Board of Mgrs. of the Marbury Club Condominium v Marbury Corners, LLC
2011 NY Slip Op 34123(U)
July 6, 2011
Sup Ct, Westchester County
Docket Number: 29420/09
Judge: Alan D. Scheinkman
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FILED AND ENTERED
ON JULY 6, 2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

FILED
JUL - 6 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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THE BOARD OF MANAGERS OF THE MARBURY CLUB CONDOMINIUM,

Plaintiff,

-against-

MARBURY CORNERS, LLC, GINSBURG DEVELOPMENT LLC, GINSBURG HOLDINGS, MARTIN GINSBURG, WILLIAM RIEHL, SUSAN NEWMAN, DAN MULVEY and ROB LODES,

Defendants.

- and -

HUDSON VALLEY BANK, N.A.,

Intervenor-Defendant.

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Index No. 29420/09

Motion Seq. # 6
Motion Date: 4/28/11

DECISION & ORDER

Scheinkman, J:

Plaintiff, The Board of Managers of the Marbury Club Condominium ("Plaintiff" or the "Board") moves (Seq. No. 6), pursuant to CPLR 3212, for partial summary judgment as to damages against Defendants Marbury Corners, LLC ("MC LLC"), Ginsburg Development, LLC ("Development LLC")[1] and Ginsburg Holdings LLC

[1]On the record of a conference held on March 2, 2011, counsel agreed to the discontinuance of this action as to Development LLC without prejudice to the parties' respective rights and positions (Tr. of 3/2/11 Conference at 47-48).

("Holdings LLC") (collectively "Corporate Defendants"), jointly and severally, in the amount of $551,359.80, together with interest thereon, with regard to the Third Cause of Action alleged in the Complaint. Defendants oppose the motion.

FACTUAL AND PROCEDURAL HISTORY

This Court, in a Decision and Order dated September 22, 2010 (the "September 2010 Decision") (the contents of which is incorporated herein by reference), granted Plaintiff, the current Board of Managers of the Marbury Club Condominium, partial summary judgment on: (1) its First Cause of Action for declaratory judgment declaring that a Promissory Note dated April 19, 2005 in the amount of $2,200,000.00 (the "Promissory Note") and related Security Documents executed in favor of MC LLC[2] were illegal, invalid and/or otherwise unenforceable; and (2) its Second Cause of Action for (a) a preliminary injunction enjoining and restraining Defendants MC, LLC, Development, LLC and Holdings LLC from enforcing the provisions of (i) the Promissory Note dated April 14, 2005; (ii) the assignment of common charges dated April 14, 2005; (iii) the Security Agreement dated April 14, 2005, and (iv) the UCC-1 Financing Statement file stamped August 2, 2005 and (b) an order canceling and rescinding these documents.

The Court severed the Third Cause of Action for an award of compensatory damages in the amount of at least $500,000 based on the interest and principal that had been paid on the Promissory Note and the Fourth Cause of Action against the individual defendants for breach of fiduciary duty. With regard to the issue of damages raised by Third Cause of Action, the Court stated that it

> appears to be complex, particularly as relates to the payments received by the Condominium from the Unit Owners of the adjoining condominium for use of the recreational facilities of this Condominium. Accordingly, the Court will not grant an inquest; rather, the Court will schedule a conference for the purpose of establishing schedules for the resolution of the remaining issues in this case (September 2010 Decision at 23).

The Court's September 2010 Decision was based on the undisputed fact that the authority of the Sponsor Board to borrow had not been authorized by the Condominium's Declaration or By-laws and therefore the Promissory Note violated Real Property Law § 339-jj.

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[2]It is undisputed that the Promissory Note and related Security Documents were assigned to Holdings LLC pursuant to assignments dated April 1, 2009.

Plaintiff originally made this motion returnable for January 28, 2011 and as its evidentiary support, submitted a Rule 19-a Statement of Undisputed Facts, a Request to Admit, a moving and reply affidavit from its President, Joseph Acocella and a moving affirmation and reply affirmation from its counsel. Defendants responded in kind with affidavits/affirmations and reply affidavits/affirmations from Martin Ginsburg and counsel as well as responses to Plaintiff's Rule 19-a Statement and its Notice to Admit.

At a pre-conference held on March 2, 2011 to discuss allowing proposed intervenor, Hudson Valley Bank, N.A. (the present holder of the Promissory Note), into the case,[3] the Court indicated that it was inclined to deny Plaintiff's motion for summary judgment on damages on the record given the various questions of fact gleaned from the papers and ordered a damages hearing with the two issues to be decided being (1) whether or not Defendants are entitled to an offset with regard to parking and recreation fees that had allegedly been paid to the Condominium to offset the debt service on the Promissory Note; and if the answer to the first question is positive, and (2) the amount of the offset. The Court and counsel engaged in a discussion over the discovery needed to prepare for the hearing and the proper scope to be afforded that discovery. On this issue, Defendants' counsel made clear that he was going to be seeking certain offsets on behalf of Defendants. The Court suggested that the fees generated by the recreation facility and the lease of parking spots which were to be paid to the Condominium could potentially be valid offsets. The Court invited counsel to enter into a stipulation regarding the amounts paid and received, the parking fees charged, and similar matters. The Court stated:

> And I'll just indicate that what I think I'm going to do since we're going to be working some of these issues and I'm hoping to get a stipulation, rather than outright deny the plaintiff's motion for summary judgment or deny it ... with a right to renew..., I'm simply going to adjourn it... If it turns out that we can agree on what the numbers are and all it distills to is a legal issue, then I want to save you the time and effort of having to put in more papers. I would give you the opportunity to supplement your papers, but I don't want to require everybody to do a complete redo.... If it turns out that there's no agreement at all on the numbers, then I'm going

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[3]At that conference, Plaintiff agreed to allowing the intervention of Hudson Valley Bank into the action. Defendants had contended, in a motion to renew/reargue, that the Bank was a necessary party. The Bank was present, through counsel, at the conference. The Court directed that counsel for the Bank be provided with all papers previously served and that the Bank's counsel be served with all further papers. The Bank, however, has not submitted any papers on this motion.

> to do what I said I was going to do, which is deny it and have a hearing on what the numbers are (Tr. of 3/2/11 Conference at 38-39).

At the conclusion of the conference, the Court ordered that (1) the parties exchange documents on the fees the Condominium received for parking and for the recreational facility and any other documents they planned to use at the hearing by March 31, 2011, and (2) the parties engage in certain limited depositions; and (3) the parties return on April 15, 2011 for the purposes of scheduling the hearing to be held.

On April 15, 2011, counsel attended the conference and presented the Court with a Stipulation dated April 15, 2011 (the "Stipulation") in which Plaintiff and Defendants stipulated into evidence various financial documents such as (1) checks evidencing the payments made by the Condominium on the Promissory Note's principal and interest, (2) the Condominium's financial statements for the years 2006-2010, (3) the Condominium's income statements for the years 2005-2010, (4) the Condominium's General Ledger for the years 2005-2010, (5) activity reconciliation reports for the common charges and parking fees paid by the Sponsor, (6) General ledger account for storage fee income for the years 2005 to 2010, (7) General Ledger of payments by the Sponsor to the Condominium in 2005, 2006 and 2007, (8) various documents produced by Defendants, and (8) a page from the Condominium Offering Plan (p. 73).

The parties further stipulated to the following facts for the purposes of the motion:

> (1) the Condominium paid Defendants a total of $551,358.80 in interest and principal on the promissory note;
>
> (2) the Condominium paid the Sponsor a total of $396,000 in interest and principal on the Promissory Note;
>
> (3) the Condominium paid Holdings a total of $155,358.80 in interest and principal on the Promissory Note;
>
> (4) In 2005, the Sponsor paid the Condominium $10,451.72 in 2005 for common charges and $125,000.00 for unspecified budget shortfalls ($49,500 of which the Sponsor contends was used to covers payments on the Promissory Notes but the Condominium denies that the Sponsor's payments are traceable to Note Payments)[4];

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[4]This issue was addressed at the March 2, 2011 conference at which Plaintiff's counsel recalled that "[t]here was a period of time before the units were fully sold after the plan went effective where the sponsor in effect was still the owner of the units paid the common charges and parking on those units .... [s]o ... there was a period of time during which the sponsor was just recycling money" (Tr. of 3/2/11 Conference at 30-31).

(5) In 2006, the Sponsor paid the Condominium $15,681 in common charges and $34,457.49 in parking fees;

(6) The Condominium received a total of $631,665.76 in parking fees in 2005-2010;

(7) The Condominium received a total of $30,868.24 in storage fees in 2005-2010;

(8) The Condominium received a total of $38,656.00 in recreation fees for 2006-2010.[5]

As a result of the Stipulation, much of the prior evidentiary submissions by the parties had been rendered moot. At the conference held on April 15, 2011, this Court requested that the parties provide supplemental affidavits setting forth their positions as to whether the Stipulation resolved all disputed issues of fact as to Plaintiff's motion and, if not, what issues remained to be resolved.

As expected, Plaintiff's Supplemental Affidavit from counsel Victor M. Metsch, Esq. asserts that

> the only purported issue of fact remaining for determination by the Court upon the Pending Motion is whether or not Defendants are entitled to an "offset" based upon the claim that, "if the [S]ponsor had not set up the note mechanism ... it would have either kept the garage or sold the parking spaces" (Supplemental Affidavit of Victor M. Metsch, Esq., sworn to April 27, 2011 ["Metsch Supp. Aff."] at ¶ 13).

Plaintiff argues that the only documents supporting Defendant's right to offsets that

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[5]On the issue of the recreation fees, Plaintiff's President, Joseph Acocella asserts that

> payments received from the neighboring (and separate) townhouse condominium for the use of the concierge service, exercise room and common room of the Condominium ... were and are deposited into the general account of the Condominium ... The initial amount of the per unit monthly fee was $75.00; and the present amount thereof is $77.25 ... The Payments were not segregated and used to pay interest and principal on the Promissory Note ... The Payments are in consideration of the actual use by [Plaintiff's] neighbors of the common and exercise rooms and help defray the cost of maintaining these facilities and [Plaintiff's] concierge service (Affidavit of Joseph Acocella, sworn to November 17, 2010 ["Acocella Aff."] at ¶¶ 7-10).

Defendant produced by March 31 as ordered by this Court were those bates stamped D-00001-D-00101, none of which support Defendant's contention that if the "'[S]ponsor had not set up the note mechanism ... it would have either kept the garage or sold the parking spaces'" (Metsch Supp. Aff. at ¶ 17). According to Plaintiff, this issue of fact is "undocumented, unsubstantiated and uncorroborated, on the one hand, and obviously and belatedly-manufactured for the purpose of attempting to create a non-substantive 'shadow' issue for trial where none actually exists, on other" (Metsch Supp. Aff. at ¶ 21).

It is Plaintiff's contention that the monies paid by the Sponsor to the Condominium in the amounts of $125,000 in 2005 and $3002 in 2006 "were made pursuant to the Sponsor's contractual obligation in the Offering Plan to cover any 'shortfalls' in the initial operating budget for the Condominium" (*id.* at ¶ 18)[6] and "that the remaining payments made by the Sponsor to the Condominium were simply common charges or parking fees due with respect to unsold units" (*id.* at ¶ 19). Plaintiff also argues that none of the checks the Sponsor provided to the Condominium were "'earmarked' for payment of the promissory note" (*id.* at ¶ 20).

With regard to the other payments made by the Sponsor to the Condominium, it is Plaintiff's position that save for (1) a payment of $4,560.30 for carpet cleaning and cleaning of common areas, (2) a payment of $5000 for the final capital reserve payment, and (3) a payment of $2350 for carpet cleaning and audio services (Metsch Supp. Aff. at ¶ 8, n.2), the remaining payments made were the result of the Sponsor's ownership of units after the end of the "budget (shortfall) guarantee" period and were the result of the common charges and parking fees relating to the units owned by the Sponsor (*id.* at ¶ 29-32, and Stipulation, Ex. Q).

According to Plaintiff, this Court should not award any equitable relief to the Sponsor in the nature of offsets because this Court has already determined in its September 2010 Decision at pp. 17, 18 and 22, that Plaintiff has come to Court with unclean hands based on its

> subjecting the Condominium to an illegal $2.2 million note and, compounding the issue, "hiding its sin" by failing to disclose the illegal purpose of the note to: (i) the Attorney General upon filing the Offering Plan; (ii) the Village of

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[6]In support, Plaintiff relies on a provision in the Offering Plan (p. 73), which provided that the Sponsor for one year from the date of the closing agreed (with certain conditions attached) to guarantee the payment of any negative differences between the total expenses set forth in the budget and the actual operating expenses of the Condominium (Metsch Supp. Aff. at ¶ 22 and Stipulation Ex. R). Plaintiff further relies on statements made in the Condominium's financial statement to the effect that these payments were made in connection with that guaranty (Metsch Supp. Aff. at ¶¶ 22-25 and Stipulation Exs. B and C).

Pelham in gaining its approval; or (iii) prospective purchasers (*id.* at ¶ 39; *see also* ¶¶ 33-38).

It is Plaintiff's position that the professed reason offered by Defendants for the issuance of the Promissory Note – *i.e.,* an effort to reduce the sales price of the units given the deleterious tax implications – is a complete fiction because "[w]hen the Sponsor raised the sale prices (and the expected net profit) by more than $13 million in the aggregate, with a huge related increase in real estate taxes, the $2.2 million note was not cancelled (*id.* at 12, n4 [emphasis in original] and Reply Affidavit of Joseph Acocella, sworn to 1/23/11 at ¶¶ 15-26 and Exs. 8-10 thereto). Accordingly, the purpose of the note was to artificially inflate the purchase prices (Metsch Supp. Aff. at ¶ 40). Plaintiff asserts that the Sponsor should not be entitled to restitution (*i.e.,* uphold and enforce part of a transaction the court has already held to be illegal) since it is contrary to the established legal principle that "a party who is responsible for an illegal contract may not seek the assistance of our courts in enforcing the illegal agreement, especially where the statute violated is designed to protect the public against fraud" (*id.* at ¶ 45). By contrast, Plaintiff contends that the Condominium, an unwitting party to the illegal contract, should be afforded full restitution (*id.* at ¶ 46).

Plaintiff argues that given the absence of any contemporaneous documentary proof in admissible form verifying "Defendants' after-the-fact postulation (in 2011) about what the Sponsor might have done (in 2003), under an entirely inapposite and diametrically different factual scenario, standing alone, need not long detain the Court ... [and] [p]atently self-serving speculation is not evidence – and merely framing an 'issue', however fanciful and superficially credible, is not the same as establishing that a question of material and dispositive fact actually exists" (*id.* at ¶¶ 53-54). Instead, whether Defendants are entitled to an offset is an issue of law that has already been determined by this Court in its September 2010 Decision finding Defendants guilty of inequitable conduct.

The principal arguments in Plaintiff's original moving papers are that (1) the recreation payments received from the Townhouses for use of the concierge service, exercise room and common room were deposited in the general account of the Condominium, were not used to pay the interest and principal on the Promissory Note and that the payments were made in consideration for the use of these rooms and were made to defray the cost of maintaining these facilities and the concierge service (Acocella Aff. at ¶¶ 7-10); and (2) the Townhouses are a separate entity from the Condominium and are not an obligor on the Promissory Note (Affidavit of Victor Metsch, Esq., sworn to November 22, 2010 at ¶¶ 11-13). Accordingly, the unit owners received no windfall as a result of the recreational fee payments received from the neighboring Townhouse. In its Memorandum of Law, Plaintiff argues that (1) "[w]here ... a contract violates a statute and is *malum prohibitum*, the party protected under the statute is entitled to receive full restitution of all payments theretofore made" (Pltf's Mem. at 5); and (2) Defendants' unclean hands bars them "from arguing that they have conferred a benefit upon the unit owners in an attempt to claim a 'set-off' against the monies paid by

the Board of Managers" (Pltf's Mem. at 6).

The crux of the supplemental affirmation provided by Defendants' counsel, Jonathan P. Vuotto, Esq. (Riker, Danzig, Scherer, Hyland & Peretti, LLP) is that the only purpose of the Stipulation was to resolve the fact issues relating to the amounts paid to the Condominium by the Sponsor and the unit owners and the amounts paid to the Sponsor by the Condominium for payments under the Promissory Note. He asserts that the Stipulation does not

> resolve one of the most important issues in this case: whether, had the Sponsor not established that certain Promissory Note under which Plaintiff was to pay to the Sponsor the principal amount of $2.2 million, the Sponsor would have transferred ownership of the parking garage to the Condominium and Plaintiffs. Additionally, the Stipulation does not address whether the Sponsor would have established the "income stream" of the parking and recreation fees for Plaintiff without the corollary obligation of Plaintiff to pay the Promissory Note. Specifically, the Sponsor provided Plaintiff with sufficient income with which to pay the Promissory Note by: (i) requiring that the ... unit owners pay Plaintiff certain parking fees; (ii) allowing the neighboring community to pay Plaintiff for the use of the Condo's recreation area; and (iii) allowing Plaintiff to charge fees for renting storage space in the Condo's garage (Supplemental Affirmation of Jonathan P. Vuotto, Esq. dated April 26, 2011 ["Vuotto Supp. Aff."] at ¶ 4).

Relying on the Affidavit in Opposition submitted by Martin Ginsberg, Defendants argue that the Sponsor considered various alternatives to the one it ultimately chose – *i.e.*, establishing the Promissory Note but setting the Condominium up with enough income to cover the debt service – such as: (1) selling garage spaces to unit owners for $30,000 - $35,000 a piece; (2) maintaining ownership of the Condominium's parking garage and leasing the spaces to the unit owners; and (3) having the adjoining Townhouse pay a fee directly to the Sponsor in exchange for the Townhouse's use of the Condominium's recreational facilities (Vuotto Supp. Aff. at ¶¶ 5-6, *citing* Affidavit of Martin Ginsberg in Opposition to Plaintiff's Motion for Summary Judgment on Damages, sworn to January 14, 2011 ["Ginsburg Opp. Aff."] at ¶¶ 10-11). Based on Ginsburg's averment that the Sponsor would have pursued one of these other options if it did not establish the Promissory Note since without the Promissory Note, the development was not economically feasible (Ginsburg Opp. Aff. at ¶ 9), the Sponsor argues that to the extent the Promissory Note is invalid:

> it would be unfair and unjust to permit Plaintiff to obtain a windfall by requiring the Sponsor to give back the amounts

already paid under the Note, which Plaintiff would never had received if the Sponsor did not establish the Note in the first place. The "deal" was that the Plaintiff was to get sufficient income through the various income streams that the Sponsor established to pay the Promissory Note. If the "deal" is to be invalidated because the Promissory Note is invalid, then the consideration for the Note – the Condo's garage – must be returned to the Sponsor, or Plaintiff will have obtained an unjust windfall that does not conform with the parties' understanding and intent (Vuotto Supp. Aff. at ¶ 8).

With regard to Defendants' original opposition, the following affidavits/affirmation were submitted:

(1) An affidavit from Mark Ginsberg, Esq., Managing Partner of the law firm of Ginsburg & Redmond, P.C. ("G&R"), the firm that drafted the Offering Plan, in which he asserts that G&R prominently displayed the existence of the Promissory Note in the Offering Plan (which included a copy of the Promissory Note and related security documents) and further that the Offering Plan (a) described the ownership of the parking garage in the Condominium and the Condominium's right to collect the fees associated with the rental of those spaces, and (b) described that the neighboring condominium would pay a monthly fee for the use of the Condominium's recreational facility and that the Condominium was given the right to retain that fee as well (Affidavit of Mark Ginsburg, sworn to January 14, 2011 at ¶ 3). Mark Ginsberg further avers that while the income from these two sources "was not earmarked exclusively for payment of debt service on the Promissory Note, it nevertheless, was given to the Condominium for that purpose" (*id.*). The remainder of the affidavit is a rehash of the arguments made in opposition to Plaintiff's original motion for summary judgment as well as in support of Defendants' motion to renew/reargue based on Defendants' belief that the disclosure of the authority to issue the Promissory Note in the Offering Plan was sufficient and that it was not required to be included in the Declaration or the By-Laws;

(2) An affirmation from Andrew Glickson, Esq. (Pullman & Comley, LLC) the sole purpose of which is to reargue and rehash Defendants' arguments that (1) the disclosure in the Offering Plan rather than the Declaration and By-Laws was legal and (2) the Sponsor's goal to reduce the purchase price of the units through the Promissory Note was legitimate and a common practice among sponsors (the submission of which the Court views as both untimely and improper). Further, to the extent he opines as to the consideration given for the Note – namely, the

two sources of income from the parking spaces and recreation fees – the Court notes that Mr. Glickson does not explain the factual basis for this opinion, and therefore, it is without evidentiary support and shall be disregarded;

(3) An affidavit from Martin Ginsburg, in which he describes the reason underlying the issuance of the Promissory Note, which was to allow for the continuance of the Condominium as an economically viable plan. He notes that without the Note, the project would not have been economically feasible. As noted *supra*, Ginsburg describes the various alternatives considered, and the reason why those alternatives were rejected. He further avers that the choice to proceed with the $2.2 million Promissory Note caused MC LLC to incur substantial tax consequences in having to pay taxes on $2.2 million. With regard to the benefits of the Promissory Note to the Condominium, he avers

> [t]he use of the Promissory Note arrangement further benefited the Condominium association because it allowed it to have control of the parking garage, the parking leases, and the recreation fee income. [MC LLC] structured the Promissory Note to include very favorable terms for the Condominium and unit owners. The Note was for a term of 40 years and the interest rate was below market rate at the time it was issued. In addition, the structure of the Promissory Note allowed the Condominium to charge below market rents for several years for the parking spaces. In exchange for the Promissory Note, MC LLC intended to transfer ownership of the parking garage to the Condominium, which [Ginsburg] estimated to be worth approximately $3 million, as well as the right to collect and use the Fees directly ... We also structured the Promissory Note and the fees such that the monthly fee income collected by the Condominium would more than cover the debt service on the Promissory Note[7] ... Overall, MC LLC believed

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[7]Ginsburg explains that the rental of the parking spaces at $100 for one space per month and $180 for two spaces per month is below market value (Ginsburg Opp. Aff. at ¶ 22). According to Ginsburg, the debt service on the Note was $150 per unit per month or $99,000 for the full year whereas the anticipated income for the parking spaces was $102,120.00 and $9,900 in additional income from the monthly recreation fee from the townhouses (Ginsberg Opp. Aff. at ¶ 24). The Special Risk portion of the Offering Plan indicated that only those purchasers who owned a car would be required to rent a parking space and it was optional for a purchaser who owned more than one

> that this arrangement was a benefit to the Condominium and the unit owners because: (a) they had the opportunity to purchase units at a lower price; (b) they would more likely be subject to property taxes that were comparable to those in other towns; (c) the Condominium became the owner of the garage; and (d) the Condominium collected the Fees directly, which could be used, but were not required to be used, to pay the debt service on the Note (Ginsburg Opp. Aff. at ¶¶ 13-16).

The remainder of Ginsburg's affidavit involves his assertions concerning the fairness of the disclosure of the Promissory Note in the Offering Memorandum, and, as such it is also a rehash of Defendants' prior arguments. He also asserts that MC LLC relied on the Purchaser's Agreement to the Promissory Note and that "without the payments on the Promissory Note, [MC LLC] would never have pursued this development in the first place because there would have been insufficient return on the investment to make the development risk worthwhile" (Ginsburg Opp. Aff. at ¶ 37). He concludes that the only consideration for the transfer of the parking garage and the right to collect fees was the Promissory Note and "[t]o the extent the Note remains invalidated and [MC LLC] is required to return payments already made, at a minimum, the Condominium should return ownership of the parking garage to [MC LLC]" (Ginsburg Opp. Aff. at ¶ 40).

Defendants' Memorandum of Law is, for the most part, a reargument of the arguments they made in opposition to Plaintiff's original motion for summary judgment and in support of their motion to renew/reargue. Additional arguments include Defendant's contention that neither Development LLC nor Holdings LLC is a proper party. As noted *supra*, the parties agreed to the discontinuance without prejudice of this

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car to lease more than one parking space. However, the First Amendment to the Offering Plan dated June 3, 2004 amended the Special Risks Portion by increasing the monthly rental for a second single-car parking space from $100 to $200 per month and for a tandem space from $180 to $200 and requiring that purchasers of all units rent at least one parking space (Acocella Reply Aff., Ex. B). The amendment allowed all purchasers who executed a purchase agreement prior to the amendment the right to rescind their purchase agreement and receive a full refund of their down payment (*id.*). Ginsberg provides no basis for his opinion as to the market value of parking spaces and no information is provided as to the cost of construction of the garage or the cost of maintenance or other costs of operation. No specific justifications for the changes in requiring a mandatory parking spot and increases in rates have been provided, though it seems at least possible that these changes were undertaken in order to increase the garage revenues to cover the Promissory Note (and thus extract, in the form of garage rents, the profit that the Sponsor lost when the price of the units was reduced).

action as against Development LLC. With regard to Holdings LLC, it is Defendants' position while MC LLC assigned the Promissory Note to Holdings LLC on April 1, 2009, which was then assigned to Hudson Valley Bank on November 1, 2009 because Holdings LLC was not a party to the original Promissory Note transaction, to the extent Holdings LLC has any liability, it should only have to return payments[8] that were made while it held the Note.

Defendants contend that Plaintiff is incorrect in its recitation of the law in New York concerning the damages to be accorded contracts violative of statutes – *i.e.*, restitution is not required and, instead, the damages to be awarded are up to the court's discretion. It is Defendant's position that given that facts of this case, the Court should "leave the parties 'where they are' vis a vis the payments already made" (Def's Opp. Mem. at 15).

According to Defendants, in determining the damages to be awarded, courts consider such "'factors as unjust enrichment and the advantages and burdens of fashioning a restitution remedy'" (Def's Opp. Mem. at 15) as well as "'the repugnance of illegality" and "public policy considerations" (*id.*).

In arguing that all four factors weigh in Defendants' favor, Defendants rely on the facts/opinions that (1) the authority for the issuance of the Promissory Note was prominently displayed in the Offering Memorandum which should be viewed as a technical violation,[9] (2) its display in the Offering Memorandum, and, therefore, the Note was more likely to be seen by the purchasers[10] than if placed in the Declaration or the By-Laws, (3) the legal representation of the purchasers and the failure of any of them to object to the Promissory Note either at the time of purchase[11] or for years thereafter, (4)

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[8]As noted *infra*, based on the Reply Affidavit submitted by Plaintiff's counsel, it appears that Plaintiff is only seeking to hold Holdings LLC liable for the payments it actually received on the Note.

[9]Defendants assert that they relied on counsel in this regard and based on the Mark Ginsburg affidavit, counsel understood that RPL § 339jj did not require disclosure of the authority for the issuance of the Note in the By-Laws or Declaration and that this belief was reasonable given that there was no published decision in New York State stating otherwise prior to this Court's September 2010 Decision (Defs' Opp. Mem. at 16).

[10]Defendants argue that while there is no evidence that the Village of Pelham was defrauded or deceived, because the Village is not a person to be protected by the statute, the issue of its knowledge of the Promissory Note is irrelevant to this analysis (Defs' Opp. Mem. at 18, n.3).

[11]Defendants point out that "[h]ad the unit owners raised any issue about the Note in the course of reviewing the Purchase Agreement and related documents, the

the benefits bestowed on the unit owners through this transfer including lower sales prices, lower taxes, the ownership of the parking garage and the right to collect fees; (5) Mr. Glickson's opinion that "the Sponsor's efforts to reduce purchase prices in exchange for the Note from the Condominium is a legitimate objective and is consistent with the strategies of developers in the Westchester County area"; and (6) the review and approval of the Offering Plan by the Attorney General, which included the Note, Declaration and By-Laws and Defendant's contention that had this error been so repugnant, "one would have expected the Attorney General to have at least commented upon that omission" which did not occur (Defs' Opp. Mem. at 18).

On the issue of unjust enrichment, Defendants argue that to require Defendants to return the payments to Plaintiff would unjustly enrich Plaintiff given that all of the unit owners signed the purchase agreements with knowledge of the financial commitment of the Promissory Note. Defendants argue that compounding this problem is that they transferred the ownership of the garage so that the fees generated by the garage would offset the debt service on the Promissory Note. Defendants argue that the facts of this case are analogous to *Nadoff v Club Central*, (2003 NY Slip Op 51071[U], 2003 WL 21537405 [Dist. Ct. Nassau County 2003]) in that the Sponsor has fully performed and now Plaintiff wants to avoid paying for the deal to which it agreed. Defendants continue in their argument that the Promissory Note should not have been voided but, at a minimum, the Court should leave the parties as they are and to require restitution would work a severe forfeiture on Defendants. Alternatively, Defendants argue that the defense of promissory estoppel is applicable to the facts of this case and summary judgment should not be granted until the factors underlying the defense of promissory estoppel have been explored and decided (Defs' Opp. Mem. at 22).

Rehashing an argument made in connection with the prior motion for summary judgment, Defendants again argue that they should be permitted to amend the Declaration. As this Court has already considered and determined this issue against Defendants in its September 2010 Decision, it will not be reiterated herein.

Defendants contend that discovery is necessary for the following factual issues[12] and, therefore, summary judgment must be denied:

(1) The Units Owners' understanding of the Promissory Note;
(2) Whether the Unit Owners would be materially and adversely affected if the Sponsor is permitted to amend the Declaration to add the authority for the Promissory Note;

Sponsor could have easily, simply, and legally amended the Declaration and that would have remedied the technical violation of RPL §§ 339-jj" (Defs' Opp. Mem. at 18).

[12]Some of the issues identified have been resolved by the Stipulation and are therefore omitted herein.

(3) Whether and if so, how the Unit Owners have been damaged by the issuance of the Promissory Note without disclosure in the Declaration or By-Laws;
(4) The information known by the Pelham taxing authorities to determine their understanding of the development and whether or not they were defrauded;
(5) Expert and industry related discovery to show that the Sponsor's use of the Promissory Note is a widely accepted tool in condominium financing and whether the statutes did not contemplate the factual scenario presented in this case or whether the law is ambiguous enough so as to be subject to a good faith interpretation. Defendants request permission to introduce expert testimony since the Glickson Affidavit is not exhaustive on this topic.[13]

Defendants advise that they will be requesting the right to file an amended pleading asserting a counterclaim seeking the rescission of the transfer of the parking garage and therefore, "the Court should withhold any further judgment until all the facts are disclosed and considered and Defendants have had an opportunity to present their case in full" (Defs' Opp. Mem. at 24).

The Court notes that, after the submission of Defendant's Memorandum of Law, by letter dated March 15, 2011, Defendants' counsel requested a Rule 24 Pre-Motion conference so that the Defendants could seek leave to amend their pleading to assert a counter-claim for unjust enrichment. For some reason, at the next conference held in this matter on April 15, 2011, the request was not raised and, therefore, the Court is left with an answer that asserts various affirmative defenses and a counterclaim for attorneys' fees, but no counterclaim for reformation or unjust enrichment so that Defendants could be restored to the position that contend they would have been in if the Note had not been invalidated – *i.e.*, that they obtain a return of the garage, the ownership of which would not have been vested in the Condominium if no Note had been issued since Defendants would have used the garage as a means of recouping the alleged shortfall based on the reduced sales prices of the condominium units.

In reply, Plaintiff argues that Defendants' opposition is just another do-over of their motion to reargue and at its essence, is simply arguing, without providing one concrete example, that what the Sponsor did was appropriate because everybody does it this way (Reply Affidavit of Victor M. Metsch, Esq., sworn to January 25, 2011 at ¶¶ 11-15). Plaintiff argues that the Glickson Affirmation is defective since Glickson is not an attorney of record and, therefore, should have submitted an affidavit rather than an affirmation (*id.* at 4, n.2). However, since CPLR 2106 provides that "[t]he statement of an attorney admitted to practice in the courts of the state ... who is not a party to an action, when subscribed an affirmed by him to be true under the penalties of perjury

[13]The Court does not view this topic to be at all relevant to any issue as to damages.

may be served or filed in the action in lieu of and with the same force and effect as an affidavit," the Court rejects Plaintiff's argument and has considered Mr. Glickson's affirmation. The privilege of using an affirmation is not limited to those who are attorneys of record; any attorney may use an affirmation, as long as the attorney is a not a party to the case.

Plaintiff counters Defendants' arguments concerning the propriety of Holdings LLC being a defendant in this action by asserting its liability for the $57,750 in payments it received during the time it was an assignee of the Note (*id.* at ¶ 21).

Responding to Defendants' request that they be permitted to amend the Declaration, Plaintiff asserts various reasons why such relief is impermissible, including, *inter alia*, this Court's September 2010 Decision denying such relief. Further, that this request is not included in Defendants' pleading and even if it were, it is a claim for reformation which is based on Defendants' unilateral mistake whereas reformation requires mutual mistake. In any event, "the Court should decline Defendants' request to manipulate the Condominium documents, after the fact, in order to do an 'end run' around the statute's requirements" (*id.* at ¶ 29).

Plaintiff argues that Defendants' request for additional discovery is without merit and that the discovery sought is immaterial since (1) the Court already determined that the Unit Owners would be materially and adversely affected if the Sponsor were permitted to amend the Declaration; (2) the Court's September 2010 Decision declaring that the Promissory Note and related security documents are illegal, invalid and unenforceable shows that the unit owners have been damaged; (3) the information concerning what was relayed to the taxing authorities is within Defendants' possession and Ginsburg has already conceded in his affidavit that they were kept in the dark; and (4) expert opinions are irrelevant to this analysis and, in any event, Defendants have already submitted expert opinions (Glickson and Gaines) and have failed to identify what additional expert disclosure would be required.

As its legal argument, Plaintiff contends that this Court has already considered the factors set out in the decision of *Halpern v Greene* (24 Misc 3d 1251[A], 2009 WL 2972386 [Sup Ct NY County 2009]) – *i.e.*, the repugnance of the illegality and public policy considerations – when it ruled that the Note was illegal, invalid and unenforceable (Pltf's Reply Mem at 4) – and found that each factor weighed against Defendants. Plaintiff refutes that the purchasers knew of Defendants' tax evasion scheme by signing the purchase agreement with the disclosure of the Promissory Note in the Offering Memorandum. Plaintiff further contends that it has been Defendants (not Plaintiff) that were unjustly enriched and this Court has already determined that the unit owners did not receive any financial benefit given the Sponsor's plan to recover the full sales price through the payments of the illegal Note. Plaintiff submits that by allowing the Sponsors to keep such ill-gotten gains would send the wrong message – *i.e.*, that statutory violations do pay. Further, that public policy considerations dictate the full restitution of the money paid.

Plaintiff argues that Defendants' theory of promissory estoppel is misguided because as this Court previously held, the reason for the Promissory Note (*i.e.* the tax evasion scheme) was not revealed in the Offering Plan; therefore, "the Sponsor's argument that the unit owners knowingly and willingly agreed to the Sponsor's scheme is totally preposterous" (Pltfs' Reply Mem. at 14).

Finally, Plaintiff reiterates its argument that this Court's September 2010 Decision denying the Sponsor the right to amend the Declaration to add the authority to issue the Promissory Note is law of the case.

THE SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 643-644 [1985]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 (2d Dept 2000); *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]). Once the moving party has made a *prima facie* showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]).

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*).

LEGAL DISCUSSION

It is well settled that a court will leave the parties where they are and will offer relief to neither when a contract in *malum in se* (*see Flegenheimer v Brogan*, 284 NY 268 [1946]; *O'Mara v Dentinger*, 271 AD 22 [4th Dept 1946]). By contrast, when a contract is *malum prohibitum*, based on a review of the relevant cases, it appears that the courts tend to follow the view espoused by the Restatement Second, Contracts §

198(b), which provides "A party has a claim in restitution for performance he has rendered under or in return for a promise that is unenforceable on grounds of public policy if ... (b) he was not equally in the wrong with the promisor" (Restatement Second, Contracts § 198[b]; *see Smith v Pope*, 72 AD2d 913 [4th Dept 1979]; *Nadoff v Club Central*, 2003 NY Slip Op 51071[U], 200 WL 21537405 [Dist. Ct., Nassau County 2003]). In addition, courts tend to allow restitution when a statute is designed to protect a class of persons and the person seeking recovery is a member of that protected class under the theory that such restitution "protect[s] the public interest and discourage[s] the contravention of statutes ...." (*S.T. Grand, Inc. v City of New York*, 38 AD2d 467 [1st Dept 1972]; *State v Ford Motor Co.*, 136 AD2d 154 [3d Dept 1988]; *Garey v Perez F. Huff Co.*, 135 Misc 138 [Sup Ct NY County 1930]).

Defendants urge that the Court leave the parties were they are and, alternatively, to the extent that the Court would grant Plaintiff restitutional relief, that Defendants should be afforded either a return of the garage or other offsets based on theories of unjust enrichment, rescission/reformation and/or promissory estoppel. It is Defendants' position that Plaintiff should not be allowed the windfall of: (1) this Court's invalidation of the Promissory Note of which Plaintiff and the unit owners were fully aware; (2) a restoration of the monies paid to date on the Promissory Note; and (3) the right to retain the parking garage the ownership of which was only transferred to Plaintiff based on the issuance of the Promissory Note as a means of providing Plaintiff with a steady income stream from which it could pay the debt service on the Note. Since Plaintiff is no longer required to pay for the Note, Defendants argue that it is unjustly enriched by being allowed to retain the garage and the income stream associated therewith.

Given that it is undisputed that the Offering Plan and Purchase Agreement permit Plaintiff to have both the ownership of the garage and the income stream from the fees associated with the garage and the recreational facility, there is no legal basis at present for the Court to award the garage to Defendants or grant them any offsets to Defendant since Defendants have not asserted any such affirmative defenses/counterclaims in their current answer. However, as noted *supra*, Defendants requested in a letter dated March 15, 2011 leave to make a motion to amend their pleading to assert an affirmative counterclaim for unjust enrichment.

It appears to the Court that the issue of restitution is best decided on a full and complete record, including a pleading from Defendants that delineates precisely what legal theories or claims it is espousing. For example, on the present record, it is not clear whether Defendants are asserting that title to garage be awarded to them and, if so, on what theory; some of Defendants' arguments seem to suggest that Defendants are, or may be seeking, reformation of various contracts or agreements. Likewise, it is unclear whether Defendants are asserting that the value of the garage should be offset against any damages to Plaintiff and, if so, on what theory. While the parties have, in conferences with the Court, discussed and debated various offset theories and continue to do so in the papers presented here, Defendants have not definitively articulated in

their opposition papers what exactly their claims are, though some of them would appear at least pass the "palpably improper" test for amendment of pleading by court leave.

Before the remedy of summary judgment is invoked, Defendants should have both the opportunity and the obligation to definitively identify their legal contentions and requests for relief. Accordingly, the Court will deny Plaintiff's motion for summary judgment without prejudice and with leave to renew following the resolution of any amendment to Defendants' answer (*Raymond Car Sales, Inc. v Motor Wholesalers, Inc.*, 28 Misc 2d 1, 5 [Sup Ct Queens County 1961 ["summary judgment must be denied if papers disclose the existence of a meritorious defense, though unpleaded"]; *see also Rizzi v Sussman*, 9 AD2d 961 [2d Dept 1959 [same]; *Furlo v Cheek*, 20 AD2d 939 [3d Dept 1964] [same]; *Yoi-Lee Realty Corp. v 177th Street Realty Assoc.*, 208 AD2d 185, 189 [1st Dept 1995] ["[w]hen a viable counterclaim arises from the same underlying transaction as is involved in the main action and is inseparable from or inextricably intertwined with that transaction, summary judgment should be denied"]).

Because Defendants have not explicitly requested leave to amend their pleading, and have not submitted a copy of a proposed amended pleading, the Court cannot now grant such leave. Given the circumstances of the case, it is likely that any motion by Defendants for such leave will be opposed by Plaintiff. For that reason, the Court notes that CPLR 3025 (b) provides, in pertinent part, that "[a] party may amend his pleading ... at any time by leave of court or by stipulation of the parties." It is well settled law that leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law (*Leszcynski v Kelly & McGlynn*, 281 AD2d 519, 520 [2d Dept 2001]; *see also Thone v Crown Equip. Corp.*, 27 AD3d 723 [2d Dept 2006]) or unless prejudice and surprise directly result from the delay in seeking the amendment (*McCaskey, Davies & Assoc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558 [2d Dept 2007]; *Emilio v Robison Oil Corp.*, 28 AD3d 417 [2d Dept 2006]; *Bolanowski vTrustees of Columbia Univ. in City of N.Y.*, 21 AD3d 340 [2d Dept 2005]; *Luberda v Spameni,* 303 AD2d 384 [2d Dept 2003]; *Adams v Jamaica Hosp.* 258 AD2d 604, 605 [2d Dept 1999]; *Nissenbaum v Ferazzoli*, 171 AD2d 654, 655 [2d Dept 1991]; *Haven Associates v Donro Realty Corp.*, 96 AD2d 526 [2d Dept 1983]; *Mosely v Baker*, 59 AD2d 936 [2d Dept 1977]). It is incumbent upon the party moving for leave to make an evidentiary showing that the proposed amendment has merit (*Monteiro v R.D. Werner Co.*, 301 AD2d 636 [2d Dept 2003]).

The Court further notes that, even if the Court were to grant summary judgment to Plaintiff for restitution, Plaintiff has failed to show, as part of its *prima facie* burden, that there was no period of time during which the Sponsor used its own money to pay for the Note payments. No theory has been tendered for why the Sponsor should be required to reimburse Plaintiff for money the Sponsor itself paid, out of its own funds, on the Promissory Note before any other unit owners were contributing to the payments.

Plaintiff's counsel acknowledged during the March 2, 2011 Conference that "[t]here was a period of time before the units were fully sold after the plan went effective where the sponsor in effect was still the owner of units paid the common charges and parking on those units ... [s]o ... there is a period of time during which the sponsor was just recycling money" (Tr. of March 2, 2011 Conference at 30-31). Yet, Plaintiff fails to provide evidence that the Sponsor made no payments out of its own funds on the Note before the units were occupied by their owners. Instead, Plaintiff merely provides a copy of the ledger evidencing payments made by the Sponsor from 2005-2010 (Stipulation, Ex. P) and separate reconciliation reports evidencing payments made by the Sponsor for common charges and parking fees (Stipulation, Ex. N), with no evidence of why none of these payments are subject to being excluded from an award of restitution. Indeed, it cannot be fairly said that it would be "restitution" to grant Plaintiff a judgment for monies that came out of the pocket of the Sponsor only.

While the parties do indicate that they dispute whether certain monies paid out by the Sponsor in 2005 went towards the Note, it is Plaintiff's burden, both to prove its damages and to establish a *prima facie* case for damages in support of its motion for summary judgment.

Accordingly, both to afford Defendants the opportunity to seek to amend their pleading, and to allow Plaintiff the opportunity to cure the defect in its presentation, the Court will deny Plaintiff's motion for summary judgment, with leave to renew, with such renewed motion to be made in accordance with a briefing schedule set by the Court following a Rule 24 pre-motion conference.

CONCLUSION

Plaintiff's motion for summary judgment shall be denied, with leave to renew, with such renewed motion to be made in accordance with a briefing schedule to be set by the Court following a Rule 24 pre-motion conference. Defendants are granted leave to make a motion, if they be so advised, to amend their answers, provided that any such motion shall be served and filed by July 27, 2011. Opposing papers shall be served and filed by August 17, 2011. Any reply papers shall be served and filed by August 25, 2011. The motion shall be made returnable on August 26, 2011 and shall be submitted without argument, unless otherwise directed by the Court.

The Court has considered the following papers in connection with this motion:

1) Notice of Motion dated November 22, 2010;

2) Plaintiff's Commercial Division Rule 19-a Statement dated November 22, 2010;

3) Affidavit of Victor M. Metsch, Esq. sworn to November 22, 2010, together with the exhibits annexed thereto;

4) Affidavit of Joseph Acocella, sworn to November 17, 2010;

5) Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment dated November 22, 2010;

6) Defendants' Counterstatement Respónse to Plaintiff's Commercial Division Rule 19-a Statement dated January 14, 2011;

7) Affirmation of Jonathan P. Vuotto, Esq. in Opposition to Plaintiff's Motion for Summary Judgment dated January 14, 2011 together with the exhibits annexed thereto;

8) Affirmation of Andrew A. Glickson, Esq. In Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment on Damages dated January 14, 2011;

9) Affidavit of Martin Ginsburg, Esq. in Opposition to Plaintiff's Motion for Summary Judgment dated sworn to January 14, 2011 together with the exhibits annexed thereto;

10) Affidavit of Mark D. Ginsburg, Esq. in Opposition to Plaintiff's Motion for Summary Judgment on Damages sworn to January 14, 2011;

11) Memorandum of Law in Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment on Damages dated January 14, 2011;

12) Reply Affidavit of Victor M. Metsch, Esq. sworn to January 25, 2011 together with the exhibit annexed thereto;

13) Reply Affidavit of Joseph Acocella together with the exhibits annexed thereto;

14) Plaintiff's Reply Memorandum of Law in Support of Motion for Summary Judgment as to Damages (undated);

15) Stipulation dated April 15, 2011 together with the exhibits to the Stipulation;

16) Supplemental Affidavit of Victor M. Metsch, Esq. dated April 27, 2011; and

17) Affirmation of Jonathan P. Vuotto, Esq. in Further Opposition to Plaintiff's Motion for Summary Judgment on Damages dated April 26, 2011 together with the attached exhibits.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Plaintiff The Board of Managers of the Marbury Club Condominium, for partial summary judgment as to damages is denied without prejudice and with leave to renew, with such renewed motion to be made in accordance with a briefing schedule to be set by the Court following a Rule 24 pre-motion conference; and it is further

ORDERED that Defendants are granted leave to make a motion, if they be so advised, to amend their answers, provided that any such motion shall be served and filed by July 27, 2011 and in the event said motion is made, opposing papers shall be served and filed by August 17, 2011, any reply papers shall be served and filed by August 25, 2011, and the motion shall be made returnable on August 26, 2011 on submission, unless otherwise directed by the Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
July 6, 2011

ENTER:

ALAN D. SCHEINKMAN
Justice of the Supreme Court

APPEARANCES:

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