papers. *See* Third-Party Plaintiffs’ Memorandum of Law in Opposition, at 5. It is indeed the case that, pursuant to CPLR 1007, “the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action.” *BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 93 (1<sup>st</sup> Dept 1985), citing *Cleveland v Farber*, 46 AD2d 733 (4<sup>th</sup> Dept 1974). Here, there are no “emotional distress” allegations in either the original complaint or the Alevys’ counterclaims thereto. Therefore, CPLR 1007 clearly bars any third-party claim by the Alevys that is asserted on this theory. Consequently, Blue Woods’ motion is granted with respect to the Alevys’ sixth third-party claim. Accordingly, the court grants Blue Woods’ motion in its entirety and the third-party complaint is dismissed as to Blue Woods.

#### The Board’s Motion to Dismiss the Alevys’ Third Counterclaim

The board seeks to dismiss the Alevys’ third counterclaim to the original complaint. That counterclaim alleges “fraudulent misrepresentation” by the board in: 1) mischaracterizing the May 18, 2007 flood as a water leak; and 2) misrepresenting that the Leighton report had found the Alevys’ apartment to be habitable. *Id.*; Exhibit 2 (answer), ¶¶ 69-86. The board argues

that, the third counterclaim is deficient, as a matter of law, because it fails to allege the detrimental reliance component of a fraudulent misrepresentation claim. *See* The Board's and Individual Defendants' Memorandum of Law in Support of the Motion, at 12. The Alevys' opposition papers do not address this argument, but, instead, merely assert that the counterclaim adequately pleads the element of injury. *Id.* at 15. The court notes that the allegations of the Alevys' third counterclaim asserted against the board are almost identical to those of the Alevys' fifth third-party cause of action for fraudulent misrepresentation asserted against Blue Woods. The court also notes that it has already indicated that the latter cause of action fails, as a matter of law, because the pleadings regarding detrimental reliance were patently inadequate. For the same reason, the Alevys' third counterclaim against the board is inadequate and, therefore, dismissed; thus, the board's motion to dismiss such counterclaim is granted.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of third-party defendant Blue Woods Management Corp., Inc. is granted and the third-party complaint is dismissed as against said third-party defendant with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion, pursuant to CPLR 3211, of third-party defendants Cara Judovits, Arthur Kimmelfield, Bobby Liu, Candy Middleton, Doug Milles, Laura Moss, Alex Schlesinger, Richard Sobelsohn, Sree Sreenivasam, Tom Sunderland, Sherrie Thompson, Louis Zurita, Barbara Friedlander and Sandra Lipkind is deemed moot; and it is further

ORDERED that the motion by plaintiff board to dismiss the Alevys' third counterclaim to the original complaint is granted and such counterclaim is dismissed; and it is further

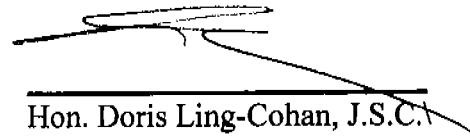
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the plaintiff Residential Board of Managers of the Columbia Condominium, on behalf of the Unit Owners, is deemed moot; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, upon all parties; it is further

ORDERED that the remainder of this action which consists of defendant Alevys' second counterclaim asserted against plaintiff board for negligence, shall continue. Any remaining discovery with respect to such counterclaim shall be completed expeditiously.

Dated: New York, New York  
August 25, 2010



Hon. Doris Ling-Cohan, J.S.C.

J:\Dismiss\columbia cond. alevy\revised columbiacondovalevy.lane.wpd

**FILED**  
**AUG 26 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**