

**205 W. 19th St. Corp. v Plymouth Mgt. Group, Inc.**

2010 NY Slip Op 33870(U)

February 22, 2010

Sup Ct, NY County

Docket Number: 116116/2008

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

205 WEST 19<sup>TH</sup> ST. CORP.,  
Plaintiff,  
  
-against-  
  
PLYMOUTH MANAGEMENT GROUP, INC. and  
LAURA MERCIER,  
  
Defendants.

INDEX NO. 116116/08  
MOTION DATE Dec. 18, 2009  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 13

The following papers, numbered 1 to 14 were read on this motion for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-5	
6-8	9-10
11-14	

Cross-Motion:  Yes  No

Upon the foregoing papers, the motion of defendant Laura Mercier for summary judgment dismissing the complaint insofar as asserted against her and plaintiff's cross motion for summary judgment in its favor and against defendant Laura Mercier are decided in accordance with the accompanying decision and order.

Dated: 2/22/10

O. P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X

205 WEST 19<sup>TH</sup> ST. CORP.,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.: 116116/2008

PLYMOUTH MANAGEMENT GROUP, INC., and  
LAURA MERCIER,

Defendants.

-----X

HON. PETER O. SHERWOOD, J.S.C.:

In this breach of contract action, defendant Laura Mercier (“Mercier”) moves for summary judgment in her favor dismissing the third, fourth and sixth causes of action asserted against her in the verified complaint. Defendant Plymouth Management Group, Inc. (“Plymouth”) and plaintiff oppose the motion. Plaintiff also cross-moves for summary judgment in its favor and against Mercier on the same causes of action asserted against Mercier. For the following reasons, the motion is granted in part and denied in part, and the cross motion is denied.

**Background**

Plaintiff 205 West 19<sup>th</sup> St. Corp. (“the Co-op”), a New York corporation, is the owner of a 19-unit, residential, cooperative apartment building located at 205 West 19<sup>th</sup> Street, New York, New York (“the building”) (Mercier Aff., Ex. “A” [complaint] ¶¶ 1, 4). Defendant Plymouth is the building’s management company (*Id.*, ¶¶ 2, 5). Defendant Mercier was formerly a shareholder in the Co-op. On October 31, 2006, Mercier purchased the 550 shares allocated to Unit 9 (“the Apartment”), and was given a proprietary lease therefor (“the Lease”) (*Id.*, ¶ 6, Ex. “C”). The relevant portions of the Lease provide as follows:

6. Changes in Terms and Conditions of Proprietary Leases: . . . The form and provisions of all the proprietary leases . . . may be changed by the approval of lessees owning at least 75% of the Lessor’s [the co-op’s] shares then issued, and such changes shall be binding on all lessees even if they did not vote for such changes . . . Approval by lessees as provided for herein shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose.

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24. Waivers: The failure of the Lessor [the Co-op] to insist, in any one or more instances, upon a strict performance of any of the provisions of this Lease, or to exercise any right or option herein contained, . . . shall not be construed as a waiver or a relinquishment for the future, of any such provisions, options or rights, but such provision, option or right shall continue and remain in full force and effect . . . and no waiver by the Lessor of any provision hereof shall be deemed to have been made unless in a writing expressly approved by the Directors.

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32. Surrender of Possession: Upon the termination of this Lease . . . the Lessee [Mercier] shall be and remain liable to pay all Rent, additional rent and other charges due or accrued and to perform all covenants and agreements of the Lessee up to the date of such termination. . . .

(*Id.* Ex. "C"). Incorporated into the Lease are the Co-op's By-Laws ("the By-Laws") (*Id.*, Ex. "D"). The provisions of the By-Laws, insofar as they are relevant to the motion and cross motion, provide as follows:

2.02 Special Meetings. Special meetings of shareholders ... may be called at any time by the President or Secretary or by a majority of the Board of Directors. ... No business other than that stated in the notice of special meeting shall be transacted at such meetings unless the holders of all the issued shares are present in person or by proxy.

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2.06 Voting. At each meeting of shareholders, each shareholder present in person or by proxy shall be entitled to one vote for each share registered in his name at the time of service of notice of such meeting ... Proxies shall be in writing, duly signed by the shareholder, but need not be acknowledged or witnessed, and the person named as proxy by any shareholder need not himself be a shareholder. Voting by shareholders shall be viva voce, unless any shareholder present at the meeting in person or by proxy demands a vote by written ballot, in which case the voting shall be by ballot and such ballot shall state the name of the shareholder voting, the number of shares owned by him, and the name of the proxy if such ballot is cast by proxy.

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2.07 Inspectors of Election. Inspectors of election shall not be required to be appointed at any meeting of shareholders unless requested by a shareholder present in person or by proxy and entitled to vote at such meeting. On the making of such request, inspectors shall be appointed or elected as provided by law.

2.08 Order of Business. At each meeting of shareholders, the President or, in his absence, the Vice President shall act as chairman of the meeting. If both shall be absent, the Treasurer shall preside or, in his absence, the Secretary. The Secretary or, in his absence or disability, such person as may be elected by vote of the holders of a majority of the shares represented shall act as secretary of the meeting. So far as consistent with the purpose of the meeting, the order of business shall be as follows:

- (i) Call to order.
- (ii) Presentation of the proofs of the calling of the meeting.
- (iii) Roll call and presentation and examination of proxies.
- (iv) Reading of minutes of previous meeting or meetings.
- (v) Reports of officers and committees.
- (vi) Appointment or election of inspectors of election, if requested.
- (vii) If the annual meeting or a special meeting [is] called for that purpose, the election of directors.
- (viii) Unfinished business.
- (ix) New business.
- (x) Adjournment.

Less than one year after purchasing the Apartment, Mercier decided to sell it. She put her unit on the market in early October of 2007 (Mercier Aff., ¶ 5). Mercier states that from the time she purchased the Apartment through the time that she decided to sell it, the Co-op did not have a By-Law imposing a "flip tax" on apartment sales (*Id.*, ¶ 7). Annexed to Mercier's affidavit in support of the motion is a copy of an October 22, 2007 e-mail she received from Plymouth stating that the Co-op did not impose a flip tax (*Id.*, Ex. "G"). Mercier alleges that the Co-op's President, Michael Nesspor ("Nesspor"), caused the Co-op to hurriedly adopt a flip tax resolution specifically in order to impose it on her upcoming sale (*Id.*, ¶¶ 8-9, 11). Nevertheless, Mercier claims that she is not liable for the flip tax, as a matter of law, because the Co-op failed to properly follow the procedures set forth in the By-Laws when it adopted the flip tax resolution, but even if the flip tax had been validly adopted, it is invalid and unenforceable as it was passed in bad faith and tailored to Mercier's sale (*Id.*, ¶ 2).

Mercier alleges that on December 27, 2007 (when she was out of the country), the Co-op sent out notices that "by order of the Board of Directors" a special meeting would be held on January 10, 2008, for the purpose of adopting a flip tax (*Id.*, ¶¶ 9-11, Ex. "I"). Mercier states that because she

was unable to return to the United States on such short notice, she asked her financial advisor, Bruce Nadell ("Nadell"), to attend that meeting with her proxy (*Id.*, ¶ 12).

Nadell states in a sworn affidavit submitted in support of the motion that the proposed resolution circulated at the meeting contained inconsistencies; particularly, that one section of the document indicated that the vote would be on a two-tiered flip tax of from 1% to 1.5% of an apartment's sales price (depending on how long the unit owner had resided in the building), while another section indicated that the two-tiered flip tax would be between 1% and 3% of the sales price (Nadell Aff. ¶ 6). He further states that the meeting was more of a social gathering than a shareholder's meeting and that the Co-op did not conduct the special meeting or the vote in accordance with the rules set forth in the Co-op's By-Laws (Nadell Aff. ¶ 5; Mercier Aff. ¶ 26). Finally, Mercier alleges that the resolution adopting the flip tax was invalid, because five of the proxies (representing 2,583 of the 5,317.50 votes necessary to pass the resolution) that were used in the vote were invalid because they did not contain all of the information specified in the By-Laws. (*Id.*, ¶¶ 14-25, Exs. "J"- "O").

Nesspor denies that the Co-op hurried to pass the flip tax resolution in order to impose a charge specifically on Mercier, and claims that the Co-op's Board had discussed the flip tax issue in at least five meetings since 2002 (Nesspor Aff., ¶¶ 5-8). Annexed to his affidavit in support of the cross motion are copies of the minutes of those meetings, which Nesspor alleges were sent to Mercier (*Id.*, Exs. "C", "E", "G", "H", "I"). At her deposition, Mercier acknowledged that she received at least some of those minutes (*Id.* ¶ 7, Ex. "D", at 19-21). Nesspor further states that the Co-op conducted its annual meeting on December 11, 2007. At that meeting, the Board decided to call a special shareholders' meeting on January 10, 2008, to vote on the issue of adopting a flip tax. Notice of the special meeting was sent to the shareholders on December 27, 2007 (*Id.*, ¶¶ 8-9). Nesspor contends that the proxy form and the proposed flip tax resolution to be voted on at the special meeting were annexed to the notice (*Id.* ¶ 9, Ex. "J"). Pursuant to such notice, the January 10, 2008 special shareholders' meeting was held in Nesspor's apartment, at which the flip tax resolution was discussed and put to a vote (*Id.*, ¶ 11). The resolution states, in pertinent part, as follows:

2. Paragraph 5.02 of the Bylaws of [the co-op] shall be amended as follows: “A fee equal to one percent (1%) of the fair market value of the shares assigned or transferred shall be paid to Lessor by Lessee, as a condition precedent to any ... transfer of the stock appurtenant thereto (such fee being commonly referred to as a “transfer tax”). The fee may be paid by a party other than the Lessee upon notice to Lessor. For any such ... transfer where the shares have been owned by the transferor ... [for] fewer than three years prior to the date of the transfer ... the transfer tax shall be 3% of the fair market value of the shares ... transferred.”

(*Id.*, Ex. “J”). At his deposition, Nesspor claimed that the shareholders used paper ballots to vote on the flip tax resolution (Mercier Reply Aff., Ex. “C”, 21-24). In his affidavit in support of the Co-op’s cross motion, however, Nesspor now claims that he was “mistaken”, and while written proxies were collected at the beginning of the meeting, a vote on the flip tax resolution was taken via voce and by proxy (Nesspor Aff. ¶ 12). Nesspor alleges that Co-op Vice President (and Plymouth President) Steven Miller (“Miller”) acted as the Secretary and inspector of election at the January 10, 2008 special shareholders’ meeting, and conducted all of the meeting formalities, including overseeing the flip tax resolution vote (*Id.*, ¶¶ 11-12). Annexed to Nesspor’s affidavit are copies of all of the proxies that Miller collected, and a copy of the vote report that Miller prepared which indicates that the flip tax resolution passed with 5,460 votes (*Id.* Exs. “R”, “S”). Affidavits from the shareholders whose proxies Mercier claims were defective are also annexed to Nesspor’s affidavit, all of which indicate that the respective shareholder had intended to vote his or her shares in favor of the flip tax resolution (*Id.* ¶¶ 10-11, Exs. “L”-“Q”).

Mercier closed the sale of her apartment on April 28, 2008 (Mercier Aff. ¶ 29, Ex. “T”). On that date, counsel for the Co-op marked her proprietary lease “cancelled,” and did not request payment of the flip tax (*Id.* ¶¶ 29-30). However, by letter dated June 3, 2008, the Co-op’s attorney served a demand upon Mercier’s attorney that the transfer fee (flip tax) of \$255,000.00, a sum representing three percent (3%) of the sales price of the Apartment, be paid to the Co-op within five (5) days (*Id.* ¶ 31, Ex. “V”). Mercier refused to make this payment (*Id.*).

On November 20, 2008, the Co-op commenced this action by filing a summons and verified complaint asserting six causes of action for: (1) breach of contract (against Plymouth); (2) negligence (against Plymouth); (3) breach of the lease (against Mercier); (4) unjust enrichment (against Mercier); (5) legal fees (against Plymouth); and (6) legal fees (against Mercier) (*Id.*; Ex. “A”).

Mercier filed an answer on March 2, 2009, in which she denies many of the material allegations of the verified complaint and interposes numerous affirmative defenses including that the claims against her are barred by plaintiff's failure to adhere to the governing provisions of her proprietary lease and the Co-op's ByLaws (*Id*, Ex. "B"). Mercier now moves for summary judgment to dismiss the verified complaint insofar as asserted against her. The Co-op opposes Mercier's motion and cross-moves for summary judgment on its third, fourth and sixth causes of action.<sup>1</sup>

### *Discussion*

When seeking summary judgment, the moving party bears the burden of proving by competent, admissible evidence that no genuine issues of material fact exist (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Here, the Court concludes that Mercier is only entitled to summary judgment dismissing the fourth cause of action against her, and that neither Mercier nor the Co-op has sustained the respective burden of proof as to the other claims.

#### **1. Breach of the Lease Agreement**

The Co-op's third cause of action seeks to recover the flip tax of \$255,000, plus interest, from Mercier on a theory of breach of the Lease and the By-Laws. "[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it" (*Eden Temporary Services v House of Excellence*, 270 AD2d 66, 67 [1st Dept 2000], quoting *Paz v Singer Co.*, 151 AD2d 234, 235 [1st Dept 1989]). Here, Mercier raises six arguments to support her claim that the flip tax resolution is invalid and unenforceable. For reasons of clarity, the court will review these arguments in sequence.

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<sup>1</sup>Defendant Plymouth also opposes Mercier's motion for summary judgment submitting an affidavit of Steven Miller, its President who is also an Assistant Vice President of the Co-op, and a Memorandum of Law. However, Plymouth's arguments are essentially identical to those advanced by the plaintiff and, indeed, Plymouth specifically incorporates plaintiff's arguments (*see*, Plymouth's Memorandum of Law, at 2). Therefore, they will not be separately addressed.

### **A. Notice of Special Shareholders' Meeting**

Mercier first argues that the January 10, 2008 special shareholders meeting was not called in accordance with the Co-op's By-Laws (Mercier's Memorandum of Law in Support of Motion, at 12-13). She notes that the notices of the special shareholders' meeting, mailed on December 27, 2007, state that the meeting had been called "by order of the Board of Directors." Mercier contends that the Board never adopted a resolution calling for that special meeting during its annual meeting on December 11, 2007 (*Id.*).

The Co-op denies this contention. It presents a copy of the minutes of the December 11, 2007 annual meeting that plainly state that the Board "had decided" to hold a vote on whether to adopt a flip tax in a special shareholders' meeting to be held in January, and to "properly notify" the shareholders about this meeting beforehand (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 14-16; Nesspor Aff., Ex. "I").

Mercier argues in reply that the Co-op's December 11, 2007 annual meeting "was not an officially constituted Board meeting," and that the issue of the flip tax was only discussed there "informally" (*see* Mercier's Reply Memorandum, at 12-13).

These claims are belied by the minutes of the December 11, 2007 annual meeting. Conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment (*see e.g. Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260, 262 [1<sup>st</sup> Dept 2003]). Therefore, the Court finds that Mercier's first argument lacks merit.

### **B. Proposed Flip Tax Resolution**

Next, Mercier argues that the notice of the January 10, 2008 special shareholders' meeting was defective since it did not have a copy of the proposed resolution to be voted on annexed to it (*see* Mercier's Memorandum of Law in Support of Motion, at 13-14). The Co-op again denies Mercier's contention, and presents a copy of that notice, which includes: (1) the notice itself; (2) a blank proxy form; and (3) the proposed resolution (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 14-16; Nesspor Aff., Ex. "J"). In reply, Mercier simply repeats her original claim (*see* Mercier's Reply Memorandum, at 6). Mercier's claims in this regard are also belied by the documentary evidence and, therefore, are devoid of merit.

### **C. Conduct of Special Shareholder's Meeting**

Mercier contends that the January 10, 2008 special shareholders' meeting was not conducted in accordance with the Co-op's By-Laws. Specifically, Mercier contends that the Co-op's Secretary was not present at that meeting, and no minutes thereof were recorded (*see* Mercier's Memorandum of Law in Support of Motion, at 14-15).

The Co-op disputes Mercier's contentions and responds that Miller, the Board's Vice President, acted as both Secretary and inspector of the election at the January 10, 2008 meeting, and conducted all of the meeting formalities, including overseeing the flip tax resolution vote (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 16). The Co-op presents excerpts from Miller's deposition testimony to support its contentions (*see* Nesspor Aff., Ex. "F").

In a reply affidavit, Mercier repeats her contentions and offers a reply affidavit from Nadell to support them (*see* Mercier's Reply Aff. ¶ 2; Mercier's Reply Memorandum, at 7-9; Nadell Reply Affidavit, ¶¶ 9-11). However, in his reply affidavit, Nadell simply states that at the January 10, 2008 meeting, no one announced that Miller was serving as Secretary and inspector of the election, but does not set forth any proof - beyond a parsing of Nesspor's deposition testimony - that Miller was not discharging those functions. The Court finds that Nadell's statements do not substantiate Mercier's third argument that the special shareholders' meeting was not conducted in compliance with the Co-op's By-Laws.

### **D. Vote on the Flip Tax Resolution**

Mercier claims that because five of the proxies that were submitted at the January 10, 2008 special shareholders' meeting were invalid, the flip tax resolution did not pass and, therefore, cannot be asserted against her (*see* Mercier's Memorandum of Law in Support of Motion, at 7-11). Mercier notes that: (1) four of the proxies failed to name a proxy holder; (2) two of the proxies omitted information about the number of shares that were being voted; and (3) one of the proxies was "assigned" to a proxy holder that did not attend the meeting, but herself sent a proxy (*Id.*).

The Co-op acknowledges that these proxies are incomplete, but argues that the vote on the flip tax resolution was, nevertheless, valid (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 7-12). The Co-op asserts that Mercier has confused the requirements of "proxies" and "ballots" that are set forth in section 2.06 of the By-Laws, and argues that, although the missing

information might be necessary if paper ballots had been used in the flip tax resolution vote, it was not required because a voice vote was taken instead (*Id.*).

Mercier replies first, that the disputed proxies were per se invalid for failure to name the proxy holders, and, second, that Nesspor has given contradictory statements about whether a voice vote or paper ballots were used (*see* Mercier's Reply Memorandum, at 14-16, 20-23).

The Court rejects the former argument in view of the general rule, embodied in Business Corporation Law § 609 (i), that no special form is required for a proxy (*see e.g. Brodsky v Board of Managers of Dag Hammarskjold Tower Condominium*, 1 Misc 3d 591, 594 [Sup Ct, NY County 2003]). Although it is true that the disputed proxy forms do not recite the names of the proxy holders, all of the forms are signed by the shareholders (as the statute and the by laws require), and each of the shareholders has submitted a separate affidavit stating that he or she orally designated their proxy to Nesspor (*see* Nesspor Aff., Exs. "L" to "P"). Under these circumstances, the Court cannot conclude that the proxies are per se invalid.

Nesspor's conflicting testimony about the manner of voting at the special shareholders' meeting is more troubling. As previously noted, Nesspor stated at his deposition that the flip tax resolution vote was taken by paper ballot (Mercier Aff., Ex. "W", at 21). However, in his affidavit in support of the cross motion, Nesspor states that he was "mistaken," and that the vote was taken by "viva voce," pursuant to section 2.06 of the By-Laws (*see*, Nesspor Aff. ¶ 12). Section 2.06 of the By-Laws clearly imposes different requirements on the use of paper ballots than it does on voice votes, including that ballots: (1) be in writing; (2) state the name of the shareholder; (3) state the number of shares owned by the shareholder; and (4) state the name of the proxy if the ballot is cast by proxy. It is also clear that the five disputed proxies herein would not satisfy these requirements if they *had* been used as paper ballots. What is not clear is whether the proxies were so used, whether there were other ballots, or whether, as Nesspor now contends, a voice vote was taken instead. While Miller's deposition testimony is in agreement with Nesspor's contention that there was a voice vote (*see* Mercier Aff., Ex. "X", at 54), Nadell, who was also present, states that no formal vote was taken (*see* Nadell Reply Aff. ¶ 10). Such conflicting testimony and statements reflect a disputed issue of fact the resolution of which may resolve the issue of whether or not Mercier is liable for payment of the flip tax. It is axiomatic that issues of witness credibility are not

appropriately resolved on a motion for summary judgment (*see, Santos v Temco Service Industries, Inc.*, 295 AD2d 218 [1st Dept 2002]).

#### **E. Plaintiff's Bad Faith**

Mercier argues that the flip tax resolution is unenforceable, as a matter of law, because it was passed in bad faith as it specifically targeted her (*see* Mercier's Memorandum of Law in Support of Motion, at 15-19). The Co-op responds that there is no evidence of bad faith. It observes that the minutes of at least five board meetings show that the Co-op was considering adopting a flip tax since 2002 - well before Mercier had even purchased her apartment (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 23-24). In *Barbour v Knecht* (296 AD2d 218, 224 [1<sup>st</sup> Dept 2002]), the Appellate Division, First Department, held that a shareholder alleging discrimination could call a board's good faith into question by "[a] showing of unequal treatment." Here, however, Mercier has offered nothing apart from her own conclusory and self-serving statements that she was unfairly singled out, while the co-op has presented documentary evidence that it had long been considering the adoption of a building-wide flip tax. Accordingly, the Court finds this argument to be devoid of merit.

#### **F. Discriminatory Treatment**

Lastly, Mercier avers that the flip tax resolution is unenforceable, as a matter of law, because it is discriminatory in a manner that violates Business Corporation Law § 501 (c) (*see* Mercier's Memorandum of Law in Support of Motion, at 19-20). In opposition, the Co-op correctly contends that Mercier's reading of the law is erroneous (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 22-24). Although, as a general matter, Business Corporation Law § 501 (c) prohibits unequal treatment of shareholders holding the same class of shares, it contains a single exception to the prohibition, added by amendment effective July 24, 1986, which permits co-op boards to adopt multi-tier flip taxes that may treat holders of the same class of stock differently depending upon how long they have owned that stock (*see e.g. Carling v 205-69 Apartments, Inc.*, 52 AD3d 261 [1<sup>st</sup> Dept 2008]; *Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245 [1<sup>st</sup> Dept 1997]; *Mogulescu v 255 West 98th Street Owners Corp.*, 135 AD2d 32 [1<sup>st</sup> Dept 1988], *appeal dismissed* 71 NY2d 964 [1988] and 73 NY2d 868 [1989]).

In sum, based upon the forgoing discussion, the Court concludes that both Mercier's motion and the Co-op's cross motion for summary judgment with respect to the third cause of action for breach of contract must be denied at this juncture.

## **2. Unjust Enrichment**

The Co-op's fourth cause of action seeks to recover from Mercier the amount of the flip tax allegedly due under a theory of unjust enrichment. "The criteria for recovery under a theory of unjust enrichment are: '(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services'" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002], quoting *Moors v Hall*, 143 AD2d 336, 337-338 [2d Dept 1988]). Here, both Mercier's and the Co-op's moving papers are silent with respect to this cause of action, although they both purport to seek summary judgment on it. Normally, the Court would merely deem that, by their silence, the parties had abandoned their requests for relief. However, the law is clear that "the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit" (*Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295, 295 [1<sup>st</sup> Dept 2002]). Here, there is no question that Mercier's Lease is valid. The only question is whether or not the Co-op validly added a flip tax provision to the Lease. Because this subject matter is entirely governed by contract, the Co-op is precluded, as a matter of law, from proceeding against Mercier on equitable principles. Accordingly, Mercier's motion for summary judgment dismissing this fourth cause of action for unjust enrichment is granted.

## **3. Attorney's Fees**

Finally, the co-op's sixth cause of action seeks to recover an award of attorney's fees against Mercier. Mercier argues that the cancellation of the Lease on the day she sold her apartment released her from any ongoing contractual obligations, such as the payment of legal fees (*see* Mercier's Memorandum of Law in Support of Motion, at 20-25). The Co-op correctly observes that sections 24 and 32 of the Lease specifically permit it to assert claims against Mercier after the termination of the Lease (*see* Plaintiff's Memorandum of Law in Support of Cross Motion, at 27-29). The Co-op also notes that section 26 of the Lease specifically requires Mercier to pay attorney's fees in any

suit to recover a flip tax (*Id.* at 30). However, the validity of such flip tax is the central issue in this litigation. Because the Court has already determined that summary judgment finding Mercier liable for payment of the flip tax must be denied at this juncture, the Court also concludes that it would be inappropriate to pass on the respective applications for summary judgment on the cause of action for recovery of legal fees connected with such tax. Accordingly, Mercier's motion and the Co-op's cross motion for summary judgment as regards the sixth cause of action for attorney's fees is denied.

***Conclusion***

Based upon the foregoing discussion, it is hereby

**ORDERED** that the motion of defendant Laura Mercier for summary judgment dismissing the complaint as against her is granted to the extent that the fourth cause of action of the complaint is severed and dismissed, and in all other respects the motion is denied; and it is further

**ORDERED** that the cross motion of plaintiff 205 West 19th St. Corp. for summary judgment in its favor is in all respects denied; and it is further

**ORDERED** that the balance of this action shall continue.

**DATED:**

2/22/2010

**ENTER:**



**O. PETER SHERWOOD**

**J.S.C.**