

Bayer v 57 E. 72nd Corp.

2010 NY Slip Op 32668(U)

September 25, 2010

Sup Ct, NY County

Docket Number: 110067/2004

Judge: Paul G. Feinman

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

PAUL G. FEINMAN

PRESENT:

J.S.C.

PART 12

Index Number : 110067/2004

BAYER, SHAWN

vs

57 EAST 72ND CORP.

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for 50

PAPERS NUMBERED

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

12

Answering Affidavits — Exhibits _____

3-6

Replying Affidavits _____

7-8

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
SEP. 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 25, 2010

Paul G. Feinman
J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
SHAWN BAYER and KAREN BAYER,
Plaintiffs,

Index No. 110067/2004

-against-

Mot. Seq. No. 007

57 East 72nd CORPORATION, KYROUS REALTY
GROUP, INC., as agent for 57 East 72nd Street
Corporation, HARRIET KYROUS, BRAXTON
ENGINEERING, P.C., SHARIF TANAMLI, H. KEVAN
PICKENS, HAZEL HAMMONDS, ANDREA DARIF
and ALEN MACWEENEY,

Decision and Order

Defendants.
-----X

Appearances:

For Plaintiffs

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By: Matthew A. Kaufman, Esq.
485 Underhill Boulevard, Suite 101
Syosset, NY 11791
(516) 496-7828

For Defendants 57 East 72nd Corporation, Kyrous Realty Group,

Inc., Harriet Kyrous and Sharif Tanamli

Law Offices of Bruce Levinson
By: Gregory Brown, Esq. and Bruce Levinson, Esq.
747 Third Avenue, 4th Fl.
New York, NY 10017-2803
(212) 750-9898

Papers reviewed on this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affidavits in Support, Exhibits A - W	1
Memorandum of Law in Support of Defendants' Motion	2
Affirmation in Opposition	3
Plaintiffs' Memo of Law in Opposition	4
Plaintiffs' Exhibits Volume I (Exhibits A - J)	5
Plaintiffs' Exhibits Volume II (Exhibits K1 -Y)	6
Reply Affidavit with Exhibits A - C	7
Reply Memorandum of Law	8
Transcript of Oral Argument	9

FILED
SEP 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

The plaintiffs, Shawn and Karen Bayer, are the owners of the two adjoining units in a cooperative apartment building known as 57 East 72nd Corporation (57 East). The Bayers owned and occupied apartment 4B, and purchased the adjoining unit, apartment 4C, from Terrell Polk, a non-party to this litigation, with the intention of combining the two units. After the board

of directors failed to approve their application to combine the two units, this lawsuit ensued in which the Bayers allege 15 causes of action. Among others, they sued the four moving defendants: (1) the cooperative 57 East; (2) the managing agent Kyrous Realty Group, Inc. (Kyrous Realty); (3) the managing agent's President, Harriet Kyrous (Kyrous); and (4) the board of directors' President, Sharif Tanamli, who also owns and occupies the units directly under the Bayers' units. These moving defendants seek summary judgment dismissing the complaint.¹ For the reasons set forth below, the motion is granted in part and denied in part.

The Complaint

The complaint originally alleged 15 causes of action based on 57 East's rejection of plaintiffs' application to combine their two apartments, 4B and 4C (Pl. Ex. A.) Some of these have since been discontinued, dismissed or rendered academic.

Plaintiffs' first cause of action alleges that 57 East violated Business Corporations Law § 501 (c) by treating plaintiffs unequally from other shareholders. They request a judgment declaring that because of this discrimination, the board's rejection is null and void, unreasonable under the proprietary lease, and that defendants are prohibited from taking any action interfering with the proposed alteration.

The second cause of action seeks a permanent injunction prohibiting defendants from interfering with the renovation. At oral argument, plaintiffs conceded that its application for a preliminary injunction has been rendered academic by intervening events.

¹ Defendant Alen MacWeeney's motion for summary judgment, dismissing the trespass causes of action against him, was previously denied. Defendants H. Kevan Pickens and Andrea Darif have not joined in this motion. Plaintiffs discontinued their cause of action against Braxton Engineering, P.C. They have also discontinued the tenth through fifteenth causes of action as against Hazel Hammonds..

The third cause of action alleges that plaintiffs relied on defendants' representations that they could combine apartments 4B and 4C and that defendants would rely on former defendant Braxton Engineering, P.C. (Braxton) to evaluate plaintiffs' renovation plans. Plaintiffs allege that defendants caused Braxton to alter its favorable evaluation. Plaintiffs assert that because of defendants' conduct, they are entitled to a judgment declaring that defendants waived any objection to the renovation and are estopped from disapproving it.

The fourth cause of action alleges that defendants Kyrous, Tanamli, Hammonds, and Darif owed a fiduciary duty to plaintiffs to act for the furtherance of 57 East's lawful business and purposes and to abstain from self-dealing at plaintiffs' expense. Plaintiffs allege that defendants breached this duty by failing to approve their renovation plans.

At oral argument, plaintiffs withdrew the fifth cause of action, tortious interference with business relationships.

In their sixth cause of action plaintiffs allege that Kyrous and Tanamli fraudulently represented that plaintiffs would be able to combine apartments 4B and 4C and that they relied on this representation.

The seventh cause of action states that defendants Kyrous, Tanamli, and former defendant Braxton engaged in willful and malicious conduct that was aimed at depriving plaintiffs of the use of their apartments, by altering Braxton's June 15, 2004, report that stated that the plaintiffs' proposed kitchen complied with 57 East's wet-over-wet policy.

The eighth cause of action alleges that altering the June 15, 2004 report is a prima facie tort and constitutes "an intentional infliction of harm..."

Plaintiffs discontinued their ninth cause of action by stipulation.

The tenth cause of action alleges that MacWeeney and Hammonds trespassed into plaintiffs' apartment 4B on June 12, 2006, in order to perform plumbing and electrical work in their apartment, 5B, and that defendants Kyrour, Kyrour Realty, Darif, and Hammonds knew or should have known that MacWeeney and Hammonds did not have a New York City Department of Buildings permit for the work in 5B.

Plaintiffs' eleventh cause of action alleges that plaintiffs notified Kyrour and Kyrour Realty about the June 12th trespass, but they "failed to take affirmative action" to stop the construction in unit 5B. They further allege that while Kyrour notified the building superintendent that Hammonds and MacWeeney were not to enter plaintiffs' apartment, their actions "were a sham" and that they "intended to take no further action to prevent future trespasses," notwithstanding that they knew or should have known that MacWeeney and Hammonds would make additional entries. Plaintiffs contend that this was a breach of Kyrour's and Kyrour Realty's fiduciary duty to them.

In their twelfth cause of action, plaintiffs allege that MacWeeney and Hammonds committed further trespasses between June 15, 2004, and June 21, 2004.

The thirteenth cause of action alleges that "Defendants have wrongfully engaged in a course of conduct which has included the Court to distract and mislead the Plaintiffs," and that "Defendants' conduct has damaged the Plaintiffs resulting in impermissible trespasses upon their property by Co-Defendants..."

The fourteenth cause of action alleges that Kyrour and Kyrour Realty knew or should have known that Hammonds and MacWeeney did not have a Department of Buildings permit and that they knew or should have known that plaintiffs did not give them permission to enter

their premises.

Finally, the fifteenth cause of action alleges that MacWeeney trespassed into plaintiffs' premises on June 23, 2004, and caused damage to the joists in the ceiling between plaintiffs' and MacWeeney's apartment.

Facts

Under 57 East's proprietary lease with plaintiffs, the board must approve all alterations and renovations, including any combination of apartments (Pl. Ex. C). The lease states that the board may not unreasonably withhold approval. As noted in Kyrous's affidavit and 57 East's bylaws, renovation plans are submitted to the building's engineer before the board reviews them. The board is not bound by the engineer's evaluation.

In addition to alleging that the board's disapproval was unreasonable and discriminatory under Business Corporations Law § 501 (c), plaintiffs allege that defendants committed a trespass because another resident, MacWeeney, entered their apartment on three occasions and that defendants failed to prevent the trespass. Plaintiffs further allege that Tanamli misrepresented that they could combine the apartment and misrepresented the fact that apartment 4C contained New York City Building Code violations.

In sum, 57 East rejected plaintiffs' alteration plans on the grounds that their proposed kitchen violated its policy prohibiting wet areas, such as kitchens and bathrooms, over dry areas, such as bedrooms or living rooms. Under this wet-over-wet policy, wet rooms may only be located over wet areas. For example, a kitchen may be located only over a kitchen in the apartment below. Kyrous, in her denial letter to plaintiffs, informed plaintiffs that their kitchen violated this policy because it extended over a bedroom in the apartments below. Tanamli owns

these combined apartments, 3B and 3C. Kyrous also stated that plaintiffs' proposed bathroom violated the policy. Kyrous also contended that a corridor connecting plaintiffs' apartment would be a potential source of noise going to Tanamli's apartment. Kyrous told plaintiffs that the board based the rejection based on its own concerns and the concerns of the building's engineering firm, former defendant Braxton.

Kyrous and Tanamli submit affidavits in support of their motion (Not. of Mot., Kyrous Aff., Tanamli Aff.). Kyrous states that she was acting only in her representative capacity, as an agent for a disclosed principal, Kyrous Realty, throughout plaintiffs' application process.

Tanamli, in addressing the allegation that he made certain misrepresentations to plaintiff Shawn Bayer, states that following a shareholder meeting, the two had a discussion during which Bayer said that he would like to buy 4C and combine it with 4B. He described the encounter as an informal one.

Shawn Bayer, in his affidavit in opposition and deposition testimony, concedes that his conversation with Tanamli was informal and that Tanamli made no promises that the board would approve the combination. Bayer acknowledged that he was a former board member and was aware that the board must approve all renovations and repairs.

While Kyrous makes a number of references to the wet-over-wet policy in her affidavit, she does not provide any written copy of the policy and does not allege that one exists. Rather, she states that the policy is an industry-wide standard and is in effect in all of the more than 20 buildings that Kyrous Realty manages. Kyrous does not provide any of the policy's details or extent, other than that it prohibits wet areas over dry areas.

It is undisputed that the board approved plaintiffs' purchase of apartment 4C in

September 2002 and that in November 2003 plaintiffs informed the board that they intended a "gut renovation" in order to combine 4C with 4B. The record also reveals that plaintiffs submitted renovation plans on February 3, 2004, which the board then sent to Braxton. The board rejected the plans at a meeting, at which plaintiffs were present. The board's minutes indicate that portions of the proposed combined apartments would violate the wet-over-wet policy.

Following the initial rejection, plaintiffs submitted revised plans. Kyrour, in her affidavit, states that she forwarded the revised plans to Braxton. On May 5, 2004, Braxton notified her that it would conduct an inspection of plaintiffs' apartments and the apartments below and would review the plans, "...in order to determine whether the proposed changes violated the Building's wet-over wet policy." Although Kyrour and Tanamli assert that it was not Braxton's role to determine whether plans conform to or violate the policy, neither of them objected to Braxton's statement that it would make this determination.

Braxton's May 21, 2004, report noted that the proposed kitchen contained a wet over a dry area of the apartment below. It concluded that, "The drawings do not clearly indicate the location of the kitchen sink and dishwasher. These items must be over the wet area to comply with the building's policy. Clarification is required." Again, there was no objection to this conclusion about policy compliance.

Plaintiffs submitted new plans that Kyrour forwarded to Braxton. Plaintiffs obtained a copy of that June 15, 2004, report. The engineer, after reviewing plaintiffs' revised plans, wrote, "1. Kitchen-The plans now indicate that the kitchen will comply with the building's 'wet-over-wet' policy. The drawings indicate that the sink and dishwasher will be over Apt. 3c's kitchen, which is a wet area. The engineer has no further comment." The engineer also stated that he

“conceptually” approved the plans.

Kyrous avers that she found Braxton’s conclusion “troubling because it was not the engineer’s province to give opinions on 57 East’s policies.” Kyrous asserts that she and the board determined that the “...new plans did indeed violate the wet-over-wet policy because a portion of the kitchen, including the refrigerator, would be over the bedroom of the apartment below.” She explains in her affidavit that, “We felt that any leaks in the kitchen could not be contained, and therefore posed a substantial risk to apartment 3C. Refrigerators make noise and subtly vibrate. Therefore I asked Braxton to revise its report so that it expressed only scientific conclusions rather than business judgments.”

The engineer complied with Kyrous’s directive to revise the report. Kyrous states that the revised report, “reiterates the objective fact that the proposed ‘sink and dishwasher will be over Apt. 3c’s kitchen, which is a wet area,’ but concluded that ‘the remaining portion of the proposed kitchen would be located over Apt. 3B’s bedroom’.” Kyrous placed the first engineer’s report, which she characterizes as a “draft report” in her files “for future reference,” and marked it “Revised.”

The board, with plaintiff Karen Bayer present, met on June 23, 2004, and rejected the renovation plans again. On June 25, 2004, Kyrous sent a rejection letter to plaintiffs. Although the engineer did not express an opinion in the revised report, Kyrous wrote that “...both the board and the engineering firm have expressed serious concern over certain aspects of the proposed renovation.” Kyrous added that a large portion of plaintiffs’ proposed kitchen would be over the bedroom below, creating the risk that water could leak down to the bedroom. She also opined that a large amount of noise would come from the kitchen; although the engineer said nothing

about noise, she wrote that the board and its engineer were concerned that "a large volume of noise is typically generated" from kitchens and that this would "significantly impair your neighbors' quality of life."

Next, Kyrous wrote that the widespread use of water and plumbing fixtures in the proposed master bathroom could result in leaks, based on that the plans show that "a significant portion [of the bathroom] would overlie the entry hallways and living rooms in the apartments below. The adverse effect of such water leaks on your immediate downstairs neighbors would be particularly severe." Continuing, the letter stated that plaintiff's proposed central corridor connecting the two apartments was directly over the bedroom below. This "...also presents quality of life concerns due to the building's historic noise problems."

Kyrous expressed the further concern of the board and the engineer that the scope of the project would exceed the building's policy limiting repairs to a 120-day duration. Again, the engineer did not express any opinion on the anticipated duration. Moreover, Kyrous does not address the policy's provisions allowing work to be done in stages if the limit were to be exceeded. Nor does she provide a basis for her conclusion that the project would take more than 120 days.

Kyrous concluded the letter by stating that, "The Board is not opposed to the *concept* of apartment combinations. However, your proposed renovation, in the Board's best Business Judgment (which we reached in consultation with its engineer and attorney), presents a number of unique problems." (Italics in the original). Kyrous invited plaintiffs to re-submit modified plans.

Tanamli conceded that plaintiffs' plans show that "the plumbing would now be in line

with the adjacent units.” However, he opined that “...the layout of the kitchen would not prevent water from flowing into areas which were above dry areas, potentially causing damage.

Furthermore, the refrigerator was over my third floor bedroom. This constitutes a violation of the wet-over-wet policy.”

Tanamli next asserted that the board was concerned that future owners may wish “to make changes in the location of the appliances of the non-conforming kitchen.” He expressed the concern that “new owners might unwittingly place wet appliances (i.e. refrigerators with ice makers) and plumbing fixtures in new locations over dry areas in apartments below.”

Defendants submit plaintiffs’ original and revised plans. These plans do not show a refrigerator with an ice maker and do not depict a water line going into their refrigerator.

Although Tanamli concedes that plaintiffs will use a waterproof membrane under their floors, he asserts that, “There was no guarantee that...leaks in the oversize kitchen would not have permeated through to the apartments below.” He expresses the concern that because plaintiffs will reside in the apartment only on a part-time basis, “It is entirely conceivable that [they] could turn on the dishwasher in the apartment on a Sunday evening before returning to their home in the suburbs, only for it to spring a leak and flood the apartment for days...”

Tanamli does not explain how a smaller kitchen would prevent a dishwasher leak from releasing water to dry areas of his apartment below. Defendants do not submit expert proof that the waterproof membrane under plaintiffs’ floors would not provide adequate protection against leaks to Tanamli’s apartment.

Shawn Bayer, in his affidavit in opposition to the motion, concedes that his refrigerator would be located over Tanamli’s bedroom. However, he states that the refrigerator can be

moved.

Plaintiffs also submit a letter to the board from their former attorney who also concedes that the kitchen would be over the Tanamli bedroom below and that the proposed master bathroom would be over a portion of a hallway below.

Plaintiffs also submit an affidavit from an engineer, Ronald Erickson. Erickson inspected plaintiffs' apartments and reviewed the renovation plans that Tanamli submitted to the board and to the New York City Department of Buildings. The latter plans, according to Erickson, differ from the former. Erickson bases this conclusion on the fact that the plans Tanamli submitted to 57 East are dated December 13, 1999; however, the two sets of plans he submitted to the Department of Buildings are dated February 2, 2000, and February 4, 2000.

According to Erickson, when Tanamli combined his two units, he increased his kitchen size from four and one-half feet wide and eleven and one-half feet long to six feet wide and thirteen feet long. Erickson also states that Tanamli increased his bathrooms' dimensions. Erickson opines that "A strict reading of the plans for Tanamli evidences an expansion of 'wet' rooms over dry areas in the 'B' line." Erickson states that the plans Tanamli submitted to the board did not show a washer and a dryer; however, the plans he submitted to the Department of Buildings depicted these appliances.

Erickson next asserts that Kyrour and Tanamli incorrectly characterize plaintiffs' proposed study as a central corridor. He urges that this study is "...conceptually no different than the 'library' Tanamli created during his...alteration."

Finally, Erickson posits that plaintiffs' kitchen enlargement is "no different form [sic] the enlargement of Tanamli's kitchen, but the Tanamli enlarged kitchen, places part of that kitchen

over a dry area.”

Tanamli, in his reply affidavit, asserted that he never installed the washer and dryer. Bayer, in his deposition testimony, conceded that he inspected Tanamli’s apartment and that there was no washer or dryer.

Refuting plaintiffs’ trespass allegation, Kyrour denies, in her affidavit, that she authorized the unlawful entry and states that as soon as she learned that workers entered plaintiffs’ premises, she wrote to Hammond and told her that this entry was prohibited and cautioned her to cease. Defendants submit her written communication to Hammonds. Plaintiffs do not submit any written proof or deposition testimony showing that the moving defendants participated in the trespass.

Nor do plaintiffs offer any written evidence or deposition testimony supporting the claim that Kyrour and Tanamli engaged in self-dealing in denying the application. At his deposition, Shawn Bayer testified that Tanamli’s wife told him that her husband did not want anyone to occupy the apartments above them. Moreover, there is no dispute that plaintiffs renovated 4C and that it can be occupied, although it is not combined with 4B. Bayer also testified that his claim that Kyrour had an interest is based only on his assumption that favoring the board’s position would ensure that Kyrour Realty remains the building’s managing agent.

Finally, although plaintiffs contend that they were treated unfairly because the board expedited approvals for Tanamli’s and Hammonds’s renovations, they do not submit documents or testimony supporting this assertion. Kyrour denies that there was any favorable treatment and submits documents showing that the board halted the Hammonds renovation until the Building Code violations were cured.

Discussion

A party seeking summary judgment has the burden of submitting evidence in admissible form that eliminates triable issues of fact. The proof, both for and in opposition to summary judgment must be factual and not conclusory (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Similarly, speculation is insufficient either to support or defeat the motion (*see Smith v New York City Hous. Auth.*, 74 AD3d 645 [1st Dep. 2010]). Unless the party seeking summary judgment establishes its prima facie entitlement to relief, the opponent has no duty to offer proof in opposition. Once the movant establishes entitlement to judgment in its favor, it is incumbent upon the opposing party to come forward with evidence creating a material issue of fact.

First Cause of Action

Here, the movants have not met their initial burden of proof with respect to the first cause of action against 57 East. The proprietary lease states that the board may not unreasonably withhold permission to make renovations. Contrary to defendants' arguments, the business judgment rule (*see Matter of Levandusky v One Fifth Avenue Corp.*, 75 NY2d 530 [1990]) does not shelter the corporation if it unreasonably denies such permission (*see Rosenthal v One Hudson Park, Inc.*, 269 AD2d 144 [1st Dept. 2000]). Also, contrary to movants' argument, Business Corporations Law § 501 (c) mandates that all shareholders are to be treated equally (*see Fe Bland v Two Trees Management Co.*, 66 NY2d 556, 568-569 [1985]).

Defendants' moving papers fail to eliminate a triable issue of fact on the issue of whether the denial of plaintiffs' application to combine the B and C units was reasonable. Certainly, in light of the fact that a similar combination of a B and C unit was approved by the board for shareholder Tanamli could permit a fact finder at trial to conclude that the Bayers were not

treated equally to another shareholder, who also happens to be the board President.

The record is devoid of any proof of the precise terms of the wet-over-wet policy. The renovation agreement that plaintiffs signed does not even mention, let alone define the terms of the policy. Although defendants contend that placing a refrigerator over a bedroom violates the policy, they offer no proof that this allegedly industry-wide standard prohibits this placement. The fact that Braxton found that the revised plans conformed to the policy raises an issue of fact of whether there was compliance.

Nor have defendants provided legally sufficient proof that the denial was reasonable. They fail to adequately explain why they accepted Braxton's first finding that the renovation would violate the policy, but then caused it to alter the finding when it found compliance. In both instances, Braxton furnished an opinion; however, it was only on the second report that defendants said Braxton exceeded its role in expressing its opinion. Moreover, they fail to provide legally sufficient proof that the proposed kitchen, bathroom, and corridor will violate established building policy.

Defendants speculate when they argue that plaintiffs' refrigerator will cause noise or that it or the dishwasher constitute a leak hazard. The proof in the record shows that there is no plumbing connection to the refrigerator and the possibility that a future occupant will install a refrigerator with an ice maker is rank speculation. The characterization of its vibration as subtle is too vague to constitute factual proof. The argument that the dishwasher may malfunction and leak is similarly conjectural. Nothing in the record shows that a dishwasher is a prohibited item. There is no expert proof to support the claim that the size or the configuration of the proposed kitchen could make damage from a leak more likely than that of a smaller or differently

configured kitchen, or that the waterproofing material plaintiffs intend to use is inadequate to protect the apartment below from water damage.

Similarly, there is no legally sufficient proof that the size of plaintiffs' proposed bathroom will cause a leaking hazard or that the plumbing lines to the room will be an extraordinary hazard. There is an absence of legally sufficient proof on the question of whether the area connecting plaintiffs' combined apartments will generate unacceptable noise. There is a factual issue of whether the area is a corridor or a study similar to the library in Tanamli's combined apartments, which the board had approved.

There is also a question of whether the rejection was discriminatory under BCL §501 (c). All shareholders of 57 East stock must be treated equally, under the terms of the proprietary lease. However, the instant rejection was not on the reasonableness criterion under the lease, but was based on the inapplicable business judgment rule. Therefore, there is a triable issue of fact on the question of whether plaintiffs received improperly different treatment from that given to other shareholders.

Movants have failed in the first instance to show that they are entitled to judgment as a matter of law on the first cause of action.

Second Cause of Action

At oral argument the plaintiffs conceded that the need for injunctive relief had been rendered academic.

Third Cause of Action

The third cause of action seeks essentially the same relief sought in the first cause of action. However, the third cause of action is based on defendants causing Braxton to alter its

report and the alleged misrepresentation that plaintiffs could combine the apartments.

While there is no dispute that both Kyrous and Tanamli directed Braxton to change the report, they both point to 57 East's rule that the engineer's report is not binding on the board; rather, the board makes the ultimate decision to accept or reject a renovation application. Movants' reliance on this rule is sufficient to trigger plaintiffs' obligation provide admissible proof that defendants' actions proximately caused them harm entitling them to relief. Plaintiffs have not met this burden. They have failed to show that the board was improperly influenced by the revised report. Therefore, defendants are entitled to summary judgment dismissing the third cause of action.

Fourth Cause of Action

The fourth cause of action alleges that Kyrous, Tanamli, Hammonds, and Darif breached their fiduciary duties to plaintiff. Hammonds has not joined or opposed the motion, and the court will not grant sua sponte relief in her favor, as it has not given prior notice of its intent to do so. Plaintiffs have released Darif by stipulation. The sole question for the court to determine is Kyrous's and Tanamli's liability on this cause of action.

There is no dispute that Kyrous is the agent of a disclosed principal. She is the president of Kyrous Realty, a corporation that functions as 57 East's managing agent. Tanamli is the board president. Liability against both must be predicated on their acting as individuals, not as corporate officers.

The affidavits Kyrous and Tanamli submit are legally sufficient to show that they were acting in their representative capacities. This shifts to plaintiffs the burden of showing that there is a material question of fact as to whether these defendants were acting as individuals or were

engaged in self-dealing as individuals; plaintiffs failed to meet their burden of coming forward with proof that Kyrous and Tanamli committed tortious acts apart from exercising their corporate functions (*see Konrad v 136 East 64th Street Corp.*, 246 AD2d 324 [1st Dept. 1998]).

Shawn Bayer's deposition testimony fails to establish that Kyrous was acting or benefitting as an individual during the application process. His testimony in support of his contention was that she had an interest in denying the application because this would ensure Kyrous Realty's retention as the managing agent. This testimony is both speculative and conclusory. It is not the legally sufficient factual proof necessary to defeat summary judgment.

The only testimony Bayer offered against Tanamli was that Tanamli's wife told him that her husband said that he did not want anyone residing above them. The record belies this statement because it shows that not only did the board approve the sale of 4C to plaintiffs, but that plaintiffs were able to renovate the apartment and make it habitable, without any objection by Tanamli or the board. In any event, Ms. Tanamli's statement is hearsay upon hearsay. It is not the kind of proof required to defeat the motion. Therefore, the motion must be granted in favor of Kyrous and Tanamli on the fourth cause of action.

Fifth Cause of Action

The fifth cause of action is dismissed, based on the statement by plaintiffs' counsel at oral argument.

Sixth Cause of Action

The defendants' submissions demonstrate that they are entitled to summary judgment on the sixth cause of action alleging misrepresentation. An examination of the record indicates that Kyrous made no representation of any kind. Tanamli denies promising that plaintiffs would be

allowed to combine the apartments. Shawn Bayer's testimony was that Tanamli did *not* make a promise or otherwise guarantee board approval. Bayer, a former board member, knew that board approval was necessary. Therefore, even if Tanamli had made the promise, Bayer has not and cannot prove that he reasonably relied on it. Accordingly, this cause of action should be dismissed.

Seventh and Eighth Causes of Action

The seventh and eighth causes of action arise out of the same event: directing Braxton to alter its report. As noted earlier, plaintiffs have not established that this alteration proximately caused any harm to them. Therefore, both these causes of action must be dismissed.

Ninth Cause of Action

Plaintiffs have discontinued their ninth cause of action by stipulation.

Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Actions

The tenth, eleventh, twelfth and fifteenth causes of actions against Hammonds are dismissed based on the stipulation dated August 18, 2008.

Kyrous Realty, Kyrous, and Tanamli are entitled to summary judgment on the eleventh, twelfth, thirteenth, fourteenth, and fifteenth causes of action. Plaintiffs have discontinued these causes of action against Darif. As noted, the trespass causes of action against MacWeeney remain, as this court previously denied his motion for summary judgment.

Kyrous, Kyrous Realty, and Tanamli have established their entitlement to summary judgement on the trespass causes of action. Kyrous wrote to Hammonds telling her that there were to be no further intrusions into plaintiffs' apartments. Kyrous's submission shows that she did not participate in or authorize the trespasses. Plaintiffs have offered no proof that implicates

Kyrous Realty, Kyrous, or Tanamli in the trespasses. Therefore, defendants are not liable, as a matter of law (*Semon v Chasol Constr. Corp.*, 7 AD2d 1009 [2d Dept. 1959]).

Conclusion

Accordingly, it is

ORDERED that the motion for summary judgement by defendants 57 East 72nd Street Corporation, Kyrous Realty, Harriet Kyrous, and Sharif Tanamli is granted to the extent of dismissing as against them the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth causes of action, and their motion is otherwise denied; and it is further

ORDERED that the remainder of the complaint is severed and continues under this index number; and it is further

ORDERED, on the court's own motion, that any party to the stipulations dated August 18, 2008, and July 10, 2009, may take appropriate steps to enter an order and judgment pursuant to those stipulations; and it is further

ORDERED that the movants shall serve a copy of this order upon the Clerk of Court (60 Centre St., Basement) who shall enter judgment accordingly and upon all parties to this action; and it is further

ORDERED that the remaining parties and their counsel shall all appear in Mediation I on November 22, 2010, at 80 Centre Street, New York, New York. Failure of any party to appear at the mediation may result in entry of a default judgment pursuant to 22 NYCRR 202.27.

This constitutes the decision and order of the court.

Dated: September 25, 2010

Paul H. Finna

J.S.C.

FILED

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SEP 28 2010

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2010 Pt 12_110067_2004_007_MIL

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