[* 1]

SHORT FORM ORDER

18552-08
INDEX # ~~18552-08~~
RETURN DATE: **9-28-11**
MOT. SEQ. # **003**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x

GERALD ALBAUM, RENEE ALBAUM, DONALD ANDELSMAN, ARLENE ANDELSMAN, ELLEN APPEL, LAWRENCE APPEL, CATHERINE ARDITA, SALLY AUGELLO, ARTHUR AUSTER, MARILYN AUSTER, IRENE AXELROD, STUART BAKER, BRENDA BAKER, IRENE BARKAN, LEONARD BASTA, SUSAN BASTA, THEODORE BECK, JOEL BERNSTEIN, MARIA BOCCONE, DONNA BOCCONE, MARGARET BONASER, VINCENT BONASERA, EILEEN BORETZ, ROCHELLE BRAVERMAN, GERALD BUCHFERER, JUDITH BUCHFERER, BERT BURD, ALICE CHASE, ELLEN DANK COHEN, LEONARD COHEN, ALLAN COHN, ARLENE COHN, RALPH CONGELLO, MARY CONGELLO, EDWARD T. COYNE, STEPHEN CRIVELLO, THERESA CRIVELLO, SAM CUKIER, CAROLYN CUKIER, BARBARA DAVIS, MELVIN DIAMOND, BARBARA DIAMOND, HENRY DEBONIS, DIANA DEBONIS, ANGELO DI MARIA, LUCILLE DI MARIA, CHARLES DIMARTINO, MARIE DIMARTINO, JACK DREISHPOON, LINDA DREISHPOON, STUART DRUSS, LOUISE DRUSS, LAWRENCE ENFIELD, BARRY EPSTEIN, JOHN ESPOSITO, DOLORES ESPOSITO, HARVEY FARBER, ELAINE FARBER, NICHOLAS FIUMANO, KAREN FRIEDMAN, JACOB FRITZEL, ANITA FRITZEL, MARY LOUISE GUIDA, GEORGE GLUBIAK, LYDDA GLUBIAK, SUSAN GOLDBERG, MARTIN GOLDSTEIN, SANDRA GOLDSTEIN, SEYMOUR GOODMAN, SONDRA GOODMAN, MIRA GRAYSON, MARIE GUNNING, JOHN HALL, GERALD HARRIS, ANN HARRIS, FRED HARRIS, SANDRA HARRIS, CARL HIRSCH, ROBERTA HIRSCH, ARNOLD HORWITZ, AGNES HORWITZ, BERNARD HYMAN, IDA HYMAN, PASQUALE IASSOGNA, MARGARET IASSOGNA, BERYL JOHNSON, ALAN JOSEPH, ADELE JOSEPH, HARRIET KERNS, RAYMOND KRICKMIER, MARGARET KRICKMIER, WILLIAM JURKLEN, ANGELINA KURKLEN, MARTIN KURTZ, SUZANNE KURTZ, STEPHEN KUTCHER, SUSAN KUTCHER. LILLIAN LEE, PHILIP LEIBEL, JOSEPHINE LENGEFELD, JACK LENNETT, SHARON LENNETT, BENJAMIN LEITNER, ALBERTA LEITNER, PATRICIA LEMIEUX, PAUL LEVY, MARILYN LEVY, ANN LEWIS, RICHARD LIND, SAMUEL LOGIN, ALFRED MANNHEIMER, ROBERT MARSHALL, AURELIO MARTINEZ, SANDRA MARTINEZ, CHARLES MASSARIA, ANN MARIE MASSARIA, HOWARD MCGUFFOG, THERESA MCGUFFOG, LUCY R. MEISNER, ROBNERT MELNITSKY, JANET MELNITSKY, DAVID METAL, MARYANN MERCURIO, RAY MINCONE, ROBERT MONSOUR, BARBARA MONSOUR, LAWRENCE NIAD, BARBARA NIAD,BARRIE O'KEEFE, MARY O'KEEFE, MARIE PALENERO, BARBARA PERMUTT, ARTHUR PIERVINCENTI, ANN MARIE PIERVINCENTI, JOHN PINERO, EDITH PINERO, CATHERINE POLIS, MARVIN POLLINO, GLORIA POLLINO, MELVIN PRINTZ, JEROME RADELMAN, GAETANO RENDA, CAROL RANDA, CYRYL RAUCH, ANGELO RESTIVO, PAUL RIZZI, SANDRA RIZZI, JOSEPH RONDINELLI, JOSEPHINE RONDINELLI, OSCAR ROSENES, MARILYN ROSENES, CYNTHIA RUND, RUTH RUSSO, SALVATORE SALADINO, ANNA SALADINO, HOWARD SAMUELS, SYLVIA SAMUELS, BRENDA SCHECHTER, FLORENCE SCHEINMAN, HILDA SCHNELL, IRENE SCHULER, HARVEY SCHLACKMAN, HARRIET SCHLACKMAN, CHARLES SETTY, JOANN SETTY, BARRY SHANBRON, DORINE SHANBRON, KYUNG SHEE, MELVIN SILVERMAN, SANDRA SILVERMAN, STANLEY SIMON, ARNOLD SINKIN, JOAN SINKIN, RITA SOLOMON, JACK SOLOMON, ROBERTA SOROKA, MARTIN SPECINER, LILA SPECINER, PAUL SPENGLER, MARIA SPENGLER, PAULA STATFELD, DOMINIC STANCO, JOAN STANCO, SIDNEY STEIN, RHONDA STINER, NATHAN STUMMER, SAMUEL SUGAR, GLENDA SUGAR, VINCENT TESORIERO, MARIANNE TESORIERO, WILLIAM TOMPKINS, RITA VUOLO, LORRAINE WARREN, ROBERTA WEINROTH, LESLIE WEISFELD, JUDITH WEXLER, MANNY WINTER AND BLANCHE WINTER,

Plaintiffs,

-against-

GREENS GOLF CLUB, LLC.,

Defendant.

----------x

CALENDAR DATE: November 16, 2011
MNEMONIC: MG; XMD

PLTF'S/PET'S ATTORNEY:
Beekman Schwartz Kaufman & Livoti, LLP
1050 Franklin Avenue, Suite 304
Garden City, New York 11530

DEFT'S/RESP ATTORNEY:
Rosenberg, Calica & Birney, LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530

Upon the following papers numbered 1 to 26 read on this motion and cross motion for summary judgment Notice of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross-Motion and supporting papers 11-17; Answering Affidavits and supporting papers 18-23; Replying Affidavits and supporting papers 24-26; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiffs for summary judgment pursuant to CPLR §3212 and the cross-motion by the defendant seeking the same relief of summary judgment pursuant to CPLR §3212 are decided as follows and it is

ORDERED that the plaintiffs' motion for summary judgment on their complaint pursuant to CPLR §3212 seeking reimbursement of certain fees improperly assessed against the members of the defendant is granted in its entirety and the case will be scheduled before the Court for inquest to determine the amount of fees due to be refunded to each of the individual plaintiffs; and it is further

ORDERED that the cross-motion by the defendant for summary judgment pursuant to CPLR §3212 seeking dismissal of the plaintiffs' complaint is denied.

The plaintiffs are all resident homeowners of a condominium community known as The Greens at Half Hollow located in Melville, Suffolk County on Long Island, New York. This community consists of 1,044 units and has a golf club as part of this complex. The Offering Plan executed between the individual homeowners/plaintiffs and the sponsors included certain declarations and covenants of which the applicable provision was contained on page 17 of the Offering Plan. This provision in dealing with fees with respect to the defendant, Greens Golf Club LLC provided, *inter alia*:

> "All home owners will automatically be "Social Members" of the Golf Club at a current monthly cost of $100. This fee is payable monthly directly to the Club Owner by each Home Owner in the Development... The current Social Membership Fee shall be guaranteed by the Sponsor and remain at this level for two (2) years after closing of the first Home for all Home Owners or for each Home Owner for one (1) year after the closing of his or her Home whichever alternative may apply on a case by case basis. *Thereafter, this fee may be modified by the Club Owner on an annual basis after the initial guarantee period has expired*. " (emphasis added).

In a letter, dated December 2005, the defendant sent a letter to all homeowners stating that their "social membership fees" would be increased to $300.00 per month and "effective January 2006, we will eliminate the 18% service charge presently applied to activities, trips and events throughout the Club (except food and beverage). In its stead, each membership will be billed an annual fee ($115.00) for staff services/appreciation..."

The plaintiffs contest the imposition of this staff services/appreciation fee arguing that the fee was never part of the Offering Plan and such plan "expressly creates and authorizes only one fee - a Social Membership Fee." The plaintiffs were forced to pay the imposition of these fees or suffer both monthly late fees and possible liens on their homes for non-payment. The defendant argues that the added $115.00 annual fee was specifically earmarked for use towards staff services and there is no restriction on the amount to be charged for such fees. The defendant also argues that the it has the right pursuant to the Offering Plan to modify the membership fees charged to the plaintiffs, to which the plaintiffs respond that the Offering Plan only creates one fee, a Social Membership Fee and not a newly established "annual service fee", and seeking a modification of the social membership fee is different from a new fee structure.

Both the plaintiffs and the defendant move and cross-move for summary judgment pursuant to CPLR §3212 arguing that this issue is one of law on the question of the modification of and/or imposition of a new "annual service fee." For the following reasons, the plaintiffs' motion for summary judgment on their complaint pursuant to CPLR §3212 is granted and the defendant's cross-motion is denied. This case will be scheduled for an inquest on the question of damages and the amount to be refunded to each plaintiff.

In contract actions involving the interpretation of the contract language where the parties rely on a written agreement, such as the Offering Plan, agree that the facts are not generally in dispute and do not refer to any parol evidence to shed light on the meaning of the agreement, the interpretation of that written agreement presents only a question of law. ***Tantleff v. Truscelli***, 110 AD2d 240, 493 NYS2d 979 (2nd Dept. 1985) aff'd 69 NY2d 769, 513 NYS2d 113 (1986). Thus, as a general rule, in a contract action, if the Court can determine the intent of the parties from the terms of the written agreement itself, without resort to extrinsic or parol evidence, the question can then be decided by the Court as a matter of law. ***Rom Terminals, LTD. V. Scallop Corp.***, 141 AD2d 358, 529 NYS2d 304 (2nd Dept.1988), app den. 73 NY2d 707, 539 NYS2d 300.

In ***Teal v. Place***, 85 AD2d 788, 455 NYS2d 309 (3rd Dept.1981) the Court stated:

> "'[t]he first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein' (citing *Nichols v. Nichols,* 306 NY490, 496, 119 N.E.2nd 501). Where the intention of the parties is fully determinable from the language employed in the agreement (see 4 Williston, Contracts §600, at p. 280), there is no need to resort to evidence outside the written words to determine their intention. Thus, no question of fact is presented, only a question of law-the interpretation of the March 7, 1980 written contract, and summary judgment was proper (***Long Is. R.R. Co. V. Northville Inds. Corp.***, 41 NY2nd 455, 461, 393 NYS2d 925, 362 N.E.2nd 558; ***Mallad Constr. Corp. V. County Fed. Sav. & Loan Assn.***, 32 NY2nd 285, 291, 344 NYS2d 925, 298 N.E.2nd 96)" See also, ***Estate of Gardner v. Carson***, 271 AD2d 721, 705 NYS2d 431 (3rd Dept. 2000)

Here, in the case at bar, the intent of the parties as discerned within the Offering Plan is very clear that there will be a "Social Membership Fee" which may be adjusted, manipulated and/or modified to warrant changes in expenses due to membership fees imposed. There is nothing within the Offering Plan to allow in addition to a "Social Membership Fee" the inclusion for an additional earmark for another membership fee now designated as a "annual service fee." The defendant correctly has stated the obvious that

> "The Golf Club was firmly within its rights to 'modify' the fees charged to the unit owners to include a specifically earmarked service fee portion thereof which modestly increased the fees by only $115.00 per year."

The agreement between the parties called for one "Social Membership Fee" and not an entirely distinct and separate "annual service fee" to reward the employees as a gratuity and charged to each homeowner. While defendant may adjust the charges under the umbrella of a "Social Membership Fee" to incorporate all sorts of charges and fees, it may not abrogate the agreement of one "Social Membership Fee" by the imposition of new distinct and separate fees under a new fee structure where the agreement calls for only one fee, the "Social Membership Fee."

The Court need not resort to evidence outside the written word when the language within the Offering Plan for a "Social Membership Fee" is so clear because the Offering Plan is quite extensive and refers only to a "Social Membership Fee" and not that separate and distinct homeowner fees may be assessed and charged at the choice of the defendant. The defendant is bound by the language of the agreement it entered into with each homeowner/resident. While the defendant argues that no economic impact will result to the members in the long run because the annual service fee will just be incorporated within the "Social Membership Fee", the Court cannot ignore the clear import of the Offering Plan which is the agreement into which the parties entered. The Court notes that the plaintiffs will win only a "pyrrhic victory" because the suggested annual service fee will be incorporated into the "Social Membership Fee" since the defendant has the right to increase and modify such fees through the "Social Membership Fee" mandate. The Court in construing the written agreement cannot avoid the mandated language within the agreement that only a "Social Membership Fee" is available to the defendant to impose such charges.

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (***Millerton Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ

the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, the plaintiffs' motion for summary judgment pursuant to CPLR §3212 on their complaint seeking to strike an annual service fee imposed on all homeowners residing at the Greens is granted and the annual service fee in the amount of $115.00 is stricken as contrary to the agreement between the parties as well as are any late fees or assessments involved in such service fee. The case will be scheduled before the Court for inquest to determine the fees due each of the individual plaintiffs at the request of the parties to this action and the case is also scheduled for a conference before this Court on Wednesday, May 23, 2012 at 10 am to determine scheduling of the inquest and damages, if necessary.

The foregoing constitutes the decision of the Court.

Dated: April 23, 2012

Peter F. Cohalan

J.S.C.

HON. PETER FOX COHALAN