

**Board of Mgrs. of 184 Thompson St. Condominium v  
184 Thompson St. Owner LLC**

2018 NY Slip Op 32169(U)

September 7, 2018

Supreme Court, New York County

Docket Number: 103991/2011

Judge: Eileen Bransten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3

-----X

BOARD OF MANAGERS OF 184 THOMPSON  
STREET CONDOMINIUM,

Index No. 103991/2011

Plaintiff,

Mot. Seq. Nos. 006; 007

- v -

**DECISION AND ORDER**

184 THOMPSON STREET OWNER LLC,

Defendant.

-----X

**HON. EILEEN BRANSTEN:**

Defendant, 184 Thompson Street Owner LLC, moves for partial summary judgment (motion sequence 006) as to whether it properly calculated the reserve fund for the condominium located at 184 Thompson Street, and dismissing the Plaintiff's fourth cause of action, alleging the reserve fund was underfunded, as a result. Plaintiff, Board of Managers of 184 Thompson Street Condominium, moves for summary judgement (motion sequence 007) declaring that Defendant 184 Thompson Street Owner, LLC has failed to adequately fund the reserve fund and declaring that the certain credits taken by the Defendant be disallowed.

I. Background

Defendant, 184 Thompson Street Owner LLC, is the Sponsor behind the conversion of rental apartments to condominium units at 184 Thompson Street in New York City (the "Property"). *See Amen. Comp.* ¶¶1,4; *see also Defendant's Rule 19-a Statement* ¶2-3. Pursuant to Section 26-703 of the New York City Administrative Code, when a rental building is

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 2 of 11

converted to a condominium the Sponsor is to adequately create a minimum reserve for the condominium. *Amen. Comp. at ¶6; see also Defendant's Rule 19-a Statement ¶4.* This reserve was to be funded with three percent (3%) of the total price offered to tenants up to the effective date of the condominium offering plan.<sup>1</sup>

The condominium offering plan was accepted for filing with the New York Secretary of State on August 10, 2006. *See Geller Affirm. Ex. 2.* The Defendant then funded the reserve fund with \$2,495,166 as adjusted by the Eighteenth Amendment to the Offering Plan dated July 11, 2007. *See Comp. ¶27; see also Geller Affirm. Ex. 7.* The Sponsor may decrease the total amount in the reserve fund by taking a set number of credits for capital replacements begun after the plan was submitted for filing. *Comp. at ¶32.* Ultimately, the Plaintiff alleges that the Defendant failed to adequately fund the reserve fund by, *inter alia*, miscalculating the total amount that should have been placed in the reserve, by taking credits for work which does not qualify as a capital replacement, and by failing to perform work yet taking money from the reserve nonetheless. *Id. at ¶¶23-29; 39, 43-50.*

## II. Analysis

### A. Calculation of the Reserve Fund

Section 26-703 of the New York Administrative Code requires that “Within thirty days after the closing of a conversion pursuant to an offering plan the offeror shall establish and transfer to the cooperative corporation or condominium board of managers, a reserve fund to be

---

<sup>1</sup> See Discussion Part II.A. *infra*.

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 3 of 11

used exclusively for making capital repairs, replacements and improvements necessary for the health and safety of the residents of such buildings.” See *NYC Admin. Code §26-703(a)* (*AmLegal 2018*); see also *Amen. Comp. ¶6*. An offeror may fund the reserve using one of two methods; either “three per cent of the total price or, three per cent of the actual sales price of all cooperative shares or condominium units sold by the offeror at the time the plan is declared effective, provided, however, that if such amount is less than one per cent of the total price, then the fund shall be established as a minimum of one per cent of the total price.” See *NYC Admin. Code §26-703(b)*.

Here, the Sponsor elected to fund the reserve by depositing three per cent of the total price into the reserve fund. See *NYC Admin. Code §26-703(b)(i)* (*AmLegal, 2018*); see also *Amen. Comp. ¶7-10*; *Blanco Affirm. ¶5*; *Geller Affirm Ex. 7*. “Under the plain language of the governing statutes, the ‘total price’ referred to in § 26–703(b)(i) is not the price in effect during the exclusive discount period, i.e., the so-called ‘insider’s price,’ but rather the ‘last price offered to tenants in occupancy prior to the effective date of the plan.” See *Board of Managers of 184 Thompson Street Condominium v. 184 Thompson Street Owner, LLC*, 106 A.D.3d 542, 542-43 (1st Dep’t. 2013) citing *Turtle Bay Towers Corp. v. Welco Assocs.*, 228 A.D.2d 189, 189 (1st Dep’t 1996).

The Plaintiff argues the reserve fund was improperly calculated by providing an affidavit from tenant Jamie Kalikow and an offering sheet for tenant Andy Ramgooli. See *Geller Affirm. Exs. 13, 20*. The offering sheet for Andy Ramgooli is undated and is, therefore, inadequate to determine whether the offer was made prior to the effective date of the Offering Plan. Similarly, the affidavit of Jamie Kalikow states that in August 2006 she received an Offering Plan, but then

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 4 of 11

waited several months while a group of tenants attempted to negotiate a lower price; these negotiations ended approximately six months later and, only then, did Jamie Kalikow decide to purchase the apartment. *See Geller Affirm. Ex. 20 ¶¶4-8.*

The law requires the Sponsor to provide three percent of the “last price . . . offered to tenants in occupancy **prior to the effective date of the plan** regardless of number of sales made.” *See Turtle Bay Towers Corp. v. Welco Assocs.*, 228 A.D.2d 189, 189 (1<sup>st</sup> Dep’t, 1996) (emphasis added). The offering plan was declared effective by the Eighth Amendment to the offering plan dated February 21, 2007. *See Geller Affirm. Ex. 6.* Here, while at least two tenants waited to purchase units until they no longer qualified for the “insider’s price,” there remain questions as to whether the tenants were offered to purchase their units at the higher price prior to the effective date of the offering plan. Thus, summary judgment on this issue is DENIED.

#### B. Work Failing to Qualify as a Capital Replacement

Section 26-702(c) of the New York City Administrative Code defines Capital

Replacements as:

[A] building-wide replacement of a major component of any of the following systems:

- (1) elevator;
- (2) heating, ventilation and air conditioning;
- (3) plumbing;
- (4) wiring;
- (5) window;

or, a major structural replacement to the building; provided, however, that replacements made to cure code violations of record shall not be included. (AmLegal, 2018).

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 5 of 11

Both parties agree that that there does not appear to be any case law which interprets how Capital Replacements are to be defined. Thus, this court is merely left to consider the text of the statute when determining whether the Sponsor's claimed capital replacements are eligible to receive credit. As the Court of Appeals has made clear, "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 56 (2011). The Court, therefore, first determines whether each service for which a credit is claimed falls within the plain meaning of the statute.

i. Regarding the Elevator System

The Plaintiff argues that modifications to the elevator system do not apply as capital replacements because the modifications were made to cure existing violations. *See Geller Affirm. Ex. 3* (noting that outstanding violations to the elevator system consisted of a failure to have proper signs posted on each floor, failure to have keys for the inspection of a side exit, a need to replace defective door rollers, a worn car saddle, an issue pertaining to a hoistway door roller, and failure to have a fire extinguisher). This comports with the statutory provision that "replacements made to cure code violations of record shall not be included". *See NYC Admin. Code §26-702(c)* (*AmLegal*, 2018). The Defendant argues that the renovations to the elevator were a complete modernization of the system and, as a result, do not constitute a replacement made merely to cure a code violation of record. *See Blanco Affid. Ex. I*.

The provided evidence, however, fails to conclusively weigh in favor of either party and presents a triable issue of fact. Specifically, the contract for modernization of the two elevator

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 6 of 11

units fails to itemize what services were performed such that the court can conclude the work went beyond efforts to cure the existing violations. *See id.*

Summary judgment on the issue of the elevator is DENIED.

ii. Regarding the HVAC System

The Plaintiff argues that work conducted on an HVAC Unit should be reduced as the total cost of the work performed exceeded the estimate contemplated in the Offering Plan. The Defendant argues that the work itself was contemplated in the offering plan and, regardless of the actual price, entitles the Defendant to a Credit. The New York City Administrative Code provides that

[A]n offeror may claim and receive credit against the mandatory initial contribution to the reserve fund for the **actual cost** of capital replacements which he or she has begun after the plan is submitted for filing to the state department of law and before the plan is declared effective; provided, however, that any such replacements must be set forth in the plan together with their **actual or estimated** costs and further provided, that such credit shall not exceed the lesser of the actual cost of the capital replacements or one per cent of the total price." *See NYC Admin. Code §26-703(c) (AmLegal, 2018) (emphasis added).*

Neither the Plaintiff nor the Defendant dispute the work was performed. Under the plain meaning of the statute, the Defendant is eligible to recover the **actual cost of the replacement**. *See id (emphasis added); see also Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 56 (2011).

Plaintiff also argues that, because the Defendant is unable to show the HVAC work was actually paid for, it is ineligible to receive the credit. *See Geller Affirm.* ¶¶28-33. This is a misreading of the statute. The statute permits recovery for the **actual costs** of replacements. *See NYC Admin. Code §26-703(c) (AmLegal, 2018) (emphasis added).* The actual cost of replacements to the HVAC system are conceded by the Plaintiff and are documented through

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 7 of 11

invoices between third-parties and the Defendant which evidence the cost associated with the third-parties performance of the work. *See Geller Affirm. Exs. 24-25; see also Plaintiff's Memorandum in Support at 22.*

This Court, therefore, denies Plaintiff's motion as it pertains to the HVAC units and awards summary judgment on this issue to the Defendant. *See e.g. Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 111 (1984) (noting the court has the power to search the record and award summary judgment to a nonmoving party); *see also CPLR 3212(b)* (permitting the court to award summary judgment against any party).

### iii. The Addition of Roofing Membrane and Terrace Work

The Plaintiff argues the addition of a single layer of roofing membrane does not qualify for a capital replacement credit given that the roof was (1) already watertight and (2) was merely tested by Roslyn Engineering not replaced. As discussed in the Offering Plan, "the building was re-roofed on or about 1999 . . . The roof is in fair condition and can be expected to last another 2 -- 4 years. There are no active roof leaks." *See Geller Affirm. Ex. 2.*

The Defendant argues it expended significant capital to test the roof and to place a new layer of roofing membrane over it. There was no need to replace the existing roof, merely repair the test cuts made when conducting inspections. *See id.* Absent more, and applying the plain language of the statute, this fails to qualify for a capital replacement credit given that the roof was never replaced.

The Plaintiffs also argue that the Defendant improperly included terrace work as a major structural replacement to the building. The terrace work undertaken by the Sponsor consists

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 8 of 11

primarily of removal of spalled cement, securing any loose materials, and patching and recoating the terraces. (Geller Aff., Ex. 2 at D-55 – D-57). The Defendant fails to address this issue of terraces in its brief, thus, the court is persuaded that the work performed on the terraces fails to qualify as a capital replacement under the statute.

Summary judgment on the issues of roofing and terraces is GRANTED.

#### iv. Windows and Doorways

Plaintiff argues the Sponsor is unable to take credits for the replacement of 156 doors and 30 windows. *See Geller Affirm. Ex. 22*. The Plaintiff interprets the pure text of the statute to come to the logical conclusion that windows, not doors, are eligible for reimbursements given that windows are expressly enumerated in the statute. *NYC Admin. Code §26-702(c) (AmLegal, 2018)*. Doors are not enumerated in the statute. *See id.*

The Defendant argues, however, that the sliding glass doors should be treated as windows given that the statute describes the broader concept of a window “system” and that sliding glass doors provide the same access to light and air as a window and, for many in the apartment complex, are the only access point to light and air. Indeed, it is noteworthy that the Defendant replaced over five times as many doors as they replaced windows in the buildings.

A window, as defined by the dictionary in this context, is “an opening especially in the wall of a building for admission of light and air that is usually closed by casements or sashes containing transparent material (such as glass) and capable of being opened and shut.” *See Merriam-Webster Dictionary*. Conversely, a doorway, as defined by the dictionary in this context, is “a usually swinging or sliding barrier by which an entry is closed and opened.” *See*

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 9 of 11

*Merriam Webster Dictionary*. With two different purposes, and two different definitions, a door does not qualify as a window.

Under the plain meaning of the statute, the door, therefore, would not qualify for a capital replacement of a window system. *Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 56 (2011). The court, however, also notes that the statute also permits credits for major structural replacements to the building. See *NYC Admin. Code §26-702(c)* (*AmLegal*, 2018) (emphasis added). Here, the Court finds very helpful, canons of statutory interpretation not discussed by either party, *ejusdem generis* and *noscitur a sociis*. The *Ejusdem generis* rule, is a rule under which “a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series.” See *Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 372 (2007) (McGuire, J. concurring in part and dissenting in part); citing *Matter of Riefberg’s Estate*, 58 N.Y.2d 134, 141 (1<sup>st</sup> Dep’t 1983). *Noscitur a sociis* is “a rule of construction whereby the meaning of a word in a provision may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it.” *Popkin v. Sec. Mut. Ins. Co. of New York*, 48 A.D.2d 46, 48 (1<sup>st</sup> Dep’t 1975).

Thus, the court looks to the full enumerated list of replacements under the statute to determine whether the legislature intended the replacement of 156 sliding glass doors to be considered as constituting a major structural replacement such that the Defendant would be entitled to take a credit under the statute. New York City’s Administrative Code permits credits to be taken for building wide replacements to the following enumerated systems: (1) elevators; (2) heating, ventilation and air conditioning; (3) plumbing; (4) wiring; and (5) windows; as well

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 10 of 11

as “major structural replacement” to the building. *See NYC Admin. Code §26-703(c) (AmLegal, 2018)*.

Here, under the canons of *ejusdem generis* and *noscitur a sociis*, the Court determines whether the inclusion of replacing 156 terrace doors constitutes a major structural replacement of the building as it is contemplated by the statute. *Popkin v. Sec. Mut. Ins. Co. of New York*, 48 A.D.2d at 48 (noting that the dictionary definition of the term “flood” did not accurately encapsulate an event and the use of general language in the contract assisted in determining the event was covered under the flood provision of an insurance policy). The statute clearly lists major components to any building, such as HVAC, electrical, and plumbing. *See NYC Admin. Code §26-702(c) (AmLegal, 2018)*. There is a presumed expectation that there will, generally, be more windows than doorways which need replacement. In addition, the court takes notice of the Defendant’s argument that the windows and terrace doorways serve the similar purpose of providing access to light and fresh air which, while expressly not mentioned in the statute, are enjoyed by the tenants. *See e.g. Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 85–86 (1970) (noting that a “substantial interference” with easements of light and air insofar as they diminish the tenant’s beneficial enjoyment of the premises would constitute grounds for a constructive eviction).

Here there are more doorways in the building than windows. The legislature, in drafting the statute, determined that there could be other major replacement costs associated with the transformation of rental units to a coop or condominium and thus provided for credits to be granted to the sponsor for “major structural replacements”. Here, the court finds that the

BOARD OF MANAGERS OF 184 vs. 184 THOMPSON STREET OWNER  
103991/2011

Page 11 of 11

replacement of 156 sliding glass doors falls within the type of replacement contemplated by the statute. *See e.g. Popkin, 48 A.D.2d at 48.*

A grant of summary judgment in favor of the Defendant on the issue of the windows and doorways is therefore warranted. *See e.g. Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 111 (1984)* (noting the court has the power to search the record and award summary judgment to a nonmoving party); *see also CPLR 3212(b)* (permitting the court to award summary judgment against any party).

### III. Decision and Order

Upon the foregoing it is hereby

ORDERED the Defendant's motion for partial summary judgment is DENIED (motion sequence 006); and it is further

ORDERED the Plaintiff's motion for summary judgment is GRANTED IN PART and DENIED IN PART (motion sequence 007).

Summary Judgment is granted to the Plaintiff on the issue of the roof replacement.

Summary Judgment is granted Defendant on the issue of windows and doorways and the issue concerning the HVAC unit.

Triable issues of fact remain regarding the elevator and whether the reserve fund was adequately funded.

  
\_\_\_\_\_  
Hon. Eileen Bransten