

Marcus v Grunberg

2017 NY Slip Op 30094(U)

January 17, 2017

Supreme Court, New York County

Docket Number: 109886/2007

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29**

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**Amnon Marcus, Shimon Marcus,
Moshe Marcus, Edli Marcus and Ran Marcus**

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 109886/2007

**Michael Grunberg, Ariel Grunberg,
342 West 56th Owners Corp. and
Fanny Grunberg & Associates, LLC
d/b/a "Grunberg Realty" and
d/b/a "Grunberg Management"**

Defendant
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Upon the foregoing papers, the Plaintiffs' motion for summary judgment is denied in accordance with the attached memorandum decision:

Procedural History

This Court has before it a second motion for summary judgment (post-note-of-issue) filed by the Plaintiffs Amnon Marcus, Shimon Marcus, Moshe Marcus, Edli Marcus and Ran Marcus. The Plaintiffs made a previous motion (pre-note-of-issue) before this Court for summary judgment and for injunctive relief, and the Defendants also cross-moved for an order of the Court staying the underlying action (motion sequence 002). By decision dated May 11, 2015, the Court denied both the Plaintiffs' motion and the Defendants cross-motion.

Background and Underlying Dispute

The Plaintiffs commenced the underlying action on or about March 3, 2014. In the underlying action, the Plaintiffs are brothers, and the Defendants Michael Grunberg and Ariel Grunberg are also brothers. Plaintiffs allege in the verified complaint in sum and substance that they are the joint owners of shares and the proprietary lease (the "Proprietary Lease") allocated to Unit 7C in a cooperative corporation know as 342 West 56th Owners Corp. (The "Corporation"). The Plaintiffs further allege that the Defendant Michael Grunberg is the Managing Principal of Fanny Grunberg & Associates, LLC ("Grunberg & Associates") and that the Defendant Ariel Grunberg is a Principal of Grunberg & Associates. Plaintiffs further indicate that Grunberg & Associates is the managing agent for the Corporation. The Plaintiffs further indicate that Ariel Grunberg is the President of the Corporation's board of directors (the "Board") and that Michael Grunberg is the vice president of the Board.

The Plaintiffs allege in their complaint that they entered into a partnership with the Grunberg Defendants to develop certain real property in the State of Israel (the "Project"). The Plaintiffs allege that during the course of the Project, an Israeli bank required additional security in order to provide additional financing. The Plaintiffs argue that they and Michael Grunberg and Ariel Grunberg (Collectively the "Grunberg Defendants") agreed that the Grunberg Defendants would pledge a condominium unit that the Grunberg Defendants owned in Israel to the benefit of the lending bank. In consideration of that, the Plaintiffs entered into a written guaranty (the "Guaranty") in which the Plaintiffs agreed to indemnify the Grunberg Defendants for any loss in connection with the Project and for the Defendants' collateralization of their condominium in Israel to the extent sum of \$625,000.00. The Guaranty further indicated that the parties were simultaneously executing a security agreement and cooperative recognition agreement ("Security and Recognition Agreement") in order to collateralize the Guaranty with the Plaintiffs' co-op apartment, unit 7C at 342 West 56th Street, New York, New York (the "Apartment"). The Plaintiffs argue that an essential precondition to their entry into

the Guaranty and the Security and Recognition Agreement was the Grunbergs' representation that they would pledge their condominium in Israel as collateral for additional financing for the Project.

The Plaintiffs argue that they executed the Guaranty and the Security and Recognition Agreement in good faith and performed upon said agreements. However, Michael Grunberg refused to pledge the condominium in Israel to the financing bank. The Plaintiffs argue in the summons and complaint that the Project ultimately failed due to the inability to obtain necessary financing.

The Plaintiffs further allege in the summons and complaint that the Grunberg Defendants caused a UCC-1 lien (based upon the Guaranty) to be placed upon the Apartment. On March 3, 2013, the Plaintiffs caused a UCC-3 statement to be filed allegedly vacating the UCC-1 lien on the basis that the Guaranty and Security and Recognition Agreement were not based upon any consideration. The Plaintiffs argue that even though the lien was allegedly vacated by Plaintiffs filing the UCC-3 statement, the Grunberg Defendants have maintained the position that a lien remained in effect, and the Board will not consent to the sale of the Apartment. Similarly, the Board will not consent to the Plaintiffs subletting the Apartment.

The Defendants Michael Grunberg, the Corporation and Grunberg & Associates served and filed an answer to the Plaintiffs' complaint including two counterclaims. The first counterclaim is for reasonable attorneys' fees and expenses incurred by the Corporation in the underlying action, as per the Proprietary Lease. The second counterclaim is for reasonable attorneys' fees and expenses incurred by Michael Grunberg in the underlying action as per the Guaranty.

The Defendant Ariel Grunberg also served and filed an answer to the Plaintiffs' summons and complaint.

On or about March 11, 2016, the Plaintiffs filed an amended complaint, largely incorporating the same allegations in their initial complaint. The Plaintiffs allege the following nine causes of action in their amended complaint:

- first cause of action for a declaratory judgment declaring that the Board's treatment of the Plaintiffs' sale and sublease applications was different and unequal compared to other co-op share holder in the Corporation, which was a breach of their fiduciary duty to the Plaintiffs and in breach of the Proprietary Lease;
- second cause of action for an injunction directing and compelling the Grunberg Defendants to remove the UCC-1 lien, and return the certificate of shares owned by the Plaintiffs in the Apartment;
- third cause of action for an injunction directing and compelling the Corporation, through its Board, to treat the Plaintiffs fairly and equally, and to approve a future sale of the Apartment to a bona fide purchaser that Plaintiffs present in a duly submitted application;
- fourth cause of action for breach of fiduciary duty against the Corporation;
- fifth cause of action for breach of fiduciary duty against the Grunbergs;
- sixth cause of action for breach of the Proprietary Lease against the Corporation;
- seventh cause of action for tortious interference with contract and prospective economic advantage against the Grunberg Defendants and Grunberg & Associates;
- eighth cause of action for tortious interference with contract and prospective economic advantage against the Grunberg Defendants and Grunberg & Associates; and
- ninth cause of action for attorneys' fees.

The Defendants Michael Grunberg, the Corporation and Grunberg & Associates served and filed an amended answer to the Plaintiffs' amended complaint including two counterclaims. The first counterclaim is for reasonable attorneys' fees and expenses incurred by the Corporation in the underlying action, as per the Proprietary Lease. The second counterclaim is for reasonable attorneys' fees and expenses incurred by Michael Grunberg in the underlying action as per the Guaranty.

The Defendant Ariel Grunberg also served and filed an amended answer to the Plaintiffs' amended summons and complaint including a counterclaim for reasonable attorneys' fees and expenses.

Analysis

The Court's prior decision dated May 11, 2015 denying Plaintiffs' prior motion for summary judgment and injunctive relief

As previously stated, the Plaintiffs made a prior motion for summary judgment and injunctive relief (mot sequence 002). In said motion, the Plaintiffs' requested the following relief:

- a declaratory judgment that the Guaranty is void due to its failure to be supported by consideration;
- a declaratory judgment that the Security and Recognition Agreement is void due to its failure to be given for value;
- a declaratory judgment that the UCC-1 lien on the Apartment is void;
- a declaratory judgment that the UCC-3 filed by the Plaintiffs terminating the UCC-1 lien is valid and controlling, or, in the alternative, directing the Grunberg Defendants to submit a termination statement of the UCC-1;
- an Order of the Court directing the holder of the co-op shares to return to the Plaintiffs physical possession of the co-op shares held by it;
- an Order of the Court prohibiting the Corporation from withholding consent to the sale of the co-op shares to a bona fide purchaser due to the vacated Security and Recognition Agreement;
- an Order of the Court directing the Corporation to pay to the Plaintiffs their reasonable attorneys fees;
- an Order of the Court dismissing the Corporation's counterclaim for legal fees pursuant to section 234 of the Real Property law; and
- an Order of the Court dismissing Michael Grunberg's counterclaim for legal fees based upon the void Guaranty.

In its May 11, 2015 decision, this Court denied the Plaintiffs' prior motion for summary judgment on the basis that the Plaintiffs failed to make out their prima facie case for summary

judgment. In said decision, this Court found, contrary to the Plaintiffs' arguments, that the Guaranty and the Security and Recognition Agreement were ambiguous in their terms. In denying the Plaintiffs' prior motion for summary judgment, the Court indicated in its May 11, 2015 decision that "both the Guaranty and the Security and Recognition Agreement must be read together as a single document in order to interpret the scope of the agreements between the parties". The Court further indicated that "[u]pon a reading of the Guaranty and the Security and Recognition Agreement together, this Court finds that said agreements do not unambiguously indicate that the sole collateral/value for said agreements was the Defendants promise to post their apartment in Israel as collateral for the Project."

Specifically, the Court found that "the terms of the Security and Recognition Agreement do not unambiguously indicate that the sole 'value' for the security interest would be the Grunberg Defendants posting their apartment as collateral for the Project. Further, the provisions of the Security and Recognition Agreement referring to 'any amounts Guarantor owes the Secured Party or defaults on any promise Guarantor has made on any note, guarantee, loan or credit agreement that the Guarantor may have with Secured Party' and 'all Guarantor's obligations to Secured Party which now exist or may exist in the future' suggest the possibility that the Security and Recognition Agreement was intended to both collateralize the terms of the Guaranty and to secure prior loans between the parties." The Court also indicated in its prior decision that "the Defendants have submitted extrinsic evidence in support of their argument that the parties entered into the Security and Recognition Agreement in part to secure multiple loans that the Grunberg Defendants had made to the Plaintiffs."

This Court concluded that "when read together, the Guaranty and the Security and Recognition Agreement are ambiguous as to whether the sole purpose of the Security and Recognition Agreement was to secure that the Grunberg Defendants would post their apartment as collateral for the Project, or if the Security and Recognition Agreement was also

intended to secure multiple loans that the Grunberg Defendants had made to the Plaintiffs”.

As such, by decision dated May 11, 2015, the Court denied the Plaintiffs’ prior motion for summary judgment (and the Defendants’ cross motion to stay the action), finding that there were issues of fact as to the parties’ intent in entering into the Guaranty and the Security and Recognition Agreement.

The Plaintiffs’ requested relief in the instant motion for summary judgement is largely identical to the Plaintiffs’ requested relief in the prior motion for summary judgment and injunctive relief. Similarly, the Plaintiffs’ substantive arguments in the instant motion for summary judgment are also largely identical to the Plaintiffs’ substantive arguments in their prior motion for summary judgment and injunctive relief.

The Plaintiffs instant motion for summary judgment requests that the Court make the following findings as a matter of law:

- that 342 West 56th Owners Corp. (The “Corporation”) through its board of directors (the “Board”) breached its fiduciary duties to the Plaintiffs;
- that the Corporation breached the Proprietary Lease;
- that the Defendants Michael Grunberg, Fanny Grunberg & Associates, LLC (“Grunberg & Associates”), and the Corporation tortuously interfered with the Plaintiffs’ contracts and business relationships;
- that the Defendants Michael Grunberg and Ariel Grunberg (Collectively the “Grunberg Defendants”) improperly filed a UCC-1 lien on the Apartment for which agreed-upon consideration was not provided, and directing the Grunberg Defendants to remove the UCC-1 lien; and
- awarding Defendants damages for lost rental income, lost interest and time value of money which would have been received from the sale of the Plaintiffs’ co-op apartment, for costs and expenses in maintaining the Apartment and for cost and expenses in maintaining this litigation.

The Plaintiffs’ instant motion for summary judgment can be effectively separated into two parts. The first part seeks a finding by the Court that the Guaranty is void for lack of consideration, and therefore the Grunberg Defendants’ UCC-1 lien based upon the Guaranty is improper. Said relief is identical to the relief that the Plaintiffs sought in their prior motion for summary judgment and injunctive relief. Further, upon examination of the Plaintiffs’ submitted papers, the Court finds that the portions of the Plaintiffs’ instant summary judgment motion

requesting that the Court find that the Grunberg Defendants improperly filed a UCC-1 lien on the Apartment and directing the Grunberg Defendants to remove the UCC-1 lien, are based on the same substantive arguments that the Plaintiffs already presented in their prior motion for summary judgment.

The Court notes that the Plaintiffs are not seeking to “reargue” the Court’s May 11, 2015 decision denying the Plaintiffs’ prior motion for summary judgment, nor do the Plaintiffs’ in anyway object to any of the Courts’ findings in its prior decision. Specifically, the Plaintiffs do not argue that the Court was incorrect in concluding in its previous decision that the Guaranty and the Security and Recognition Agreement must be read together as a single document in order to interpret the scope of the agreements between the parties, and that based upon the prior submitted evidence, there were issues of fact as to the parties’ intent in entering the Guaranty and the Security and Recognition Agreement.

Plaintiffs’ attorney acknowledges in his affirmation that the Plaintiffs’ previous pre-discovery motion for summary judgment was “perhaps premature” (Plaintiffs’ attorney’s affirmation p.7, ¶ 30). However, the Plaintiffs now argue that the Parties have completed discovery, and their intent as to the Guaranty is “unmistakable clear”. The Plaintiffs now argue in sum and substance that the Guaranty read together with the “contemporaneous email records and contemporaneous conduct by the parties” is sufficient to establish that the Parties intended that the Plaintiffs agreed to pledge their co-op shares solely in exchange for the Grunberg Defendants’ promise to pledge their apartment in Israel in connection with the Project.

The Plaintiffs have failed to show that there is a sufficient justification for the Court to entertain a second summary judgment motion as to the UCC-1 lien based upon discovery.

"Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Fleming & Assoc., CPA, PC v Murray & Josephson, CPAs, LLC*, 127 AD3d 428 [1st Dept 2015]); Maggio v 24 W. 57 APF, LLC, 134 AD3d 621, 625 [1st Dept 2015]; *Jones v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010]).

Upon review of the Plaintiffs submitted papers the Court finds that the Plaintiffs have failed to show that there is sufficient justification for the Court to entertain a second motion for summary judgement requesting findings that the Guaranty was void and that the UCC-1 lien was improper. Specifically, having reviewed the Plaintiffs' attorney's memorandum of law, Plaintiffs' attorneys' affirmation, and the Plaintiffs' attached exhibits, the Court finds that the arguments presented in support of the Plaintiffs' instant motion for summary judgment on this issue are virtually identical to the arguments presented in the Plaintiffs' prior motion for summary judgment.

Further, the only specific items of "newly discovered evidence" referred to by Plaintiffs' attorney that were not before this Court in deciding the Plaintiffs' prior motion for summary judgment is a single unauthenticated email (Plaintiffs' attorney's affirmation p.8, ¶ 32). Plaintiffs' attorney argues that this unauthenticated email is dispositive of the Parties' intent that the Plaintiffs' were to pledge their co-op shares solely in exchange for the Grunberg Defendants' promise to pledge their apartment in Israel in connection with the Project.¹ The Court does not find that a single unauthenticated email constitutes newly discovered evidence sufficient to justify entertaining the Plaintiffs' second motion for summary judgment on the

¹ The Court notes that the Plaintiffs have attached with the instant motion 17 exhibits including depositions taken of the Defendants Michael Grunberg and Ariel Grunberg. However, with the exception of the email exchanges in exhibit 8, the Plaintiffs make no reference in the affirmations nor the memorandum of law to any specific items of evidence obtained through discovery. In the absence of any other specific references by the Plaintiffs to specific items of evidence, the Court will assume that the only items of evidence relevant to the Plaintiffs' substantive arguments are the evidence to which the Plaintiffs specifically refer.

question of the Parties' intent as to the Guaranty where the instant motion is based upon the same substantive legal arguments that the Plaintiffs presented in their prior motion for summary judgment.

As such, the Court will not entertain the portion of the Plaintiffs' instant summary judgment motion requesting (for the second time) that the Court find that the Guaranty is void for lack of consideration and that UCC-1 lien based upon the Guaranty is improper.

The email to which the Plaintiffs refer is insufficient to remove all material issues of fact as to the Parties intent in entering the Guaranty

Even assuming arguendo that the Court were to consider the single unauthenticated email as "newly discovered evidence" sufficient to justify a second motion for summary judgment, the Court would still find that said unauthenticated email is insufficient to remove all material issues of fact as to the Parties' intent in entering the Guaranty.

The unauthenticated email, purportedly from Ariel Grunberg to Mark Altschul indicates in sum and substance that the Plaintiffs and the Grunberg Defendants agreed that the Plaintiffs would use the Grunberg Defendants' apartment in Israel as collateral for the Project while the Plaintiffs gave their Apartment as collateral to the Grunberg Defendants. However, the fact that the Grunberg Defendants allowed the Plaintiffs to use the apartment in Israel as collateral for the Project is undisputed. It is also undisputed that the Plaintiffs pledged their Apartment as collateral at least in part in exchange for the Grunberg Defendants reciprocally pledging their apartment in Israel. One of the major points of conflict in the underlying action is whether or not the Plaintiffs *also* pledged their Apartment as collateral for past loans that the Grunberg Defendants had made to the Plaintiffs in connection with the Project.

Taken alone and/or read together with the entirety of the facts and evidence as presented to this Court, the single unauthenticated email does nothing to remove the material issues of fact as to the Parties' intents in entering the Guaranty.

The Court will entertain the portion of the Plaintiffs' instant summary judgment motion seeking summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money".

The second part of the Plaintiffs' motion for summary judgment seeks summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money" stemming from the Boards failure to consent to the Plaintiffs' sale or sublease of the Apartment. The arguments the Plaintiffs present in the instant motion on this point largely reiterate the arguments they presented in their previous motion for summary judgment and injunctive relief. However, the Court recognizes that the Plaintiffs' prior motion for summary judgment and injunctive relief did not request summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation as to these claims. In its prior decision, the Court evaluated the Plaintiffs' arguments on this point within the context of a motion seeking injunctive relief and not within the context of a summary judgment motion.

As such, the Court will determine, on the merits, the portion of the Plaintiffs' motion seeking summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money" stemming from the Boards failure to consent to the Plaintiffs' sale or sublease of the Apartment.²

² For the remainder of the instant decision, unless specifically indicated (e.g. "Plaintiffs' motion for summary judgment... in its entirety") any reference to the Plaintiffs' motion for summary judgment will refer only to the portion of the Plaintiffs' motion seeking summary judgement against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money" stemming from the Boards failure to consent to the Plaintiffs' sale or sublease of the Apartment.

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*Id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [NY 2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [NY 2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 NY 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [NY 1992]).

Parties Contentions

The Plaintiffs argue in support of their motion for summary judgment that the Grunberg Defendants and the Corporation improperly rejected the Plaintiffs' applications to sell and/or sublease the Apartment. Specifically, the Plaintiffs argue that Michael Grunberg, as vice president of the Board and through Grunberg and Associates, directly interfered with the Plaintiffs' application process by influencing the Board's votes and interfering with the prospective purchasers of the Apartment. The Plaintiffs argue that the Board rejected four applications by the Plaintiffs to sell or sublease the Apartment over a two year period, while at the same time accepting at least sixteen applications by other co-op shareholder's to sell or sublease their apartments.

The Plaintiffs further argue that their applications were subjected to extremely high levels of scrutiny. Plaintiffs argue that minor technicalities, which were ignored or overlooked in other co-op shareholders' applications, were cited as pre-textual grounds for the Board to delay and deny Plaintiffs' applications to sell or sublease the Apartment. Plaintiffs further argue that Ariel Grunberg admitted at his deposition that the Plaintiffs' applications as to the Apartment were treated "differently".

The Plaintiffs argue that by rejecting the Plaintiffs' applications to sell and/or sublease the Apartment, the Board treated the Plaintiffs unfairly and unequally in comparison to the other co-op shareholders. Plaintiffs argue that this unfair/unequal treatment constituted a breach of the Corporation's fiduciary duty to the Plaintiffs as shareholders in the co-op. The Plaintiffs further argue that said unfair/unequal treatment does not fall within the scope of the business judgment rule.

The Plaintiffs refer to their two attempts to sell the Apartment to Eric Wong and Paola Garzoni respectively; and Plaintiffs' three attempts to sublet the Apartment to Yuezhong Cao, Bruno Romagne and Olivio Capellan respectively. The Plaintiffs argue in sum and substance that the Board unfairly rejected all of these applications to sell or sublet the Apartment. The Plaintiffs give the following detailed descriptions of their attempts to sell and sublease the Apartment:

- In January of 2013, Mr. Wong had entered into contract of sale with the Plaintiffs and placed a \$28,750 purchase price deposit in escrow. But for the UCC-1 lien on the apartment, Mr. Wong was ready to purchase the Apartment. The Plaintiffs argue that the Grunberg Defendants' refusal to withdraw the UCC-1 lien caused Mr. Wong to cancel the contract.
- In July of 2013, Plaintiffs sought the Corporations's permission to sublease the Apartment to Mr. Cao, and on July 26, 2013, Plaintiffs broker submitted a completed application to the Board. Plaintiffs argue that the Board rejected the Plaintiffs' application without giving a reason or putting the matter to a vote.
- On August 5, 2014, the Plaintiffs submitted an application to the Board to sublease the Apartment to Mr. Romagne. The Board rejected the Plaintiffs' application. Plaintiffs argue that the Board rejected the Plaintiffs' application without putting the matter to a vote.

- In September 2014, the Plaintiffs made an application to sell the Apartment to Ms. Garzoni who owns two other apartments in the building. The Plaintiffs argue that over a year later in January 2016, Mark Altschul, on behalf of the Corporation, sent a letter to Ms. Garzoni indicating that the Apartment was the subject of the instant litigation and that the Corporation cannot consider any transfer until said litigation has been resolved. The Plaintiffs argue that it is completely incorrect that the Apartment could not be sold due to the instant litigation, and that the failure of the Board to even consider the sale application constituted a breach of its fiduciary duty. The Plaintiffs further argue that Mr. Altschul's interference, on behalf of the Corporation and the Grunberg Defendants, constituted a tortious interference with Plaintiffs' business relations and prospective economic advantage.
- On October 1, 2014, the Plaintiffs submitted an application to sublease the Apartment to Olivio Capellan. The Plaintiffs argue that there was no evidence that the application was ever presented to the Board, nor was there any evidence of any vote by the Board on the Plaintiffs' application. The Plaintiffs argue that on October 13, 2014, Mr. Altschul emailed the Plaintiffs on behalf of the Board informing the Plaintiffs that due to two individuals resigning from the Board, the Board could not meet the requirements for a quorum under its bylaws. As such no action could be taken pending the election of new Board members.

In opposition, the Defendants argue that no basis exists for the Plaintiffs' claims for breach of contract, breach of fiduciary duty or tortious interference.³ Specifically, the Defendants argue that there was no intentional and/or unjustified interference with the Plaintiffs' attempted sale of the Apartment or sublease requests. The Defendants attach with their opposition papers, affidavits by Michael Grunberg, Richard Gabriele, Ariel Grunberg, Mark Altschul and Stephanie Wong.

Michael Grunberg attests that he is the vice-president of the Corporation and a manager of Grunberg and Associates. Michael Grunberg further argues in sum and substance that both the Guaranty and the UCC-1 filing based upon said Guaranty are valid.

³ The Court is only considering the portion of the Plaintiffs' motion seeking summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money" stemming from the Boards failure to consent to the Plaintiffs' sale or sublease of the Apartment. Therefore, although the Court fully reviewed all of the Parties' submitted papers and substantive legal arguments, the Court will only refer to the opposition arguments that relate to the portion of the Plaintiffs' motion seeking summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money" stemming from the Boards failure to consent to the Plaintiffs' sale or sublease of the Apartment.

Richard Gabriele attests that he is the attorney for the Defendant Ariel Grunberg.

Gabriele argues that the Plaintiffs' instant motion is untimely. Specifically, Gabriele argues that pursuant to a preliminary conference order dated June 30, 2016, the Court directed that any dispositive motions should be filed within 30 days of the note of issue. Gabriele argues that the note of issue was filed on April 22, 2016, and therefore the latest date by which the Plaintiffs could file the instant summary judgment motion was May 22, 2016. Gabriele argues that the Plaintiffs filed the instant summary judgment motion on or about August 22, 2016, and therefore the instant motion should be denied as untimely.⁴

Gabriele further argues that there are material issues of fact as to whether the Plaintiffs formally filed any application with the Board and whether the requisite documents and fees were paid. Gabriele further argues that there are material issues of fact relating to the Plaintiffs' claimed damages.

Ariel Grunberg attests that he had read the affidavits of Michael Grunberg and Richard Gabriele. Ariel Grunberg confirms that the facts set forth in Michael Grunberg and Richard Gabriele's affidavits are true to the best of his knowledge.

Mark Altschul attests that he is the attorney for Grunberg Realty and the Corporation. Altschul further attest that he is familiar with the prospective sales and sublets with respect the Apartment. He further attests that the Grunberg Defendants have recused themselves from participating in any decision by the Board regarding the Plaintiffs' Apartment due to the Grunberg Defendants' on-going dispute with the Plaintiffs. Altschul refers to paragraph 15 of the Proprietary Lease, which states that "[t]here shall be no limitation on the right of Directors or Lessees to grant or withhold consent to a subletting for any or no reason except as limited by law..."

⁴ Gabriele states in his affidavit that the "Defendants" filed their summary judgement motion on or about August 22, 2016. However, this is clearly a typo and Gabriele is clearly referring to the Plaintiffs' instant motion for summary judgment.

On the issue of the Plaintiffs' potential sale of the Apartment to Mr. Wong, Altschul argues that the Plaintiffs have not attached any documentation to demonstrate that the Corporation ever received, reviewed and/or rejected the Plaintiffs' application to sell the Apartment to Mr. Wong. Additionally, Altschul argues that the removal of the UCC-1 lien as a condition of purchase was a condition required by Mr. Wong as the potential purchaser. As such, the sales contract between the Plaintiffs and Mr. Wong was not canceled due to any action on the part of the Corporation and/or Board.

Altschul makes the same argument as to the Plaintiffs' potential sale of the Apartment to Ms. Garzoni. Specifically, Altschul refers to the rider to the contract of sale between the Plaintiffs and Ms. Garzoni, which indicates that the removal of the UCC-1 lien was a condition precedent to the consummation of the sale.

On the issue of the Plaintiffs' request to sublease the Apartment to Mr. Cao in July 2013, Altschul states that although the Corporation denied Plaintiffs' requests to sublet to Mr. Cao, either Mr. Cao or his child moved into the Apartment anyway. Altschul argues that pursuant to the written sublease agreement between the Plaintiffs' and Mr. Cao, the term of Mr. Cao's sublease commenced on July 2013 and ended in July 2014. Altschul stated that upon information and belief, Mr. Cao and/or his child vacated the Apartment in August or September of 2014. Altschul states that the Corporation commenced a holdover eviction proceeding against the Plaintiffs, Mr. Cao and any sub-subtenants. Altschul further states that the Apartment was vacated before any trial on the matter could take place.

On the issue of the Plaintiffs' application to sublease the Apartment to Mr. Romaine, Altschul states that Mr. Romaine was from France and did not have any credit history in the United States for the Corporation to review. Altschul argues that the Plaintiffs' application to sublease the Apartment to Mr. Romaine was denied on said grounds.

On the issue of the Plaintiffs' application to sublease the Apartment to Mr. Cappellan, Altschul states that the Plaintiffs made their application to sublease the Apartment to Mr. Cappellan while the Plaintiffs' application to sell the Apartment to Ms. Garzoni was also being considered. Altschul states that he advised the Plaintiffs that the Board could not simultaneously consider two inconsistent applications. Altschul further states that the Plaintiffs responded by threatening that if both the sublease and sale applications were not approved by the Board, the Plaintiffs' would pursue legal action. Altschul states that since the Plaintiffs failed to choose between the sale and sublease applications, the Board was within its rights to consider neither application.

Stephanie Wong attests that she has been employed as an administrative assistant by Grunberg and Associates since November 1993 and is personally familiar with the facts and circumstances of the underlying action. Ms. Stephanie Wong further attests that at no time did the managing agent Grunberg and Associates receive any application by the Plaintiffs in connection with a proposed sale of the Apartment to Mr. Eric Wong. Ms. Stephanie Wong further argues that the market value of the apartments in the subject building comparable to the Apartment have gone up since 2013. As such, Ms. Stephanie Wong argues that the Plaintiffs are not entitled to any claim or award of damages in connection with the Plaintiffs' alleged attempted sales of the Apartment.

In reply to the Defendants' opposition, the Plaintiffs argue that their instant motion is not untimely. Specifically, the Plaintiffs argue that the preliminary conference order was superceded by many subsequent conference orders and that the parties were engaged in good faith settlement discussions. The Plaintiffs further argue that the Court stated that the Parties' time to move for summary judgment would not be prejudiced due to the Parties' good faith settlement discussions. The Plaintiffs further argue that the Defendants' opposition papers are untimely. Specifically, the Plaintiffs argue that the Parties stipulated to extending the return date of the motion to October 21, 2016 and for the Defendants to file their

opposition papers by September 30, 2016. The Plaintiffs argue that the Defendants did not file their opposition papers until October 14, 2016, and as such the Defendants' opposition to the instant motion is untimely.

The Plaintiffs further argue that they have made out their prima facie case for summary judgment and that the Defendants have failed to establish a triable issue of fact in opposition to Plaintiffs' motion for summary judgment.

The Court will determine the Plaintiffs' instant motion on the basis of the Parties' submitted papers and the substantive legal arguments included therein regardless of the "timeliness" of the papers.

It is within the Court's discretion to consider "late" moving and opposition papers in the absence of prejudice to the Parties (*See Serradilla v. Lords Corp.*, 117 AD3d 648 (1st Dept 2014); *Barnaba-Hohm v St. Joseph's Hosp. Health Ctr.*, 130 AD3d 1482 (4th Dept 2015); *Wilcox v Newark Val. Cent. Sch. Dist.*, 107 A.D.3d 1127 (3d Dept 2013)). The Court recognizes that the Parties in the underlying action did engage in extensive settlement negotiations, which may have delayed motion practice for the sake of of potential settlement. Further, as both Parties were able to submit their papers and/or respond to each other's papers, the Court finds that neither the Plaintiffs nor the Defendants were in anyway prejudiced by untimely papers.

As such, the Court will determine the Plaintiffs' motion for summary judgment based upon the Parties' submitted papers and the substantive legal arguments presented therein.

There are multiple issues of fact sufficient to warrant denying the Plaintiffs' instant motion for summary judgment against Michael Grunberg, Grunberg & Associates, and the Corporation for tortious interference; summary judgment against the Corporation for breach of the Proprietary Lease; and for "damages for lost rental income, lost interest and time value of money" stemming from the Boards failure to consent to the Plaintiffs' sale or sublease of the Apartment.

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination '[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith'" (*Beach Point Partners v Beachcomber, Ltd.*, 41 N.Y.S.3d 92 (2d Dept 2016) quoting *40 W. 67th St. Corp. v Pullman*, 100 N.Y.2d 147 (NY 2003); *Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530 (NY 1990); *Griffin v Sherwood Vil., Co-op "C", Inc.*, 130 AD3d 780 (2nd Dept 2015))

The Plaintiffs argue in sum and substance that the Board rejected Plaintiffs' applications to sell and/or sublease the Apartment in bad faith, and that the Board's "reasons" for denying the Plaintiffs' applications are merely a pretext. However, upon review of the Parties' submitted papers including the Affidavits and evidence submitted by the Defendants, the Court finds that there are material issues of fact sufficient to create an issue of fact as to whether or not the Board had valid reasons to deny the Plaintiffs' applications.

Specifically, the Court finds that the Defendants' submitted papers are sufficient to create an issue of fact as to whether or not the Plaintiffs' followed the proper procedures in filing their applications to sell and/or lease the Apartment. In particular, the Court finds that the Defendants' submitted papers are sufficient to create an issue of fact as to whether or not the Plaintiffs ever filed an application with the Board to sell the Apartment to Mr. Wong. Further, it is unclear from the Plaintiffs' papers that Mr. Wong's choice to terminate the contact of sale as to the Apartment was in any way influenced by any actions taken by the Board or the Corporation.⁵ Similarly, there is an issue of fact as to whether Ms. Garzoni cancelled of the

⁵ To the extent that the Plaintiffs argue that Mr. Wong cancelled the contract of sale due to the UCC-1 lien, said argument hinges upon the Plaintiffs' argument that the Guaranty is void. As stated in the instant decision, the Court has previously denied the Plaintiffs' motion for summary judgment on this point in its May 11, 2015 decision and the Plaintiffs have failed to present a sufficient basis for the Court to entertain a second motion for summary

sales contract on the Apartment based upon the existence of the UCC-1 lien or if she cancelled the sales contract based upon any action taken by the Board.

There is also a material issue of fact as to whether the Board acted in bad faith in rejecting the Plaintiffs' applications to sublease the Apartment to Mr. Romaine and Mr. Cappellan. Specifically, whether the Corporation and/or Board rejected the Plaintiffs' applications for reasons that would fall under the shield of the business judgment rule or if the Corporation and/or Board acted in good faith.

Further, just as there are material issues of fact as to whether or not the Corporation and Board's rejections of the Plaintiffs' sale and sublease applications falls under the shield of the business judgment rule, there are also issues of fact as to the degree of influence that Michael Grunberg and Grunberg & Associates did or did not exercise over the Board's decision in these matters.

Conclusion

To the extent that the Plaintiffs' causes of action against any or all of the Defendants stem from the Corporation and/or the Board's rejection of the Plaintiffs' applications to sell and/or sublease the Apartment, the Court finds that there are material issues of fact sufficient to warrant denying summary judgment.

Further, this Court reiterates its determination, as stated in its May 11, 2015 decision, that there are material issues of fact to warrant denying summary judgment as to the Plaintiffs' causes of actions against any or all of the Defendants stemming from Plaintiffs' argument that the Guaranty is void and the UCC-1 lien is improper.

Finally, as there are material issues of fact on the question of liability as to all of the Plaintiffs' causes of action against any or all of the Defendants in the underlying action, the Court will not reach the question of damages in the instant decision. A determination of Plaintiffs' damages, if any, would be premature pending a determination on the issue of

judgment on this issue.

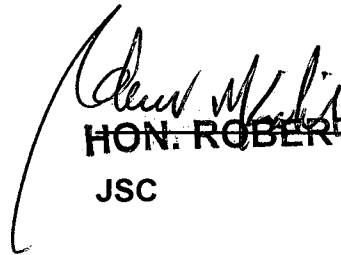
liability. Similarly, the Court will not reach the question of Plaintiffs' requests for costs and attorneys fee in the instant decision.

Accordingly and for the reasons so stated in the instant decision, it is hereby

ORDERED that the Plaintiffs' motion for summary judgement is denied it its entirety

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: January 17, 2017


HON. ROBERT D. KALISH
J.S.C.
JSC