Board of Mgrs. of the 411 E. 53rd St. Condominium v Perlbinder
2014 NY Slip Op 31897(U)
July 18, 2014
Sup Ct, New York County
Docket Number: 650603/2014
Judge: Shirley Werner Kornreich

SHIRLEY WERNER KORNREICH J.S.C

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

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BOARD OF MANAGERS OF THE 411 EAST 53RD STREET CONDOMINIUM,

Plaintiff,

-against-

BARTON PERLBINDER and STEPHEN PERLBINDER,

Defendants.

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BARTON PERLBINDER and STEPHEN PERLBINDER,

Plaintiffs,

-against-

BOARD OF MANAGERS OF THE 411 EAST 53RD STREET CONDOMINIUM,

Defendants.

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DECISION & ORDER

Index No. 650603/2014
(Action 1)

Index No. 654039/2013

(Action 2)

SHIRLEY WERNER KORNREICH, J.

Motion Sequence 001 in the first entitled action (Action 1) and Motion Sequence 001 and a cross-motion in the second entitled action (Action 2) are consolidated for disposition.

I. Parties

The plaintiff in Action 1 is the Board of Managers (Board) of the 411 East 53rd Street Condominium (Condominium), which is located at 411 East 53rd Street, New York, NY (Building). The Condominium is mostly residential, with two commercial units. Commercial Unit A (Garage or Garage Unit) is a garage owned by the defendants in Action 1 and the plaintiffs in Action 2, Barton Mark Perlbinder (Barton) and Stephen Perlbinder (collectively, Perlbinders). The Perlbinders acquired title to the Garage on or about December 15, 1986. The

Perlbinders are the sons of the sponsor of the Condominium. Barton is the sponsor's designee on the Board. The other commercial unit in the Condominium, Commercial Unit B (Supermarket), is occupied by a D'Agostino supermarket. The Perlbinders own a 34.7% interest in the entity that owns the Supermarket.

II. Motion in Action 1

Action 1 is a dispute over whether the Condominium should install a backflow preventer valve (Valve) in the Perlbinders' Garage. By order dated February 13, 2014, the New York City Department of Environmental Protection (DEP) ordered the Condominium to install the Valve in the Garage, in accordance with plans DEP had approved, on pain of a monetary penalty and possible termination of water service to the Building. The Perlbinders believe the Valve should be installed outside the Garage.

The Board moves in Action 1 for summary judgment on its first cause of action against the Perlbinders, which seeks an injunction directing them to:

> allow access to the Building's water meter located in the Perlbinders' Garage Unit for the purpose of installing the backflow preventer device mandated by the DEP and prohibiting the Perlbinders from interfering with such access and installation or otherwise impeding the Condominium from complying with the DEP's order dated February 13, 2014.

Section 5.9 of the Condominium's By-laws provides, in pertinent part, that:

> ... each Unit Owner shall grant to the Condominium Board ... a right of access to his Unit for the purposes of: ...
> (iii) performing ... installations, alterations, repairs or replacements to the mechanical or electrical services, or other portions of the Common Elements located within his Unit ....

Doc[1] 7, Ex 3.

[1] References to "Doc" refer to documents filed in the New York State Electronic Filing System.

The Perlbinders allege that the Board submitted faulty plans for the installation of the Valve that inaccurately depicted the layout of the area where DEP ordered it to be installed. The Perlbinders' opposition is based on their contention that, if the plans had been accurate, they would not have been approved. They submit an expert report by an engineer, who suggests placing the Valve outside the Garage in a heated enclosure under the steps that lead from the sidewalk above the Garage. The Perlbinders allege that installation according to the approved plans "could potentially" wreak havoc on the Garage and cause water damage, will affect its alienability, and interfere with the Perlbinders' use of it "as they see fit."

The Perlbinders also allege that the Board's animus toward them led the Board to draw plans locating the Valve in the Garage because, in a prior litigation, the Perlbinders prevailed on the issue of placing a sign on the facade of the Building. In a 2009 decision in the earlier case (AD Decision), the Appellate Division ruled that the Board's failure to permit the sign did not further a legitimate purpose and unfairly singled out the Perlbinders.[2]

It is undisputed that the Condominium's water meter is in the sub-cellar level of the Garage. The Perlbinders presented guidelines and instructions for the installation of a Valve issued by DEP and the New York State Department of Health. The guidelines and instructions provide that the Valve should be installed near the water meter; the instructions say that it should be within 5 feet of it. The engineering report submitted by the Perlbinders is silent on how far the suggested location would be from the water meter.

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[2] *Perlbinder v Board of Managers of the 411 East 53rd Street Condominium*, 65 AD3d 985 (1st Dept 2009).

The Board's motion is granted. The By-laws require the Perlbinders to give access to the Garage for the purpose of installing mechanical services. Real Property Law §339-j provides that:

> Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto.

A court should not substitute its judgment for an administrative agency's determination of questions of fact in an area where the agency has greater expertise than the reviewing court. *Van Teslaar v Levine*, 35 NY2d 311, 318 (1974). Here, the placement of the Valve is a factual determination in an area where the DEP has special expertise and this court does not. If the Valve is not installed, the Condominium will face penalties and possible termination of water service. Moreover, while the Perlbinders' attempt to overturn DEP's order, they did not bring an Article 78 proceeding to challenge the determination. The Perlbinders presented no evidence regarding the distance between their suggested location and the water meter, although it is clear that the Valve should be installed five feet from it and the water meter is in the Garage. Finally, there is no suggestion that DEP, which approved the plans, shares the Board's alleged animus toward the Perlbinders. The court will not contravene DEP's order. The Board's motion for summary judgment on the first cause of action is granted.

III. Motion and Cross-Motion in Action 2

Action 2 is a dispute over whether the Perlbinders or the Condominium should pay for needed repairs in the Garage. The duty to repair turns on whether the damaged areas are common elements and what caused the damage.

The Perlbinders move for partial summary judgment on their first cause of action for a declaratory judgment (DJ) declaring that the Board:

> has an immediate obligation to repair the existing damage in the Garage Unit and maintain the Garage Unit in compliance with the New York City Building Code.

Motion Sequence 001.

The Board cross-moves for partial summary judgment on its five DJ counterclaims numbered here as in the Board's answer: 1) declaring that the Perlbinders have an immediate obligation to repair the existing damage in their Garage and maintain it in compliance with the New York City Building Code; 2) declaring that the Perlbinders have an immediate obligation to repair any existing damage with respect to the slab and/or all surfaces of the slab located in the Garage; 3) declaring that because of their failure and refusal to maintain and repair the Garage, the Perlbinders are responsible for repairing damage in the Garage, even if some of the damage relates to common elements of the Condominium; 4) declaring that because the Perlbinders have unlawfully used the Garage as a commercial garage and combined it with an adjacent garage in the Revere Condominium, they are responsible for repairing damage in the Garage, even if some of the repairs relate to common elements of the Condominium; and 5) pursuant to the New York City Administrative Code (Adm Code) §28-301.1, declaring that because the Perlbinders own the Garage, they are responsible for the damage and repairs at issue in this action and any notice of violation (NOV) issued as a result of such damage.[3]

[3] NYC Administrative Code 28-301.1 provides that: "[a]ll buildings and all parts thereof … shall be maintained in a safe condition. … The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.

Motion Sequence 003 by the Board was granted by the court during oral argument. 6/12/14 Tr, p 6. The Board's motion requested the court to consider a decision of Administrative Law Judge Joan C. Silverman, dated September 16, 2013 (Silverman Decision, Doc 46) in connection with the motions for summary judgment in Action 2.

A. Facts

In addition to the Garage in the Condominium, Barton owns a commercial parking garage at the adjoining Revere Condominium (Revere Garage), located at 400 East 54th Street, New York, NY. Doc 37, ¶¶ 3-4. In 1986, the Perlbinders connected the Garage and the Revere Garage. *Id.* This was done pursuant to Article 12(b) of the Condominium's Declaration.[4]

The parties dispute whether the damaged areas of the Garage are part of the Garage Unit (Commercial Unit A) or part of the Condominium's Common Elements, a term defined in the Declaration of the Condominium. The Garage consists of two levels located in the cellar and sub-cellar floors, which are separated by a concrete slab that includes the ramp connecting the two floors. The slab is the floor of the cellar and the ceiling of the sub-cellar, and is supported by columns that rest on the floor of the sub-cellar. The Garage has its own roof, which is on top of the ceiling of the cellar. Affidavit of James Letsen, Doc 33, p 2, fn 1. The second level of the Garage extends below the residential part of the Building. Doc 33, Affidavit of Amr Hafez, Ex 1, p 2. The Garage damage that needs repair includes deterioration of the surfaces of, and cracks

[4] Article 12(b) of the Declaration provides:
The owner of any one or more Commercial Units, shall have the right, to the extent not prohibited by law, without obtaining the consent or approval of the Condominium Board, other Unit Owners or Mortgage Representatives, to change the size … of any one or more Commercial Units by… (y) altering boundary walls of any Commercial Unit.

in, the walls, ceilings and floors (including the slab), as well as missing concrete and exposed, rusting rebar in the ceilings, walls, slab and support columns.

The Supermarket (Commercial Unit B), also has two levels, but they are located on the ground floor and cellar. The Supermarket does not have space in the sub-cellar.

The Garage is operated by Central Parking System of New York, Inc. (Central Parking), pursuant to a management agreement with East 53rd Garage Corporation (Management Agreement), which is identified in the contract as the "Owner" of the Garage. Barton is the Chief Executive Officer of East 53rd Garage Corporation. The Management Agreement provides that the Owner is responsible for all repairs, structural and non-structural, including "repairs to walls, floors and concrete slabs." Affidavit of Anthony Tersigni, Doc 32, Ex 2, p 6.

The Perlbinders are bound by a New York City Environmental Control Board (ECB) determination, which found that their operation of a commercial garage in the Garage Unit was an illegal use. The Perlbinders are collaterally estopped to deny that fact because determination of illegal use was material and essential to the proceeding, the Perlbinders were parties to it, and they had a full and fair opportunity to contest it. *Ryan v New York Tel. Co.*, 62 NY2d 494 (1984); *Matarese v Robinson*, 103 AD3d 533 (1st Dept 2013). The ECB issued the order on October 18, 2013, after a hearing at which the Perlbinders were represented by counsel, ruling that the Garage was being operated in violation of the zoning ordinance (Illegal Use Decision). Doc 32, Ex 10. Specifically, Administrative Law Judge Susan Brand held that the Perlbinders were "engaged in an illegal use in a commercial district" because a commercial garage in the relevant C1-5 district required a BSA (New York City Board of Standards & Appeals) variance

and permit.[5] *Id.* The Illegal Use Decision found as facts that the Garage's last permit had expired in 1978, that tenants of the Building were not using the Garage and that parked cars bore Central Parking ticket stubs under their windshield wipers. *Id.*

The Board claims that the damage in the Garage emanates from its illegal use as a commercial garage, with resultant wear and tear. The Board's President, James Pendergast, submitted an affidavit stating that cars are driven between the Garage and the Revere Garage. Affidavit of James Pendergast, Doc 33, ¶5. The allegation concerning traffic between the two Garages stands unrebutted. In the opinion of the Condominium's expert, an engineer, who inspected the Garage in 2009: 1) a major cause of the corrosion of the slab was the infiltration of water and salt carried in by vehicles; 2) the concrete floor coating had deteriorated in many locations, which allowed water to seep from the upper level, through the slab to the lower level; 3) the Garage was continually exposed to weather elements and carbon dioxide; 4) over time, carbon dioxide causes steel rebar to corrode; and 5) delaminated paint on the walls and deteriorated sealant on the concrete floors permitted water to infiltrate and crack, due to repeated freeze/thaw cycles. Doc 33, Affidavit of Amr Hafez, ¶5.

In opposition to the Board's cross-motion for summary judgment, Barton submitted an affidavit, which stated that "Unit Comm-B [the Supermarket] has the same exact damage as Unit Comm-A [the Garage] even though no automobiles whatsoever go through Unit Comm-B." Doc 37, ¶7. His affidavit also stated that the columns in the Garage Unit do not service only the Garage because they are "all structural elements that are part of the Condominium." *Id*, ¶9. With respect to the slab, Barton stated that it is part of the Condominium "due to its structural

[5] A commercial garage is used by the general public, as opposed to residents of the Condominium.

nature" and is not part of the Garage Unit. *Id*, ¶10. The Condominium argues that the slab is not a common element because it is entirely within the Garage Unit and that the columns in the Garage only support the Garage.

In support of his contention, that Comm-B, the Supermarket, had the same damage as the Garage, Barton relied upon a NOV issued to 53 Associates Co. i.e., the owner of the Supermarket, on March 12, 2013 (Purported Supermarket NOV),[6] which noted the same damage as in the Garage. This led the Board to make Motion Sequence 003, to put in the record the Silverman Decision on the Purported Supermarket NOV After a hearing, the Silverman Decision dismissed the Purported Supermarket NOV on the ground that the damage constituting the violation was in the Garage, not the Supermarket. Doc 46. Only 53 Associates Co., had appeared at the hearing. *Id.*

In response to Motion Sequence 003, Barton averred that he did not know about the Silverman Decision until the Board made Motion Sequence 003. Doc 51, ¶6. He said that his prior affidavit relied on the Purported Supermarket NOV and the Department of Buildings website, which reported that it was dismissed. *Id.*[7] He professed to have been confused because on the same day, March 12, 2013, the ECB issued two other violations relating to the Garage, one addressed to the Perlbinders and one to the Condominium, all of which described the same damage as noted in the Purported Supermarket NOV. *Id.* & Docs 53 & 54.

Barton also claimed that "there is ample evidence that damage to the General Common Elements of the Condominium is a pervasive problem that has extended well beyond Unit

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[6] NOV 34853735R, issued to 53 Associates Co., dated March 13, 2013 (Purported Supermarket NOV), Doc 43.

[7] His attorneys also submitted affidavits denying knowledge of the Silverman Decision until after the Board made the motion. Docs 60 & 61.

Comm-A since at least 1994." Doc 51, ¶8. The Perlbinders present two bills addressed to the Condominium, from 1992 and 1994, for repairs to "concrete ceilings, floors, exhaust ducts and ramp" of the Garage. Doc 45. On the other hand, the Board argued that previous patching in the Garage noted by their expert is evidence that that Perlbinders repaired the Garage in the past. Doc 33, Affidavit of Amr Hafez, ¶4 & Doc 34, p 8. In his reply affidavit, Barton did not deny that the Perlbinders had patched the Garage.

The court notes that, despite Barton's protestations, the Purported Supermarket NOV on its face was based on damage in the Garage. In a box labeled "Occupancy at time of inspection," the Inspector wrote "Comm. Garage" and below that, in a note, he wrote

> Concrete floors, walls, columns and ceilings at the sub-cellar are in a state of disrepair in that they are cracked in several places, spalling with exposed rebars throughout with portions of the concrete base in danger of collapsing. This "space" is listed on the condo declaration as individually owned condo unit # Comm-B subcellar.

Doc 43. As previously stated, the Supermarket, which is partially owned by the Perlbinders, does not occupy space at the sub-cellar level, as must have been known to Barton, and "Comm. Garage" could not have been understood by him as referring to the Supermarket. Thus, it appears that Barton should have known that the Purported Supermarket NOV was based on damage found by the Inspector in the Garage that he mistakenly designated "Comm. B subcellar."

Nevertheless, there is a factual dispute as to whether the same damage exists in the Supermarket and the Garage. While Barton says that there is, the Condominium's managing agent submitted an affidavit denying it. Compare Doc 51, ¶8 & Doc 62.

The March 12, 2013 NOV issued to the Condominium (Condo NOV), described the occupancy at time of inspection as "Mixed Use".[8] Doc 54. The Inspector's note, after describing the same damage to the cellar and sub-cellar as in the Purported Supermarket NOV, states "[t]hese [illegible] are listed as common elements as per the condo declaration." *Id.* The Condo NOV has been adjourned pending this court's determination.

The third NOV issued by the ECB on March 12, 2013 named the Perlbinders as respondents (Perlbinder NOV).[9] Doc 53. The Inspector described the occupancy as "Comm. Garage" and noted the following:

> Concrete floors, walls, columns and ceilings at the sub-cellar are in a state of disrepair in that they are cracked in several places, spalling with exposed rebars throughout with portions of the concrete loose in danger of collapsing. This "space" is listed in the condo declaration as individually owned condo unit # Comm-A cellar.

Id. The Perlbinders were the only parties who appeared in opposition at the hearing, where they were represented by their current attorneys. Doc 16, Ex A (Summons & Complaint), Ex D thereto. The Perlbinder NOV was dismissed on the ground that the Perlbinders did not own, control or have dominion over the damage in the Garage and were not obligated to fix it. *Id.*

The ruling on the Perlbinder NOV was in direct contradiction to an earlier ruling by the ECB on a NOV issued to the Condominium on November 13, 2012 (Prior Condo NOV). Doc 32, Ex 4.[10] The Prior Condo NOV described the occupation as "Mixed Use" and the damage constituting the violation to be:

> 1) 1st Floor Garage floor cracked & cratered with loose rocks & stones – approx 30sf total. 2) cellar concrete ceiling cracked & missing portions throughout.

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[8] The Condo NOV number was 34853734P.
[9] The Perlbinder NOV number was 34853737K.
[10] Prior Condo NOV number was 34941438K.

Id. At the hearing, the Condominium appeared by its current attorney and there was no other appearance in opposition. *Id*, Ex 5. On January 3, 2013, the Prior Condo NOV was dismissed on the ground that the Perlbinders owned the Garage and the Condominium had "no ownership or control over" it. *Id.*

B. The Condominium Declaration & By-laws

The Condominium Declaration states that the Building:

> has a reinforced concrete foundation supporting reinforced concrete columns with brick and block exterior walls supported at each tier.

Doc 32, Ex 15, Art 4.

Pursuant to Article 7, the Garage Unit is not a "General Common Element" because it is located in the cellar and is not used in common by all of the residents of the Building. Article 7 (b) defines the "General Common Elements" as:

> Land and those rooms, areas corridors and other portions of the Building (other than the Units), … ***existing for the common use of the Units or .. the Unit Owners***, …. [T]he General Common Elements include:
>
> (ii) all foundations, ***columns***, ***beams***, ***supports***, ***girders***, exterior walls, ***interior walls***, ***partitions***, windows (including panes, casements and frames), ***floors***, roofs ***and ceilings*** in, on or under the Building, ***to the extent that the same are not expressly included as a part of a Unit***…;
>
> (iii) … ***all basements and cellars (except to the extent that Units are located on such levels***) …, and entrances to, and exits from, the Building….

Id, Art 7(b) [emphasis supplied]. The Perlbinders admitted that the Garage is not a common element, in a letter from their lawyer to the President of the Board, dated August 13, 2012. Doc 32, Ex 13.

It is undisputed that the slab is located within the Garage Unit. It is a ramp of the Garage and serves as the floor and ceiling separating its two levels. See, Doc 32, Ex 14. The slab is "expressly included as part of a Unit" and is not for the common use of the Units or the Unit Owners.

With respect to repairs, Article 5.1 of the Condominium's By-laws provides:

> (A) Except as otherwise provided in the Declaration or in these By-Laws, all painting, decorating, maintenance, ***repairs*** and replacements, ***whether structural or non-structural, ordinary or extraordinary***:
>
> (i) ***in or to any Unit and all portions thereof (including, but not limited to, the interior walls, ceilings and floors in the Units, but excluding any other General Common Elements contained therein), shall be performed by the owner of such Unit*** at such Unit Owner's cost and expense; and
>
> (ii) ***in or to the General Common Elements . . . shall be performed by the Condominium Board*** as a Common Expense;
> ....
>
> (B) Notwithstanding anything to the contrary in paragraph A of this Section 5.1, however, ... ***if any*** painting, decorating, ***maintenance, repairs***, or replacements to the Property or any part thereof, whether structural or non-structural, ordinary or extraordinary, ***is necessitated by the negligence, misuse, or abuse of any Unit Owner, the entire cost and expense thereof shall be borne by such Unit Owner, and, if necessitated by the negligence, misuse, or abuse of the Condominium Board, shall be borne by the Condominium Board as a Common Expense***.... Similarly, ***each Unit Owner shall be responsible for any and all damage to any Unit or to the Common Elements resulting from such Unit Owner's failure to maintain, repair or replace his Unit*** or any portion thereof as required herein.

Doc 32, Ex 16 [emphasis supplied].

Article 6 (c) of the Declaration states that the Garage Unit should be:

> measured horizontally ***from the inside surface of the exterior walls of the Building to the inside surface of the demising walls*** which separate the [Garage] from the corridors, stairs, elevators, compactors, and other mechanical equipment spaces or which are foundation walls; and vertically ***from the top of the concrete floor to the underside of the concrete ceiling***.

Id, Art 6 [emphasis supplied]. The language of 6(c), standing alone, makes it unclear whether the inside surface of the exterior walls, the top of the concrete floor and the underside of the concrete ceiling are part of the Garage Unit. Use of the word "from" could mean "beginning after", but also could mean "beginning with". If interpreted to mean beginning with, the Garage measurements include the surfaces of the walls, floors and ceiling of the Garage, and vice-versa. The measurement of the Garage is different from the measurement of the Residential Units and the Supermarket, which are measured horizontally from the inside "finished surface" of the exterior walls to the inside "finished surface" of the demising walls. *Id*, Art 6(b) & (d). The different measurement takes into account the fact that the Garage does not have finished walls.

Article 6(e) of the Declaration defines every Unit as including:

> (i) the front entrance door and any other entrance doors to such unit; (ii) ***the interior walls, partitions and floor coverings and plastered ceilings*** affixed, attached or appurtenant to such Unit; (iii) any and all equipment, fixtures and appliances . . . affixed, attached or appurtenant to such Unit; and (iv) all other Facilities affixed, attached or appurtenant to such Unit and benefiting only that Unit. However, ***any Common Elements located within a Unit shall not be considered part of such Unit.***

Id [emphasis supplied].

The Declaration and By-laws both provide that the Garage cannot violate the Zoning Resolution or be used illegally. Article 8 of the Declaration provides that the Commercial Units:

> may be used for any lawful purpose consistent with the New York City Zoning Resolution and any other applicable laws or regulations.

Doc 32, Ex 15, Art 8. Section 5.7(E) of the By-laws provides that "[t]he Commercial Units may be used for any lawful purpose consistent with the New York City Zoning Resolution." Doc 32, Ex 16.

C. Discussion

The AD Decision ruled that the Condominium's Declaration and By-laws must be interpreted together because they were part of the same transaction. *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 988 (1st Dept 2009). An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation. *Id*, at 986-987.

Pursuant to Article 7(b) of the Declaration, some of the areas of the Garage that need repair are part of the Garage Unit and not part of the General Common Elements. There is no question that the Garage, including the slab, is not an area "existing for the common use of the Units." The Garage is used exclusively by the Perlbinders as a commercial garage for the public, a fact binding upon the Perlbinders. The Perlbinders admitted that the Garage is not a common element in a letter from their attorney. Moreover, the Perlbinders do not deny that the slab is entirely within the Garage Unit and is part of it.

However, as set forth in Article 6(c) or the Declaration, the Garage begins at the surface of the interior walls, floor and ceiling and does not extend to the interior concrete and rebar. This conclusion is necessary in order to harmonize and give effect both to

Article 7 defining the General Common Elements, Article 6's definition of what is included in a Unit and the duty to repair in section 5.1 of the By-laws. Unless the word "from" in 6(c), the measurement provision for the Garage Unit, is interpreted to mean "beginning with" the surfaces of the walls, floors and ceiling within the Garage, elements used exclusively by the Garage would be General Common Elements, pursuant to Article 7. If the surfaces of the walls, floors, and ceilings of the Garage were not part of the Garage Unit, the owner of the Garage would have no maintenance obligation because the Garage has no finished walls, floors and ceilings. This cannot be the case, as a Unit Owner must maintain its Unit, pursuant to section 5.1 of the By-laws, and this court should not interpret the contract to render section 5.1 meaningless. *General Electric Co. v Hatzel and Buehler, Inc.*, 19 AD2d 40 (1st Dept. 1963), *aff'd* 14 NY2d 639 (1964); AD Decision, *supra*.

Similarly, in order to give effect to Article 6(e)'s definition of a Unit as including interior walls and partitions within a Unit, the unfinished walls and the slab of the Garage would have to be part of the Garage Unit because it has no other walls and the slab is a partition. On the other hand, the concrete and rebar below the surface of the interior walls, ceilings, floors and slab (a partition), are not part of the Garage Unit, pursuant Article 7(b)(ii) of the Declaration.

With respect to the columns in the Garage, there is an issue of fact as to whether they benefit only the Garage, or also support the residential Building. The Garage has a separate roof, but also extends under the residential Building. Doc 33, Affidavit of Amr Hafez, Ex 1, p 2. The fact that the Perlbinders claim that the columns in the Garage are structural is of no moment. The By-laws require a Unit-owner to make structural repairs

to a Unit and for the Condominium to make structural repairs to the General Common Elements. The same goes for the slab. The fact that it is structural, standing alone, does not make it a General Common Element.

There also are questions of fact as to the cause of the damage, which, pursuant to section 5.1 of the By-laws, bear on the obligation to repair. If the underlying cause of the Garage damage is the Perlbinders' failure to maintain surface paint and coating, or from the heavy traffic, i.e., misuse as an illegal commercial garage, then the Perlbinders would be responsible for the repairs, pursuant to section 5.1 of the By-laws. On the other hand, if the same damage is in the Supermarket, and there has been ongoing neglect building-wide by the Condominium, then the Condominium would be responsible under the same provision for repairs resulting from its negligence.

There is evidence that the Condominium and the Perlbinders have repaired the Garage in the past, i.e., repair bills and the Perlbinders' failure to deny that they patched the Garage. Consequently, past practice is inconclusive. Further, the record does not reveal what the caused the past damage.

In sum, the motion and cross-motion for summary judgment in Action 2 are denied because there are questions of fact as to whether the columns in the Garage are General Common Elements and as to the underlying cause of the damage in the Garage. Accordingly, it is

ORDERED that the motion by the Board of Managers of the 411 East 53rd Street Condominium (Board) for summary judgment on their first cause of action in Action 1, is granted; and it is further

ORDERED and ADJUDGED that defendants Barton Mark Perlbinder and Stephen Perlbinder, their agents and employees, are directed to allow access to the water meter in the garage located at 411 East 53rd Street, New York, NY, for the purpose of permitting the Board to install a backflow preventer device pursuant to the plans approved by the New York City Department of Environmental Protection (DEP), and said defendants are enjoined from interfering with such access and installation or otherwise impeding with the Board's compliance with DEP's order dated February 13, 2014; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in Action 1, and to sever the remainder of the action, which shall continue; and it is further

ORDERED the motion and cross-motion for partial summary judgment in Action 2 are denied; and it is further

ORDERED that the parties in both actions shall appear for a preliminary conference in Part 54, Room 228, of the courthouse located at 60 Centre Street, New York, NY, on August 5, 2014 at 11:00 a.m.

Dated: July 18, 2014

ENTER:

SHIRLEY WERNER KORNREICH
J.S.C.