

**Bretton Woods Condominium I v Bretton Woods Homeowners Assn., Inc.**

2010 NY Slip Op 33034(U)

October 25, 2010

Supreme Court, Suffolk County

Docket Number: 09-36820

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

MOTION DATE 9-29-09  
ADJ. DATE 10-13-10  
Mot. Seq. # 001 - MD  
# 002 - XMD  
# 003 - XMG; CASEDISPSUBJ

-----X	EDWARD M. TAYLOR, ESQ.
BRETTON WOODS CONDOMINIUM I and :	Attorney for Plaintiff Bretton Woods Condo I
BRETTON WOODS CONDOMINIUM II, :	811 West Jericho Turnpike, Suite 201W
Plaintiffs, :	Smithtown, New York 11787
- against - :	FELDERBAUM, HALBRIDGE & WIRTH
:	Attorney for Plaintiff Bretton Woods Condo II
:	357 Veterans Memorial Highway
:	Commack, New York 11725
BRETTON WOODS HOMEOWNERS :	COHEN & WARREN, P.C.
ASSOCIATION, INC., :	Attorney for Defendant
Defendant. :	80 Maple Avenue, P.O. Box 768
-----X	Smithtown, New York 11787

Upon the following papers numbered 1 to 24 read on this motion for temporary restraining order, cross motion to dismiss and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers 11 - 19, 20 - 22; Answering Affidavits and supporting papers 23 - 24; Replying Affidavits and supporting papers   ; Other memorandum of law, 10; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the plaintiffs, brought on by order to show cause, for a temporary restraining order enjoining the defendant from proceeding with its annual meeting and the appointment of a board of directors is denied as moot, and it is further

**ORDERED** that the cross motion by the defendant for an order pursuant to CPLR 3211 (a) (1) dismissing the complaint is denied; and it is further

**ORDERED** that the cross motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to the first and fourth causes of action in their action for an order declaring that the amendments of the homeowners association bylaws are null and void, is granted to the extent that the plaintiffs have established their entitlement to judgment based on the fourth cause of action, and is otherwise denied.

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The plaintiffs bring this declaratory judgment action seeking, *inter alia*, a declaration that the amendments to the homeowners association bylaws enacted by a vote of the member condominiums in a meeting held on August 31, 2009, are of no effect. The plaintiffs are two of nine condominiums duly organized pursuant to Article 9-B of the Real Property Law, which form part of a common interest community along with the defendant Bretton Woods Homeowners Association, Inc. The defendant is a domestic not-for-profit corporation governed by a declaration and attached bylaws which were filed in the office of the Suffolk County Clerk on September 12, 1975, in Liber 7908 at page 131. Article III of the declaration and Article VI of the bylaws delineate four classes of members in the homeowners association, only two of which are relevant herein. Class "A" members consist of the owners of homes within each condominium, and Class "B" members consist of the respective board of managers of each condominium. Class "A" members do not have any voting rights in the homeowners association. The voting rights of Class "B" members are set forth in identical clauses in Article III of the declaration and Article VI of the bylaws, which read:

"Each Class B Member shall be entitled to the number of votes corresponding to the number of Homes in its condominium. No Class B Member shall split or divide its votes on any motion, resolution or ballot, other than for the cumulative voting procedure which shall be employed in the election of Directors."

On August 31, 2009, the defendant held a special meeting for the sole purpose of amending Article VI and Article VIII of its bylaws to change the cumulative voting system for the election of directors to a system in which each condominium board of managers would appoint one director to the board of the homeowners association. In accordance with its bylaws, said amendments were passed by a vote of slightly more than sixty six and two-thirds percent (66 2/3 %) of the votes of the membership in the association. The plaintiffs contend that the amendments adversely affect their voting rights and their interests in violation of Article XIII of the bylaws, which states:

"[N]o amendment, however, shall affect or impair the validity or priority of the Members' interests and the interests of holders of a mortgage encumbering a member's home."

The plaintiffs allege that Bretton Woods Condominium I and II respectively contain 164 homes (or 16 % of the owners) and 172 homes (or 17 % of the owners) within the homeowners association. Because the bylaws call for cumulative voting for a nine member board of directors, the plaintiffs allege that their voting power is reduced from 33 % to 22 % under the amended voting and election system in which they would be entitled to appoint only two of nine members to the board.

In addition, the plaintiffs contend that, in order to properly enact the subject amendments, the defendant's declaration would have to be amended by a vote of eighty percent of the members. Article XI, Section 2 of the declaration reads as follows:

"Unless specifically prohibited herein, Articles I through Article III ... may be amended by an instrument signed by Members ... holding not less than

eighty per cent (80 %) of the votes of the membership. Any amendment must be properly recorded to be effective.”

It is undisputed that Article III of the declaration has not been amended, nor has any such amendment been recorded.

The plaintiffs move by order to show cause for a temporary restraining order to enjoin the defendant from proceeding with its annual meeting and the appointment of a board of directors pursuant to its newly amended bylaws. However, a proposed provision in said order which would have restrained the defendant from proceeding with its annual meeting was deleted by the Hon. Peter Fox Cohalan and the annual meeting has been held, and a new board of directors appointed. The parties agree that the issues raised by the order to show cause are moot. Accordingly, the motion is denied.

The defendant cross-moves for an order dismissing the complaint pursuant based on documentary evidence. Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Vitarelle v Vitarelle*, 65 AD3d 1034, 885 NYS2d 320 [2009]; *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401, 873 NYS2d 326 [2009]). In support of its cross motion, the defendant submits the affirmation of its attorney, the affidavit of its president, its verified answer, a copy of a 1997 amendment to its bylaws,<sup>1</sup> a copy of the August 31, 2009 amendment to its bylaws, and a copy of its certificate of incorporation as a not-for-profit corporation.

Pursuant to CPLR 3211(e) the defendant was required to bring any motion to dismiss pursuant to 3211(a) (1) before the time to answer the complaint (either 20 or 30 days). Otherwise, defendant is deemed to have waived the right to so move. It is clear that the time to answer the complaint has long expired. In addition, the actual interposition of the answer waives the right to make the instant motion (*Incorporated Village of Laurel Hollow v Laverne*, 43 Misc2d 248, 250 NYS2d 951 [Sup Ct, Nassau County 1964]).

Accordingly, the defendant’s cross motion is denied.

The Court notes that the result would have been no different if the defendant had submitted its motion to dismiss in a timely manner. The documents submitted do not conclusively resolve all factual issues, nor do they establish a defense as a matter of law. The submitted amendments and the certificate of incorporation do not establish that the defendant has a defense as a matter of law against the plaintiffs’ claim that their voting power and their ability to further their interests within the homeowners association have been improperly reduced. In addition, despite the defendant’s contention that a failure to amend the declaration has no legal significance, the submitted documents do not establish that fact.

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<sup>1</sup> The 1997 amendment to the bylaws reduces the vote necessary to amend the bylaws of the association from 80 % of the voting membership to 66 2/3 % of the voting membership

The plaintiff cross-moves for summary judgment for an order declaring that the amendments to the homeowners association bylaws purportedly enacted on August 31, 2009 are null and void. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore*, *supra*).

In support of their motion the plaintiffs submit their verified complaint, the notice calling for a special meeting of the association on August 31, 2009, the bylaws of the association, notice of the annual meeting scheduled for September 15, 2009, and the declaration creating the defendant homeowners association. Initially, the Court notes that, while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (*see Wider v Heller*, 24 AD3d 433, 805 NYS2d 130 [2005]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing party has not been prejudiced (*see CPLR 2001; see also Welch v Hauck*, 18 AD3d 1096, 795 NYS2d 789 [2005]; *Julien v New Greenwich Gardens Assoc., LLC.*, 21 Misc 3d 1132A, 875 NYS2d 821 [2008]). Thus, notwithstanding the plaintiffs' failure to include a copy of the answer with its motion, the verified answer has been included in the cross motion by the defendant itself, the record is sufficiently complete, and the Court may decide the motion on its merits (*see Welch v Hauck*, *supra*; *Julien v New Greenwich Gardens Assoc.*, *supra*).

The plaintiffs have limited their motion for summary judgment to the first and fourth causes of action in their verified complaint. The first cause of action alleges that the amendments to the bylaws enacted on August 31, 2009 "affect and impair the interests of the Class A members that reside in the plaintiff condominiums and the Class B members of the plaintiff condominiums" in violation of Article XIII of the bylaws. However, the plaintiffs have not submitted any evidence to show how cumulative voting has determined the outcome of prior board elections, how the elimination of cumulative voting will impact their representation on the board of directors, or how the new system of appointing board members will adversely "affect and impair" the interests of their Class A and Class B members. Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Accordingly, that branch of the plaintiffs' motion seeking summary judgment as to the first cause of action in the complaint is denied.

The plaintiffs have established their entitlement to summary judgment on the fourth cause of action in the complaint which alleges that the amendment to the bylaws enacted on August 31, 2009, conflicts with Article III of the declaration. It has been held that no modification of, or amendment to,

the bylaws of a homeowners association is valid unless it is set forth in an amendment to its declaration, and the amendment is duly recorded (*Strathmore Ridge Homeowners Assoc., Inc. v Mendicino*, 63 AD3d 1038, 881 NYS2d 491 [2009]; *Kuang v Bd. Of Mgrs. Of the Biltmore Towers Condominium*, 22 Misc3d 854, 873 NYS2d 421 [Sup Ct, Westchester County 2008]; *Blumberg v Albiocco*, 12 Misc3d 1045, 820 NYS2d 711 [Sup Ct, Nassau County 2006]). In addition, Article XV, Section 5 of the bylaws states that “in the case of any conflict between the Declaration and these By-Laws, the Declaration shall control.”

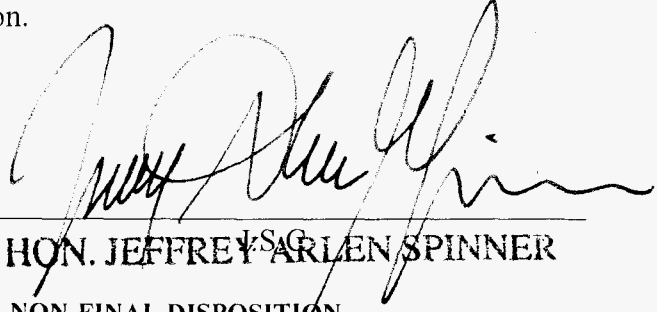
The defendant has failed to submit evidentiary proof in admissible form sufficient to require a trial of the material issues of fact. It is undisputed that the declaration has not been amended, nor has any such amendment been duly recorded. The defendant’s opposition consists of the mere assertion that the cumulative voting provision contained in the declaration is gratuitous and without legal effect. However, it is clear that the declaration and the bylaws were executed as part of the same transaction and must be interpreted together (*see, Perl binder v Board of Managers of 411 East 53rd Street Condominium*, 65 AD3d 985, 886 NYS2d 378 [2009]). In addition, the defendant’s verified answer and the affidavit of its president both acknowledge and admit that the homeowners association is governed by the declaration and the bylaws herein. Furthermore, the Court finds that the defendant’s contention that Not-For-Profit Corporation Law 617 mandates a different result is without merit.

Accordingly, the plaintiffs are entitled to entry of judgment declaring that the amendments of the homeowners association bylaws enacted by a vote of the member condominiums in a meeting held on August 31, 2009, are of no effect.

The decision herein, granting the plaintiffs complete relief in their action, albeit on one of four causes of action plead, renders the other causes of action moot. The Court’s finding that the plaintiffs are not entitled to summary judgement on their first cause of action, as well as the plaintiffs decision to omit any reference to the second and third causes of action in their cross motion, do not affect the Court’s finding that this is a final disposition of the action.

Submit judgment.

Dated:           OCT 25 2010          

  
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HON. JEFFREY ARLEN SPINNER

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION