OA Manhattan LLC v Condominium Bd. of Mgrs. of Cassa NY Condominium
2015 NY Slip Op 31930(U)
October 16, 2015
Supreme Court, New York County
Docket Number: 151067/14
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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OA MANHATTAN LLC,

Plaintiff,

-against-

THE CONDOMINIUM BOARD OF MANAGERS OF CASSA NY CONDOMINIUM and THE RESIDENTIAL BOARD OF MANAGERS OF CASSA NY CONDOMINIUM,

Defendants.

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Index No.: 151067/14
Subm. Date: April 1, 2015
Motion Sequence: 002

DECISION/ORDER

HON. ELLEN COIN, J.S.C.:

In this residential landlord/tenant action, defendant Residential Board of Managers of Cassa NY Condominium (the residential board) moves by order to show cause for injunctive relief, and co-defendant Condominium Board of Managers of Cassa NY Condominium (the condominium board) cross-moves for injunctive relief. For the following reasons, the motion and the cross-motion are denied.

Plaintiff OA Manhattan LLC (OA) is the corporate owner of residential apartment unit 36A in a mixed use residential/commercial building located at 70 West 45th Street in the County, City and State of New York (the building) (Complaint, ¶¶ 1, 6). The defendant residential board governs the building's residential units, and the co-defendant condominium board oversees the operation of both the building's commercial units and its residential units (*id.*, ¶ 7).

On this motion, the residential board requests a two-part preliminary injunction to prevent the condominium board from: 1) undertaking any action against it (or its members) relating to unpaid common charges that were assessed pursuant to the building's 2014 budget; or

2) implementing the building's 2015 budget (Affidavit of Salim Assa, sworn to March 10, 2015, ¶ 2).

"The 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 Housing, Inc.*, 4 NY3d 839, 840 [2005] [citation omitted]).

The residential board's preliminary injunction request consists of two proposed orders. Each of the orders is based on a two-part finding upon which the requested relief is predicated. These proposed findings concern the residential board's allegations that the condominium board took actions in violation of the building's by-laws. In order for the residential board to prevail on either of its requests for injunctive relief, it must first show that it is likely to succeed in demonstrating that its allegations of condominium board impropriety are true. For the following reasons, the court finds that the residential board has failed to do so.

The residential board's first proposed order alleges that the 2014 budget was adopted in violation of the by-laws, since the notices served prior to the board meeting on February 20, 2014 were improper (Assa Affid., ¶¶ 20-22). The relevant provisions of the by-laws governing the calling of condominium board meetings are as follows:

> Article 2 - Condominium Board
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> 2.6 Initial Meeting of the Condominium Board; Regular and Special Meetings.
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> 2.6.1 Within no more than ten (10) days following the initial recording of the Declaration in the Register's Office, each

Designator shall designate its Board Member by notice given to each other Designator and the first meeting of the Condominium Board shall take place.

2.6.2 Thereafter, regular meetings of the Condominium Board may be held at such time and place in the Borough of Manhattan as shall be determined by the Condominium Board from time to time but at least quarterly. Notice of regular meetings shall be given to each board member by the President, Vice President or Secretary of the Condominium Board or by the Condominium's Managing Agent, by personal delivery, nationally recognized overnight courier or telecopy (with confirmation receipt), at least five days prior to the day fixed for such meeting, which notice shall state the date, time and place (in the Borough of Manhattan) and shall include an agenda therefor.

2.6.3 Special meetings of the Condominium Board may be called by the President or Vice President of the Condominium or by any two (2) Board Members in Good Standing, in each case by giving at least ten (10) Business Days prior notice to each Board Member, by personal delivery, nationally recognized overnight courier or telecopy (with confirmation of receipt), which notice shall state the date, time and place (in the Borough of Manhattan) and purpose (including the agenda) for the meeting. In addition, the President of the Condominium Board shall, by written notice given in accordance with the last sentence of Section 2.6.2 above, call a meeting of the Condominium Board upon the written request of a Majority of Board Members.

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Article 5 - Notices

5.1 Notices. Except as otherwise provided ... all requests, notices, reports, demands, approvals and other communications required or desired to be given pursuant to the Declaration and/or the Condominium By-Laws shall be in writing and shall be delivered: (a) if to any Board of Commercial Unit Owner, in person (only in the case of a notice to the Condominium Board or the Residential Board) ...; (b) if to a Residential Unit Owner, in person or sent to the address of such Residential Unit Owner at the building ...

(Assa Affid., Ex. J).

The condominium board responds that regardless of any irregularities with respect to the February 20, 2014 meeting, the building's 2014 budget was actually adopted at a special meeting held a year later, on March 12, 2015, and that the notices for that meeting were served in compliance with the by-laws (*see* Affidavit of Benjamin Smillie, dated March 17, 2015, ¶¶ 2-7). The condominium board annexed copies of these later notices and of the board's March 12, 2015 minutes to its opposition papers. *Id.*, exhibits 1, 2. The residential board does not revisit its original argument in its reply papers (which were submitted by new counsel), or otherwise address the issue of the legitimacy of the March 12, 2015 board meeting. Therefore, the court deems the residential board to have abandoned its notice argument with respect to the February 20, 2014 meeting (*cf. Admiral Ins. Co. v Marriott Intl. Inc.*, 79 AD3d 572, 577 [1st Dept 2010] [Tom, J., concurring]). Regardless, maintaining this argument would be unsustainable in the face of the documentary proof from the condominium board concerning the March 12, 2015 meeting. Therefore, the Court finds that the residential board has failed to establish a likelihood of success with respect to its allegations of defective notice.

The residential board's first proposed order next alleges that the condominium board's attempt to enforce the common charges liens that it levied pursuant to the building's 2014 budget also violates the by-laws. Specifically, the residential board argues that: 1) the charges are invalid since they were assessed pursuant to the building's 2014 budget, which was also invalid since it had been approved at the "improperly noticed" February 20, 2014 meeting; and 2) the condominium board has "trampled on [its] rights ... specifically, its rights as the sole lien holder

and first right of enforcement" under the by-laws (Assa Affid., ¶ 28).

Article 13 of the by-laws, governing events of defaults, provides as follows:

> 13.1 Failure to Pay General Common Charges
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> 13.1.1 The Condominium Board shall take prompt action to collect any General Common Charges or Special Assessments which remain unpaid following notice and the expiration of applicable grace periods, including, without limitation, the institution of such actions and the recovery of interest and expenses as are provided in this Article 13.
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> 13.1.2 The Condominium Board shall have a lien (the 'Condominium Board's Lien') for all unpaid General Common Charges, Special Assessments, other sums payable as if part of General Common Charges or amounts otherwise due to the Condominium Board (together with interest thereon as provided in this Article) from a delinquent Unit Owner. ...
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> 13.3 Priority of Recourse Against Residential Unit Owners
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> 13.3.1 Notwithstanding anything to the contrary contained in this Article 13 and without limiting the rights of the Residential Board as set forth in the Residential By-Laws, the Residential Board shall in the first instance have the exclusive right of enforcement with respect to, and to exercise any remedy or recourse as against, a Residential Unit Owner as to whom or which any default under the Declaration, the residential By-Laws or the General Rules and Regulations exists. The Residential Board shall, upon demand by the Condominium Board, use commercially reasonable efforts ... to cause such defaulting Residential Unit Owner to cure such default ... . However, a default shall in no event be deemed to exist with respect to the Residential Board by reason of any action or inaction by, or a default existing with respect to, a Residential Unit Owner (or such Board's action or inaction with respect to the enforcement or cure of same).
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> 13.3.2 In the event the Residential Board fails, within forty-five

> (45) days after demand is made by the Condominium Board to cause the Residential Unit Owner in question to cure its default ..., then the Condominium Board shall be entitled to exercise its right to cure any such default in accordance with the applicable provisions of the Declaration or these By-Laws."

(Assa Affid., Ex. J).

The condominium board argues that the building's 2014 budget was actually adopted at the March 12, 2015 board meeting in compliance with the by-laws' notice requirements and that section 13.3.2 of the by-laws gives the condominium board the authority to file common charges liens in the event that the residential board fails to act to collect those charges 45 days after the condominium board demands that it do so (*see* Smillie Affid., ¶¶ 2-21). The condominium board presents a copy of the letter that it sent to the residential board on April 16, 2014, and copies of the arrears reports that it prepared on October 17, 2014 and March 15, 2015 in support of the common charges liens (*id.*, Exs. 5, 8, 9). Again, the residential board's reply papers fail to revisit its own original argument or to oppose the condominium board's opposition. For its part, the Court has already determined that the condominium board has presented evidence sufficient to establish that there was no defective notice issue with respect to the March 12, 2015 board meeting where the building's 2014 budget was adopted. Having reviewed section 13.3.2 of the by-laws, it appears that the condominium board did act properly in placing liens for common charges against the residential board's members, since that section of the by-laws plainly permits it to do so on forty-five days' notice to the residential board, and the condominium board has demonstrated that it complied with this notice requirement. Therefore, the Court finds that the residential board has failed to establish a likelihood of success with respect to these allegations.

Accordingly, the Court also finds that the residential board's first proposed order for injunctive relief should be denied.

The residential board's second proposed order for injunctive relief contains several allegations with regard to its request to enjoin implementation of the condominium's 2015 budget.[1] Initially, the residential board asserts that "[b]y ignoring and stonewalling the Residential Board with regard to its repeated request(s) for back-up documents and information regarding the 2015 budget, the Condominium Board has effectively expropriated and abrogated the Residential Board's right to participate in the budget process" (Assa Affid., ¶ 24). The residential board further alleges that "to the extent that the 2015 budget is predicated on the 2014 budget, it imposes impermissible, arbitrary and unexplained charges on the residential unit holders" (Assa Affid., ¶ 25). The residential board attaches an email from Robert Lebensfeld to board members and residents, dated December 30, 2014, outlining the residential board's concern's regarding unsubstantiated expenses and unprecedented shift in apportionment of expenses (*Id.*, Ex. M).

In opposition, the condominium board presents a copy of Benjamin Smillie's email dated February 10, 2015, which sets forth a point-by-point response to each of the items mentioned in Lebensfeld's email (Smillie Affid., ¶¶ 8-14, 12-15; Exs. 3, 4). The Court notes that these exchanges took place prior to the special board meeting of March 12, 2015. The Court also notes that, once again, the residential board fails to address the condominium board's responsive argument in its reply papers. While mere issues of fact do not preclude a preliminary injunction

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[1] The 2015 budget was also adopted at the same March 12, 2015 special board meeting where the 2014 budget was adopted.

injunction (CPLR 6312 [c]), sharp factual issues, which obscure the likelihood of success on the merits "to such a degree that it cannot be said that the plaintiff established a clear right to relief," will bar the provisional remedy (*Maynard v Park Slope Plaza, LLC*, 2008 NY Slip Op 32579(U) *14 [Sup. Ct., Kings County 2008] [internal quotations and citations omitted] [partial transfer of real estate interest]; *see Pearlgreen Corp v Yau Chiu Chu*, 8 AD3d 460, 461 [2d Dept 2004] [non-competition agreement]). Since here documentary evidence clearly disputes the residential board's allegation, the Court cannot find that there is a likelihood that the residential board will prevail in establishing the arbitrariness of increases of common charges in the condominium's 2014 and 2015 budgets, lack of access to information or absence of a meaningful opportunity to participate in the board meeting.

Finally, the residential board alleges that the item that the condominium board included in the 2014 budget to "pass a special assessment to satisfy the 2013 shortfall" (and which was approved at the March 12, 2015 special board meeting) "is expressly forbidden under section 6.1 of the" by-laws (Assa Affid., ¶ 27). The condominium board responds that "[it]has the power to impose special assessments for shortfalls in a prior year" (*see* Smillie Affid., ¶ 25). The condominium board cites section 6.1.5 of the by-laws as authorizing this power (*id*).

Article 6 of the by-laws, entitled "Operation of the Residential Section," provides in relevant part as follows:

> 6.1 Determination of Residential Common Expenses and Fixing of Residential Common Charges
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> 6.1.1 (a) The Condominium Board shall determine and allocate all costs and expenses incurred by the Condominium Board in connection with the operation, care, upkeep and maintenance of,

and the making of Alterations to, and Repairs of, the General Common Elements (all such costs and expenses, together with all other items which are provided for in these By-Laws and the Declaration to be General Common Expenses, the 'General Common Expenses'). From time to time, but at least once a year, the Condominium Board will prepare a budget ('Budget') for setting forth its projection of the General Common Expenses and will allocate the General Common Expenses among each of the Commercial Units and the Residential Section as a whole and assess charges ('General Common Charges') accordingly to meet the General Common Expenses. General Common Charges shall also be deemed to include any Special Assessments imposed by the Condominium Board. The Condominium Board may, at its sole discretion, from time to time increase or decrease the amount of Common Charges allocated to the Units and payable by the Unit Owners and may modify its prior determination of the Common Charges payable for any fiscal year so as to increase or decrease the amount of Common Charges payable for such fiscal year or portion thereof; however, no such revised determination of Common Expenses shall have retroactive effect on the amount of Common Charges payable by Unit Owners for any period prior to the date of such new determination. The allocations of Common Expenses between the Residential Units and the Commercial Units and among the Commercial Units set forth in Schedule B and the footnotes thereto are deemed presumptive evidence of reasonableness. The Condominium Board may not modify these allocations without the unanimous consent of all Unit Owners and Commercial Unit Owners.

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6.1.3 The Condominium Board may, at its sole discretion, from time to time increase or decrease the amount of General Common Charges allocated to and payable by the General Common Charge Obligors, and may modify its proper determination of the General Common Expenses for any fiscal year so as to increase or decrease the amount of General Common Charges payable for such fiscal year or portion thereof; however, no such revised determination of General Common Expenses shall have a retroactive effect on the amount of General Common Charges payable for any period prior to the date of such new determination. However, a prior period's

> deficit may be included in the General Common Charges for a subsequent period or be paid from a Special Assessment levied against all of the General Common Charge Obligors.
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> 6.1.5 In addition to the foregoing duty to determine the amount of and assess General Common Charges, the Condominium Board shall have the right to levy special assessments ('Special Assessments') to meet the General Common Expenses. All Special Assessments shall be levied against all General Common Obligors equitably in proportion to: (a) their respective Common Interests, or (b) the anticipated benefit(s) to the affected Unit Owners, as determined by the Condominium Board. The Board shall have all rights and remedies for the collection of Special Assessments as are provided herein for the collection of General Common Charges.

(Assa Affid., Ex. J).

The Court notes that while section 6.1.5 of the by-laws authorizes the condominium board to levy special assessments, it is actually section 6.1.3 of the by-laws that authorizes the collection of a prior year's shortfall in common charge payments in the form of a special assessment. As a result, the Court concludes that the residential board cannot overcome the text of the by-laws. Therefore, the Court finds that there is no likelihood that the residential board will prevail in establishing its allegation that including the 2013 shortfall in the 2014 budget was a violation of those by-laws.

Thus, having determined that there is no likelihood that the residential board will succeed in establishing any of the allegations that it makes in support of its second proposed order for injunctive relief, the request for a preliminary injunction is denied. Accordingly, the Court also finds that the residential board's motion should be denied in full. This denial extends to the

"supplemental request seeking appointment of a neutral forensic accountant" that the residential board submitted in lieu of reply papers in support of its order to show cause. The residential board has simply failed to identify any authority, statutory, contractual or otherwise, upon which to base this "supplemental request."

In its cross-motion, the condominium board seeks a preliminary injunction that includes orders to: 1) compel the residential board to grant it access both to floors 28-48 at the building and to all of the residential units located on those floors; 2) compel the residential board to cure and comply with violation number E435651 that was issued by the Fire Department of the City of New York to stop the transient (i.e., hotel) use of the residential units located on the building's 28th - 48th floors (the FDNY order); and 3) direct VHGWest 45th, LLC (VHG) to remove the residential check-in desk in the building's lobby and to direct it, instead, to require that all parties seeking to enter the building present proof of either tenancy or ownership of a residential unit.

The court will consider each of these proposed injunctions in turn. With respect to its request for an injunction granting it access to the building's 28th - 48th floors, the condominium board has presented an affidavit from Jennifer Villanueva, an employee of the condominium's managing agent, VHG, who states that in March 2015, she discovered that principals of the residential board had contacted the building's lock and keycard vendor and, without the condominium board's or VHG's approval, had new locks installed and new keys and/or cards issued for all of the residential units located on the building's 28th - 48th floors and the elevators that service those floors (Affidavit of Jennifer Villanueva, sworn to March 16, 2015, ¶¶ 2-20). As a result, Villanueva states, the condominium board has not had access to any of those floors

or to any units on those floors since that time (*id*). Villanueva notes that on March 11, 2015, this Court (Moulton, J.) issued a temporary restraining order (TRO) granting the condominium board "immediate and continuous access to the 48th floor" mechanical equipment room only (*id.*, ¶ 14; Ex. 4). [2]

Villanueva, however, alleges that despite the TRO, the residential board has still not provided the condominium board or VHG with access to the building's 48th floor (*id.*, ¶ 16). The condominium board argues that it and VHG are entitled to "full access to the entire building" pursuant to both article 14 of the declaration and Section 51-c of the Multiple Dwelling Law.[3] Article 14, entitled "Facilities and All Other Common Elements" provides as follows:

> Except as may otherwise be set forth herein or in the Condominium By-Laws, each Unit Owner shall have, and is hereby granted, in common with all other Unit Owners, an easement to use any and all Common Elements ... The Condominium Board and any managing agent ... shall have a right of access to each Unit and any Limited Common Element appurtenant to such Unit, if any, whether exclusive or not, (and such is hereby granted) to inspect the same or remove violations of governmental laws or regulations against any part of the Property; to cure defaults by the owner of such Unit under the Condominium By-Laws, this declaration or the Rules and Regulations, to perform maintenance, installations, alterations, repairs or replacements to the mechanical, plumbing or electrical systems or other portions of the Common Elements ... contained therein or elsewhere in the Property; or correcting any conditions originating in any Unit and threatening any other Unit or any Common Element; provided such right of access shall be exercised in such a manner as will not unreasonably interfere with the Units for their permitted purposes. Such entry shall be permitted on not less than one day's notice, except that no notice will be necessary in the case of any 'emergency' (i.e., a condition requiring repair or replacement immediately

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[2] On March 13, 2015, Justice Moulton declined to sign an order to show cause that sought all of the relief that the condominium board has requested in its current motion, finding that the earlier TRO that he had granted for access to the building's 48th floor was sufficient to satisfy considerations of public safety, since in true emergency "the Fire Department can obtain access to the remaining floors ... if necessary."

[3] The condominium board's resort to Section 51-c of the Multiple Dwelling is unavailing, as by the very language of the statute, it applies exclusively to tenancies. Unlike cooperative corporations, condominiums provide for ownership structure for their housing units.

> necessary for the preservation or safety of the Building or for the safety of occupants of the Building, or other persons, or required to avoid the suspension of any necessary service to the Building).

(Nadel Affirm, Ex. B). The residential board argues in opposition that the condominium board's argument does not speak to any of the required elements of a preliminary injunction (Affirmation of Lorraine Nadel, dated March 25, 2015, ¶¶ 4-8). While it is evident from the language of Article 14 that the commercial condominium is entitled to full access to all parts of the building, the condominium board does not submit any evidence or legal argument to address the "balance of the equities" element of the preliminary injunction standard and establish "irreparable injury."[4] Therefore, the Court cannot grant its request for a preliminary injunction for access to the building's 28th - 48th floors.

The condominium board next requests an injunction compelling the residential board to comply with and correct the FDNY violation for permitting illegal transient (i.e., hotel-style) occupancy of the building's residential units. The condominium board presents a copy of the FDNY order, which it asserts that the residential board had not complied with, and argues that this order and sections 6.9 and 8.1 of the residential by-laws forbid the owners of the building's residential units from renting their units to transient occupants. More precisely on point, Article 6 provides in relevant part as follows:

> 6.9 A Residential Unit may only be used for residential purposes and, subject to compliance with the By- Laws, for a lawful home occupation. ... A Residential Unit may only be occupied by: (i) any individual who is a Residential Unit Owner or permitted lessee; (ii) any officer ... of any corporation which is a Residential

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[4] The Court also notes that the condominium board would not be entitled to a preliminary injunction even assuming it could satisfy all the requisite element thereof, as its answer and reply to cross-claims omit a claim or prayer for equitable relief seeking access to the building and injunction against aiding transient use of the units.

> Unit Owner or permitted lessee; (iii) any partner ... of a partnership which is a Residential Unit Owner or permitted lessee; (iv) any member ... of a limited liability company which is a Residential Unit Owner or permitted lessee; (v) the fiduciary ... of any fiduciary which is a Residential Unit Owner or permitted lessee; (vi) any principal ... of any other entity (including, but not limited to, embassies and consulates of foreign governments) which is a Residential Unit Owner or permitted lessee; provided that in each instance in clauses (ii) through (vi) above: (A) the individual ... is designated as the primary occupant of the Residential Unit and is not being designated to use the Residential Unit on a transient basis or as any other than the primary occupant; and (B) such use is not, in fact or in effect, part of or in furtherance of a program, plan, entity, agreement or other arrangement providing for short-term, fractional or shared use and/or ownership of such Unit including, without limitation, as part of a travel club or any enterprise having similar attributes ... and (vii) the family members, domestic partners, domestic employees and/or non-paying guests of any of the foregoing

(Nadel Affirm., Ex. D).

The residential board responds that it "is in the process of dealing with all violations," which, it asserts, are a matter for the residential board to address, and not the condominium board (Nadel Affirm., ¶¶ 38-40). On September 8, 2015, the condominium board notified the Court that a hearing on the FDNY violation had been conducted before an administrative law judge at the New York City Department of Buildings (DOB) in April, which had resulted in issuance of three notices of violation for transient use of the building's residential units (Letter from Edward M. Cuddy III, dated September 8, 2015 [with attachments]). In this instance, although the facts clearly demonstrate that the condominium board would be likely to succeed on the merits of its injunction claim against the residential board on the issue of transient occupancy, they also conclusively demonstrate the *absence* of "irreparable harm" if this relief is not granted. Simply because the above cited sections of the building's declaration and the by-laws both forbid residential unit owners from renting their units out to transients, a remedy at law (i.e., for breach

of contract) exists which makes it unnecessary for the condominium board to seek redress in equity.

Finally, the condominium board seeks an injunction directing VHG to remove the building's check-in desk in the lobby and to replace it with a more stringent entry procedure, whereby anyone seeking access to one of the building's residential units would first have to demonstrate his or her ownership or tenancy interest in the unit. However, the condominium board does not address or even mention this request in any part of its moving papers. As a result, the Court deems that the condominium board has abandoned this request, and consequently denies it. Accordingly, the condominium board's cross-motion is denied in full.

In accordance with the foregoing reasons, it is hereby

ORDERED that the motion of defendant Residential Board of Managers of Cassa NY Condominium for a preliminary injunction pursuant to CPLR 6301 is denied; and it is further

ORDERED that the cross-motion of defendant Condominium Board of Managers of Cassa NY Condominium for a preliminary injunction pursuant to CPLR 6301 is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 16 , 2015

ENTER:

Hon. Ellen Coin, J.S.C.