[* 1]

SHORT FORM ORDER

INDEX No. 04-15801
CAL. No. 09-01965-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 4-21-10
ADJ. DATE 6-7-10
MNEMONIC: # 003 - MotD

MARVIN BUCKBINDER and LAURA BUCKBINDER, Plaintiffs, - against - THE WOODS AT SMITHTOWN HOMEOWNERS ASSOCIATION, INC. and FAIRFIELD PROPERTIES SERVICES, L.P., Defendants.	LAW OFFICE OF MITCHELL M. SHAPIRO, P.C. Attorney for Plaintiffs 135 West Main Street Smithtown, New York 11787 SCHNEIDER MITOLA LLP Attorneys for Defendants 666 Old Country Road Garden City, New York 11530

Upon the following papers numbered 1 to 41 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers 26 - 37; Replying Affidavits and supporting papers 38 - 41; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing the plaintiffs' complaint with prejudice and for a declaration of the rights of the parties is determined herein.

This is an action for damages and a declaration of rights concerning the alleged failure of the defendant, The Woods at Smithtown Homeowners Association (hereinafter Association), to repair or replace the gutters, leaders and driveway of the plaintiffs' premises located at 74 Jeremy Circle, Nesconset, Suffolk County, New York 11767. The plaintiffs have been the original owners of said premises since 1989 and the premises involved is one of 56 attached and semi-attached town homes in a development known as The Woods at Smithtown. The plaintiffs allege that prior to October 2002 their repair or maintenance requests were fulfilled but that subsequent thereto the Association refused the plaintiffs' requests for repair or replacement of said items as they were outside the scope of the Association's obligations under the Association's Declaration of Covenants, Restrictions, Easements, Charges and Liens (hereinafter Declaration), By-Laws and Rules and Regulations. Subsequently, the plaintiff, Marvin Buckbinder (hereinafter Buckbinder), commenced an action against the Association in Small Claims Court, which was dismissed based on questionable jurisdiction. Thereafter, the Association added the legal fees it incurred in the Small Claims Court action as an assessment to the plaintiffs' monthly common

charges. The plaintiffs continued to pay their regular monthly common charge but not the legal fees assessment portion. The Association imposed late fees on the plaintiffs' common charges and did not cash the plaintiffs' checks.

Then, in March 2004, the Association through its Board of Managers (hereinafter Board) filed a notice of lien, signed by the then President of the Board, Buddy Furcht, in the Suffolk County, New York, Clerk's Office against the plaintiffs' premises for the unpaid amount of legal fees and late fees charged as common charges. The Association subsequently commenced an action in the Supreme Court to foreclose said lien. By order of my distinguished colleague Justice Elizabeth Hazlitt Emerson, dated November 17, 2004, the Court granted summary judgment to the plaintiffs herein and dismissed the action because the Association was not entitled under the Declaration's terms to recover from the plaintiffs the entire cost of defending the small claims action. During the pendency of said action, the plaintiffs commenced the instant action and asserted nine causes of action against the Association and its management company, Fairfield Properties Services, L.P. (hereinafter Fairfield). The Association by its attorneys provided the plaintiffs with a Certificate of Satisfaction of Lien, dated May 29, 2007, to be filed by the plaintiffs.

The defendants now move for summary judgment dismissing the complaint because, among other issues, the actions of the Association's Board are protected by the business judgment rule; there is no longer a justiciable controversy concerning the lien; and Fairfield did not decide or act independently but was always directed by the Board.

A party seeking summary judgment must establish its position by evidentiary proof in admissible form sufficient to warrant judgment for it as a matter of law (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d at 562).

The defendants seek dismissal of the first, third and fourth causes of action for a declaratory judgment which state that the defendants are obligated to maintain, repair and replace the plaintiffs' gutters, leaders and driveway as there is no specific reference in the Declaration or By-Laws to the repair or maintenance by the Association of said items, that said items are not considered common area or property but are instead part of the lot owned by the homeowner, and that in any event the Board's decisions on the matter are protected by the business judgment rule.

"The condominium form of ownership of real property is manifested as a division of a parcel of real property into individual units and common elements in which an owner holds title in fee to his individual unit as well as an undivided interest in the common elements of the parcel" (***Residential Comm. of Bd. of Managers of the Sycamore v 250 East 30th Street Owners, LLC***, 17 Misc 3d 1139 (A), 856 NYS2d 26, *4 [Sup Ct, New York County 2007]; *see e.g.*,

Murphy v State of New York, 14 AD3d 127, 787 NYS2d 120 [2nd Dept 2004]). A parcel of real property becomes a condominium, and is thus subject to the jurisdiction of the Condominium Act (Real Property Law Article 9-B, § 339-d et seq.), through the filing of a declaration of condominium (RPL § 339-n; *see*, *id.*). Once created, the administration of the condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners concerning their own units and the condominium's common elements (*id.*;*see*, ***Gennis v Pomona Park Bd. of Managers***, 36 AD3d 661, 828 NYS2d 472 [2nd Dept 2007]; ***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d 1, 523 NYS2d 523 [2nd Dept 1987]).

The Declaration and the By-laws were executed as part of the same transaction and must be interpreted together (*see*, ***Perlbinder v Board of Managers of 411 East 53rd Street Condominium***, 65 AD3d 985, 987-988, 989, 886 NYS2d 378 [1st Dept 2009]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see*, ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 583, 723 NYS2d 44 [2nd Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]).

Buckbinder's deposition testimony (hereinafter EBT), dated February 14, 2008, submitted by the defendants, revealed that the plaintiffs' unit was the middle unit of three attached town home units. According to Buckbinder, the plaintiffs have had a longstanding, recurring problem of leaking gutters that is continuing and has caused damage to the interior of the unit. Buckbinder testified that when the problem first occurred in 1990 and when it recurred in approximately 1995 and 1997, he called Fairfield, the managing agent, to inform it that the gutters were leaking and each time Fairfield sent someone who repaired the gutters. A letter, dated September 16, 1996, from Andrew Palatta, Fairfield's Managing Agent Representative (hereinafter Fairfield's Managing Agent), to Buckbinder, also submitted by the defendants, indicates that the Board had approved the repairs on the plaintiffs' leaders and gutters and that the contractor would be taking care of the repair shortly. Buckbinder's testimony also revealed that when he next complained of the leaking gutters by letter, dated September 30, 2002, Frank V. Cecere, Fairfield's Managing Agent, initially notified him by letter, dated October 4, 2002 that the plaintiffs' gutters and leaders were scheduled to be repaired but Buckbinder subsequently received a letter, dated November 26, 2002, from Fairfield indicating that the gutters and leaders were the responsibility of the homeowner. The aforementioned letters have also been submitted by the defendants.

Rebecca Forella (hereinafter Forella), Board treasurer since 2003, testified at her EBT on January 4, 2007 that the Board hired people to perform maintenance. Bruce Zehentner (hereinafter Zehentner), Fairfield's Managing Agent from 1987 to 1996 and 2002 to January 2008, testified at his EBT on July 7, 2009 that Fairfield did not make decisions on homeowner complaints. Rather, the Board made all decisions and then directed him on how to address the situation. By affidavit, dated March 25, 2010, Geri Guerra (hereinafter Guerra), Board president for approximately two years and a unit owner for about nine years, states that the plaintiffs had failed to present the Board with proof that their gutters, leaders and driveway needed repairs or that they had expended monies to repair them.

The defendants rely on Article IV (Property Rights in the Properties), Section 2 (Title to Common Properties) of the Declaration to support their position that the gutters and leaders are the responsibility of the homeowner. Said section includes the following covenant running with the land and binding the Association, its successors and assigns:

> "The maintenance and repair of the Common Properties shall include, but not be limited to, the repair of damage to roadways, walkways, buildings, pool, tennis court, outdoor lighting and fences, landscape maintenance, exterior home and building maintenance to all Homes which will consist of staining or painting the exterior of the Homes and roof repairs."

While "Home" is defined in the Declaration under Article I (c) as referring to "all units of residential housing situated upon The Properties," no definition is provided for "buildings." However, a review of the Declaration reveals that the exterior structures of a "Home" are subsumed in the term "Building" as evidenced by Article X (Insurance) Sections 1 and 3 and Article IX (Exterior Maintenance) Section 2. Specifically, Article X (Insurance) Section 1 provides that "The Board of Directors shall be required to obtain and maintain, to the extent obtainable, the following insurance: fire insurance with extended coverage, water damage, vandalism and malicious mischief endorsements, insuring all of the Buildings on the Properties including all of the Homes..." Pursuant to Article X (Insurance) Section 3, "[i]n the event of damage to or destruction of the Buildings as a result of fire or other casualty, the Board of Directors shall arrange for the prompt repair and restoration of the Buildings (including any damaged Homes which is [sic] covered by insurance but not including any wall, ceiling or door decorations or coverings or other furniture, furnishings, fixtures or equipment installed by Home Owners in the Homes) ..." Article IX (Exterior Maintenance) Section 2 (Disrepair of Lots) provides that the Board "... shall have the right, through its agents and employees to enter upon the lot upon which said Home is located and to repair, maintain and restore the lot and the buildings and any other improvements erected thereon."

Inasmuch as the gutters and leaders are exterior structures of a Home, which is included in the term Building, the first portion of Article IV Section 2 concerning "the repair of damage to ... buildings" is applicable to gutters and leaders. Therefore, the Association is responsible for the repair of gutters and leaders of the Homes of The Woods at Smithtown pursuant to the aforementioned provisions of the Declaration.

In addition, Article IX, Section 1 (Exterior Maintenance) of the Declaration, also relied on by the defendants, expands upon the maintenance requirements of the Association. Said section includes the following:

> "The Association, shall also be responsible for landscape maintenance of the lots and common areas and snow removal of the roadways, driveways, and parking areas on the Common Properties,[1] maintenance of the walks, parking spaces,

---

[1] Article I (h) of the Declaration defines "Common Properties" or "Common Areas" as "certain areas of land other than individual lots as shown on the filed subdivision map and intended to be devoted to the common use and enjoyment of the owners of the Properties."

roadways and facilities comprising the Common Properties and maintenance of any pipes, wires or conduits located outside of any Home including common sewer lines located outside of the Homes."

Since gutters and leaders are located outside of the Home and function as conduits for water draining away from the Home, the Association is also responsible for the "maintenance" of the gutters and leaders of the association property pursuant to said section of the Declaration.

Buckbinder's EBT testimony indicated that prior to 2002 he never requested any repairs to his driveway because the Board seal coated all of the driveways but that in 2002 the plaintiff was advised that driveway repairs were the homeowner's responsibility. In addition, he testified that he hired a contractor to repair his driveway in 2007 for which he did not need Board approval. Forella's EBT testimony revealed that in the 11 years that she had resided there the Board has never arranged for the "blacktopping" of driveways. However, neither she nor Zehentner testified as to whether any driveway seal coating of cracks, as opposed to "blacktopping" or paving was performed through arrangements by the Board. A review of the Declaration indicates that "driveways" are specified in and considered part of the Common Properties in Article IX, Section 1 (Exterior Maintenance), "[t]he Association, shall also be responsible for ... snow removal of the roadways, driveways, and parking areas on the Common Properties, ..." Forella testified at her deposition that the Association arranged for a contracting company to remove snow from the driveways of the units. The Court notes that "the maintenance and repair of the Common Properties" is non-exclusive under the terms of the Declaration inasmuch as Article IV, Section 2 provides, "shall include, but not be limited to..." Thus, the defendants have failed to demonstrate that the repair or maintenance of driveways, which are considered Common Properties, are not a responsibility of the Association under the governing documents.

The plaintiffs, in opposition to the motion, submit Part I of the Offering Plan which contains a "Description of Common Areas and Facilities to be Owned by the Association" within which the section entitled "Roadways" indicates that "[t]here are 56 driveways in the Common Area serving the Homes" and "[o]wnership and maintenance of roadways and exterior parking areas will be retained by the Association. The Association will be obligated to repair, maintain, clean, and remove snow from the roadway and to construct and maintain safety signs and lighting as required by the Town." Said section of the Offering Plan is further evidence that driveways are included in the Common Properties or Common Area (*see generally*, ***Barr v DeMatteis Oak Park Assocs., LP***, 303 AD2d 436, 437, 756 NYS2d 618 [2nd Dept 2003]).

Where a challenge is made by an individual owner to an action of a condominium board of managers, whether incorporated or not, absent claims of fraud, self-dealing, unconscionability or other misconduct, the Court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium (***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d at 10). The business judgment rule will not serve to shield boards from actions that have no legitimate relationship to the welfare of the condominium, or that deliberately single out individuals for harmful treatment (*see*, ***Perlbinder v Board of Managers of 411 East 53rd Street Condominium***, 65 AD3d at 989).

Here, the defendants' proof fails to establish that the Board's actions in rejecting the plaintiffs' requests beginning in October 2002 were authorized by the terms of the Declaration or the By-Laws submitted herein and were made in good faith and in furtherance of the legitimate interests of the Association such that the Board is entitled to the protection of the business judgment rule in this case (*compare*, ***Helmer v Comito***, 61 AD3d 635, 636, 877 NYS2d 370 [2nd Dept 2009]). The Court notes that the EBT testimonies of Forella and Zehentner lacks probative value inasmuch as Forella joined the Board in 2003 and had no relevant records from prior thereto and Zehentner could not recall either the plaintiffs themselves or their complaints in 2002 concerning leaders and gutters or what resulted from their complaints. The affidavit of Guerra, the Board president, similarly lacked probative value.

In addition, the proof submitted raises issues of fact as to the extent of any damage to the plaintiffs' gutters and leaders and driveway that would require repair and maintenance "to preserve and enhance the property values and amenities of the Development" pursuant to Article IV Section 2 of the Declaration (*compare*, ***Helmer v Comito***, 61 AD3d at 636). Other than Buckbinder's EBT testimony, there is no evidence as to the actual condition of the gutters and leaders or the condition of the driveway prior to its alleged repair by the plaintiffs in order to determine whether the plaintiffs are entitled to a declaration that the gutters and leaders and driveway be repaired or replaced. The Court notes that the plaintiffs have not submitted any evidence of the condition of said items with their opposition papers. However, the defendants having failed to meet their burden, their request for dismissal of the first, third and fourth causes of action for a declaratory judgment stating that the defendants are not obligated to maintain, repair and replace the plaintiffs' gutters, leaders and driveway is denied.

As to Fairfield, the defendants have demonstrated that as an agent for a disclosed principal, Fairfield is not liable to the plaintiffs, as third party homeowners, for nonfeasance and that it lacked authority to make independent decisions on homeowner complaints (*see*, ***Pelton v 77 Park Ave. Condominium***, 38 AD3d 1, 11, 825 NYS2d 28 [1st Dept 2006]). "Unless the agent has assumed authority and responsibility, as if he were acting on his own account, then the duty which the agent fails to perform is a duty owing only to his principal and not to the third party to whom he has assumed no obligation" (***Jones v Archibald***, 45 AD2d 532, 535, 360 NYS2d 119 [4th Dept 1974]). In opposition, the plaintiffs have failed to establish that Fairfield owed them a duty or that Fairfield was affirmatively negligent in failing to maintain, repair and replace the plaintiffs' gutters, leaders and driveway (*see*, ***Pelton v 77 Park Ave. Condominium***, 38 AD3d at 11-12). Therefore, the defendants are granted summary judgment dismissing all claims as against Fairfield.

The defendants also seek summary judgment dismissing the second cause of action, which seeks a declaration that the Board wrongfully and improperly filed a notice of lien for unpaid common charges against the plaintiffs and a direction that the Association must vacate said notice of lien and for the recovery of damages. The Certificate of Satisfaction renders moot the claim to vacate the notice of lien. However, the defendants have failed to demonstrate that the filing of the notice of lien against the plaintiffs' premises for the entire amount of attorney's fees was properly filed in light of the prior decision of Justice Emerson, dated November 17, 2004. Nor have the defendants demonstrated that the plaintiffs did not sustain any damages as a result of the filing of the notice of lien based on Buckbinder's EBT testimony that since 2004 he

a result of the filing of the notice of lien based on Buckbinder's EBT testimony that since 2004 he did not attempt to sell or transfer his home (*see generally*, ***Guiliano v Carlisle***, 237 AD2d 569, 655 NYS2d 997 [2nd Dept 1997]; ***Green v Dolphy Constr. Co., Inc.***, 187 AD2d 635, 590 NYS2d 238 [2nd Dept 1992]). Therefore, only the portion of the second cause of action seeking a direction that the Association vacate the notice of lien is dismissed as moot.

The fifth cause of action is for slander of title by the willful and malicious filing of the alleged false and defamatory notice of lien. The defendants seek summary judgment dismissing said claim because there is no evidence that the Board acted unreasonably or with any malice or ill will or intent to harm the plaintiffs or the existence of any resulting damages.

"The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (***Brown v Bethlehem Terrace Assoc.***, 136 AD2d 222, 224, 525 NYS2d 978 [3rd Dept 1988]; *see*, ***Fink v Shawangunk Conservancy, Inc.***, 15 AD3d 754, 756, 790 NYS2d 249 [3rd Dept 2005]). The heart of an action for slander of title is the false disparagement of the title of another's property, resulting in "special damages" (*see*, ***Pawaroo v Countrywide Bank***, 2010 WL 1048822 [EDNY 2010]; ***Rosenbaum v City of New York***, 8 NY3d 1, 828 NYS2d 228 [2006]). An action for slander of title is maintainable only on a showing of malice in making such false statements with respect to the title (***Pawaroo v Countrywide Bank***, 2010 WL 1048822 [EDNY 2010]; ***Regan v Lanze***, 42 AD2d 831, 346 NYS2d 113 [4th Dept 1973]).

Here, the prior order of Justice Emerson rendered the notice of lien invalid but did not establish its falsity inasmuch as the Court found that the Association was entitled to recoup a portion of the lien sum from the plaintiffs. However, the deposition testimonies of Forella andZehentner failed to demonstrate that either had any actual knowledge of whether the Board knew that the Association was not entitled to recover the entire sum for attorney's fees from the plaintiffs at the time that the Board filed the notice of lien against the plaintiffs' premises such that the defendants failed to establish a lack of malice on the part of the Board (*compare*, ***Chamilia, LLC v. Pandora Jewelry, LLC***, 2007 WL 2781246, 2007-2 Trade Cases P 75,945, 85 U.S.P.Q.2d 1169 [SDNY 2007]). Guerra's conclusory statement that the Board acted responsibly, in good faith, in accordance with the Association's governing documents, and on the advice of counsel when filing the lien and commencing the foreclosure action did not remedy said deficiency. Therefore, the defendants failed to meet their burden of demonstrating entitlement to summary judgment dismissing the fifth cause of action in its entirety.

The sixth cause of action is to recover attorney's fees based on the defendants' malice and abuse of process in commencing the foreclosure action. The defendants assert that they are entitled to summary judgment dismissing said cause of action inasmuch as said fees are not authorized by the Association's governing documents, statute or any prior court orders. "An attorney's fee may not be recovered unless [such] an award is authorized by agreement between the parties, or by statute or court rule" (***Cardo v Board of Managers, Jefferson Village Condo 3***, 67 AD3d 945, 946, 891 NYS2d 97 [2nd Dept 2009], *quoting* ***Khanal v Sheldon***, 55 AD3d 684, 686, 867 NYS2d 460 [2nd Dept 2008]). However, the Courts have recognized exceptions to the general rule that attorney's fees are not recoverable absent a contractual or statutory liability, e.g., when the opposing party's malicious acts cause a person to incur legal fees, and when the

litigation creates a benefit to others (*see*, ***Matter of John T.***, 42 AD3d 459, 839 NYS2d 783 [2nd Dept 2007]; ***Mastic Fuel Serv. v Van Cook***, 55 AD2d 599, 389 NYS2d 388 [2nd Dept 1976]). Inasmuch as the defendants have failed to establish a lack of malice on the part of the Board, as indicated above, they have failed to demonstrate their entitlement to summary judgment dismissing the sixth cause of action in its entirety.

The seventh cause of action alleges defamation impugning Buckbinder's business integrity as a result of the requirement of reporting the lien to his employer and that the notice of lien filing and foreclosure action caused the plaintiffs embarrassment, humiliation and caused them to be subject to the ridicule of friends and neighbors. The defendants assert that it must be dismissed inasmuch as Buckbinder's EBT testimony failed to support said claims. "The elements of a cause of action [to recover damages] for defamation are a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'" (***Salvatore v Kumar***, 45 AD3d 560, 563, 845 NYS2d 384 [2nd Dept 2007], *quoting* ***Dillon v City of New York***, 261 AD2d 34, 38, 704 NYS2d 1 [1st Dept 1999]; *see*, ***Epifani v Johnson***, 65 AD3d 224, 233, 882 NYS2d 234 [2nd Dept 2009]). Buckbinder's EBT testimony reveals that he did not tell anyone either at work at UBS or friends or family members of the foreclosure and that although he mandatorily informed UBS of the lien, he had no idea whether any actions were taken with respect to said information, he was not treated any differently from other employees as a result, and he and other employees were "let go" from UBS in 2005 due to a reduction in force. Thus, the defendants have established their entitlement to summary judgment dismissing the seventh cause of action in its entirety (*see generally*, ***Peterec-Tolino v Harap***, 68 AD3d 1083, 892 NYS2d 154 [2nd Dept 2009]; ***Cammarata v Cammarata***, 61 AD3d 912, 878 NYS2d 163 [2nd Dept 2009]). The plaintiffs failed to raise a triable issue of fact in opposition. The Court notes that neither Buckbinder's EBT testimony nor his affidavit supports the claim that Buckbinder was told that he could no longer be promoted due to the financial "black mark" on his employment file.

The eighth cause of action alleges tortious conduct by the Association in, among other things, finding that the plaintiffs breached and defaulted in their obligations to pay common charges, wrongfully denying the plaintiffs use of all common facilities, and wrongfully refusing to accept the plaintiffs' payment of the proper amount of common charges. The defendants seek summary judgment dismissing said cause of action because the relationship between the plaintiffs and the Association was contractual and inasmuch as the plaintiffs' claims were essentially breach of contract claims, the plaintiffs have failed to allege or establish that the Association breached any legal duties separate from its obligations under the Association's governing documents. The Court finds that the plaintiffs' cause of action does lie in breach of contract, *i.e.,* breach of obligations under the Association's governing documents. A "breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (***Clark-Fitzpatrick, Inc. v Long Island R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653 [1987]). Inasmuch as the eighth cause of action does not identify a duty of care owed by the Association distinct from its contractual obligations nor does it allege that the Board engaged in tortious conduct separate and apart from its alleged failure to comply with the requirements of the governing documents, said claim must be dismissed (*see*, ***Probst v Cacoulidis***, 295 AD2d 331, 743 NYS2d 509 [2nd Dept 2002]). In opposition, the plaintiffs have failed to demonstrate anything to the contrary so as to raise an issue of fact. The eighth cause of action alleging tortious conduct is dismissed in its entirety.

The ninth cause of action alleges damages for intentional infliction of emotion distress. The defendants seek summary judgment dismissing this claim as they have demonstrated that the actions of the Board did not rise to the level of extreme and outrageous conduct, so transcending the bounds of decency as to be intolerable in a civilized society (*see*, ***Glatter v Chase Manhattan Bank***, 239 AD2d 68, 669 NYS2d 651 [2nd Dept 1998]; *see also*, ***Kaye v Trump***, 58 AD3d 579, 873 NYS2d 5 [1st Dept 2009], *lv denied* 13 NY3d 704, 887 NYS2d 1 [2009]). The plaintiffs, in opposition, have failed to raise a triable issue of fact. Thus, the ninth cause of action to recover damages for intentional infliction of emotional distress is dismissed in its entirety.

Therefore, the defendants' motion for summary judgment is granted solely with respect to the dismissal of the seventh cause of action alleging defamation, the eighth cause of action alleging tortious conduct, and the ninth cause of action alleging intentional infliction of emotional distress, all in their entirety, the dismissal of that portion of the second cause of action for a direction that the Association vacate the notice of lien, and the dismissal of all claims as against Fairfield. The remaining causes of action are severed and continued solely against the Association.

The defendants' alternate request for relief, for transfer of the instant action to the Suffolk County District Court, pursuant to CPLR §325(d), is denied inasmuch as the causes of action seeking declaratory judgment have not been dismissed and the Suffolk County District Court lacks subject matter jurisdiction over said claims (*see*, ***Bank of New York v Irwin Intl. Imports***, Inc., 197 AD2d 462, 602 NYS2d 859 [1st Dept 1993]; ***Riccardo's Lounge, Inc. v Maggio***, 9 Misc 3d 1112A, 808 NYS2d 920 [Sup Ct, Nassau County, 2005]).

Dated: September 28, 2010

J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**