

**Stais v Board of Mgrs. of the Spears Bldg.  
Condominium**

2015 NY Slip Op 30688(U)

April 27, 2015

Supreme Court, New York County

Docket Number: 152084/2015

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

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ALEC STAIS, ELISSA BURKE, JUNKO FEDERICO,  
SANTA FEDERICO, MYRNA BALDINGER,  
DAVID NEVILLE, GUCCI WESTMAN and  
LINDA EVANGELISTA,

Plaintiffs,

Index No.: 152084/2015  
DECISION/ORDER

-against-

BOARD OF MANAGERS OF THE SPEARS  
BUILDING CONDOMINIUM and THE ANDREWS  
ORGANIZATION, INC.,

Defendants.

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**HON. DONNA MILLS, J.S.C.:**

In this residential landlord/tenant action, the plaintiffs move, by order to show cause, for a temporary restraining order (motion sequence number 002). For the following reasons, this application is denied.

**BACKGROUND**

The plaintiffs Alec Stais, Elissa Burke, Junko Federico, Santa Federico, Myrna Baldinger, David Neville, Gucci Westman and Linda Evangelista (plaintiffs) are tenants in a building located at 525 West 22<sup>nd</sup> Street in the County, City and State of New York (the Condominium). See order to show cause, exhibit A (complaint), ¶¶ 1-9. The defendant Board of Managers of the Spears Building Condominium (the Board) is the Condominium’s board of managers, and the co-defendant Andrews Organization, Inc. (Andrews; collectively, defendants) is the Condominium’s managing agent. *Id.*, ¶¶ 10-12.

Under the Condominium’s governing documents, the plaintiffs are designated as “limited

common element owners” because their apartment units each contain terraces. *See* order to show cause, exhibit H at 119. The remaining unit owners are designated as “common element owners.” *Id.* This action concerns a special assessment of roof repair charges that the Board voted to levy against plaintiffs, in their capacity as “limited common element owners.” Plaintiffs assert that this was improperly done.

Plaintiffs assert that the Board commissioned and obtained an architect’s report, dated February 17, 2012, that responded to the Board’s request for a study and opinion as to the necessity and feasibility of repairing the Condominium’s roof. *See* order to show cause, Stais affidavit, ¶ 4; exhibit B. Plaintiffs next assert that, after receiving this report, the Board decided to impose a special assessment for roof repairs on all of the Condominium’s unit owners, “limited common element owners” and regular “common element owners” alike. *Id.*, ¶ 5. Plaintiffs further assert that, after additional review of the report, the Board determined that it would be more cost effective to institute a “proactive maintenance program” for the Condominium’s roof rather than to pay to replace it all at once, and to that end the Board also determined to begin collecting a “roof reserve fund” via special assessment beginning in March 2012. *Id.*, ¶¶ 6-7. Pursuant to a memorandum decision that the Board issued on February 13, 2012, that assessment would also be collected from all of the Condominium’s unit owners, “limited common element owners” and regular “common element owners” alike. *Id.*, exhibit C. However, plaintiffs also assert that subsequently, on February 13, 2015, the Board issued a “notice of special meeting” letter to all of the Condominium’s unit owners regarding a vote that it wished to take on the roof repair project that did *not* include the foregoing understanding. *Id.*, ¶ 10; exhibit D. Instead, plaintiffs note that, on February 26, 2015, the Board sent each of the Condominium’s unit owners

a separate letter that contained a preliminary estimate of roof repair costs and that provided that the “limited common element owners” would be responsible for a larger proportion of those costs. *Id.*, ¶ 11; exhibit E. Plaintiffs note that these letters did not explain why the board had made this determination. *Id.* However, plaintiffs assert that they eventually obtained documents that were used in connection with the architect’s report that indicate that the determination had been made that the proposed roof repairs would be “non-structural” rather than “structural,” as those terms are defined in the Condominium’s governing documents. *Id.*, ¶ 13; exhibit F. Plaintiffs explain that “structural repairs” must be funded by all Condominium unit owners equally (on a per share basis), while “non structural repairs” are treated differently. *Id.*, ¶¶ 18-19. The relevant portions of the Condominium’s declaration provide as follows:

“Article 7  
The Common Elements

- (A) The Common Elements consists of the entire property including the land and all parts of the Building other than the Units and including, without limitation, the following:
- 1) The General Common Elements, which are described below in paragraph (1) of this Article 7; and
  - 2) The Limited Common Elements, which are described below in paragraph (2) of this Article 7.
- (1) the General Common Elements consist of the Land and those rooms, areas, corridors and other portions of the Building (other than the Units), as well as those Facilities therein, either currently or hereafter existing for the common use of the Units or of the Unit Owners or necessary for, or convenient to, the existence, maintenance, management, operation or safety of the Property. The General Common Elements are those Common Elements which service or benefit all Units and are not limited in use to one or more Units to the exclusion of all other Units.
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- (2) the Limited Common Elements are those areas or facilities which enclose, service or benefit only specified Units to the exclusion of all other Units.

The Limited Common Elements for the Residential Units consists of a roof space ('terrace') for each sixth floor Penthouse Unit and a terrace adjoining the second floor Residential Unit 2D and a terrace adjoining Residential Unit 2F.

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Article 13  
Common Elements and Common Interests

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- (F) The maintenance, repair, replacement, management, operation and use of the Common Elements shall be the responsibility of the Board of Managers who shall collect as common charges the expenses incurred or to be incurred therewith from the Unit Owners. Further:
- 1) The Board of managers shall have the right to make or cause to be made such alterations and improvements to the Common Elements as in its opinion may be beneficial and necessary, provided, however, that such alterations and improvements do not materially and adversely interfere with the rights of a Unit Owner.

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By-laws of the Spears Building Condominium

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Section 1 - Determination of Common Expenses and Allocation of Common Charges

The Board of managers shall from time to time, and at least annually:

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- (ii) determine the aggregate amount of Common Charges payable by the Unit Owners to meet the Common Expenses of the Condominium;
- (iii) allocate and assess Common Charges and Common Expenses among the Unit Owners according to their respective Common Interests;

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The Common Expenses shall be the costs of administration, operation, maintenance, repair, replacement and restoration of the Common Elements and such items as provided for in the Declaration and these By-Laws to be Common Expenses.

The Common Expenses shall include, among other things, the cost of all insurance premiums ... . The Common Expenses may also include such amounts

as the Board of Managers may deem proper for the operation and maintenance of the Property, including, without limitation, an amount ... for a reserve fund for replacements ... . Each Unit Owner agrees that if the Board of Managers determines that certain of the Common Charges or portions thereof should be assumed by such Unit Owner or by a group of Unit Owners rather than by all Unit Owners, that such Unit owner or group of Unit Owners shall be responsible for the payment of such charges.

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#### Article V - Operation of the Property

##### Section 11 - Maintenance and Repair

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(C) All maintenance, repairs and replacements in and to the Common Elements (whether located inside or outside of the Units), including the common areas of the cellar and the roof, shall be made by the Board of Managers and may be charged to all the Unit Owners as a Common Expense (unless necessitated by the negligence, misuse or neglect of a Unit Owner, in which case such expense shall be charged to such Unit owner).

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(E) The areas of the roof that are designated a Limited Common Element or 'roof terrace' shall be the sole obligation of the Unit Owner having exclusive use thereof. However, structural repairs and replacements shall be the obligation of the Condominium Association, unless such repairs and replacements are necessitated by the negligence, misuse or neglect of a Unit Owner, in which case such cost shall be charged to the Unit Owner."

*Id.*, exhibit H. Plaintiffs claim that, even though the Board has determined that the proposed roof repairs herein are "non-structural" in nature, they are actually "structural," and plaintiffs have presented an expert's report from engineer Stephen Morse (Morse) to support their claim. *Id.*, Stais affidavit, ¶ 18; Morse affidavit. Plaintiffs finally assert that the Board attempted to improperly collect the special roof assessment from them in its March 2015 common charges statements. *Id.*, Stais affidavit, ¶ 14; exhibit G.

As a result of the foregoing, plaintiffs commenced this action on March 2, 2015 by serving and filing a summons and complaint that sets forth causes of action for: 1) an injunction; 2) an accounting; and 3) breach of fiduciary duties. *See* order to show cause, exhibit A.

Defendants have not yet filed an answer. Now before the court is plaintiffs' order to show cause for a temporary restraining order.

#### DISCUSSION

Pursuant to CPLR 6301:

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.”

CPLR 6301. The Court of Appeals has held that “[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988).

Here, in support of their motion, plaintiffs argue that they can demonstrate a likelihood of success on the merits. *See* plaintiffs' memorandum of law at 7-11. Plaintiffs specifically refer to the language of Article V, Section 11 of the Condominium's by-laws, which states that “[t]he areas of the roof that are designated a Limited Common Element or 'roof terrace' shall be the sole obligation of the Unit Owner having exclusive use thereof, [h]owever, structural repairs and replacements shall be the obligation of the Condominium Association.” *Id.* at 9. Plaintiffs then argue that this language, together with Morse's expert report, demonstrate that the proposed roof repairs are “structural,” and that, consequently, the Board was incorrect in making the special

assessment against plaintiffs only, rather than against all of the Condominium's unit owners. *Id.* at 9-11. The Board responds by citing the language of Section 1 of the Condominium's by-laws, which provides that "[e]ach Unit Owner agrees that if the Board of Managers determines that certain of the Common Charges or portions thereof should be assumed by such Unit Owner or by a group of Unit Owners rather than by all Unit Owners, that such Unit owner or group of Unit Owners shall be responsible for the payment of such charges." *See* defendant's memorandum of law at 6-7. The Board then argues that this language vests it with the sole discretion to determine against whom to levy a special assessment. *Id.* The court must interpret condominium by-law provisions in a way that will give fair meaning and effect to each of the terms at issue in order to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized. *See Lesal Assoc. v Board of Mgrs. of Downing Ct. Condominium*, 309 AD2d 594, 595 (1<sup>st</sup> Dept 2003) citing *Matter of John E. Andrus Mem. Home v DeBuono*, 260 AD2d 635, 636 (2d Dept 1999), *lv denied* 93 NY2d 813 (1999). Here, the court finds that the only reasonable interpretation is that the Board's ability to levy a special assessment for roof repairs against plaintiffs, as opposed to all of the Condominium's unit owners, turns entirely on the question of whether those repairs are "structural" or "non structural." However, with their competing expert's reports, neither of the respective parties herein has presented sufficient evidence for the court to determine this issue. The best that can be said is that it is a triable issue of fact, and, as such, can only be appropriately resolved after all evidence has been considered. In either case, the court cannot determine that issue now. As a result, plaintiffs are unable to establish a "likelihood of success on the merits" at this juncture, and the court must deny their order to show cause without prejudice to their right to seek a resolution of the above issue after

the completion of discovery herein. Accordingly, plaintiffs' application for an order to show cause is denied.

DECISION


ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion by order to show cause, pursuant to CPLR 6301, of plaintiffs Alec Stais, Elissa Burke, Junko Federico, Santa Federico, Myrna Baldinger, David Neville, Gucci Westman and Linda Evangelista is, in all respects, denied; and it is further

ORDERED that the defendants Board of Managers of the Spears Building Condominium and the Andrews Organization, Inc. shall serve and file an answer to the complaint within 20 days from the date of entry of this decision.

Dated: New York, New York  
April 27, 2015

ENTER:



Hon. Donna Mills, J.S.C.

**DONNA M. MILLS, J.S.C.**