

**Board of Mgrs. of the 80th at Madison Condominium
v 1055 Madison Ave. Owners LLC**

2021 NY Slip Op 30494(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 160134/2019

Judge: Richard G. Latin

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
NEW YORK COUNTY

PRESENT: HON. RICHARD G. LATIN PART IAS MOTION 46

Justice

-----X

INDEX NO. 160134/2019

THE BOARD OF MANAGERS OF THE 80TH AT MADISON
CONDOMINIUM

MOTION DATE 02/11/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

1055 MADISON AVENUE OWNERS LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

Upon the foregoing documents, it is ordered that plaintiff's motion for partial summary judgment on its third and fourth causes of action is determined as follows:

Plaintiff commenced this action alleging, inter alia, that 1055 Madison Avenue Owners LLC ("the commercial unit owner") violated the subject condominium's Declaration and By-Laws when it affixed signage to the granite exterior facade of the condominium located at 45 East 80th Street, New York, New York without the approval of the condominium board. With this motion the plaintiff essentially seeks to compel defendant to remove the signage.

In support of their motion, plaintiff submits, inter alia, the Declaration and By-Laws, as well as the affidavit and e-mails of Gerald A. Novack, member for the board of managers.

It is undisputed that the parties are bound by the Declaration and By-Laws. Article 9 section (d) of the Declaration states that:

The Commercial Unit Owner may erect, maintain, repair and replace one or more signs, of such size, content and character as the Commercial Unit Owner may determine (in its sole discretion), for the purposes of (i) advertising the operation of any business

conducted in the Commercial Unit or (ii) the sale or rental of the Commercial Unit or any portion thereof, on the inside of the windows and doors of the Commercial Unit. The Commercial Unit Owner shall not be required to obtain the consent of the Condominium Board, the Manage Agent or any other Unit Owners, or any pay and fee or charge of the Condominium Board or its agent, for such sign(s).

Further, Section 5.7 of the By-Laws state in pertinent part:

Use of the Units. (A) In order to provide for congenial occupancy of the Property and for the protection of the values of the Units, the use of Units shall be restricted to, and shall be in accordance with, the terms contained in the balance of this Section 5.7 . . .

(E) . . . The Commercial Unit Owner shall have the right to erect, maintain and replace one or more signs, for the purposes of (a) advertising the operation of any business conducted in the Commercial Unit or any portion thereof, or (b) the sale or lease of the Commercial Unit or any portion thereof, on the inside of the windows and doors of the Commercial Unit. Such signs may be of such size, content and character as the Commercial Unit Owner may determine (in its sole discretion). The Commercial Unit Owner shall not be required to obtain the consent of, or pay any fee to, the Condominium Board, its Managing Agent or any other Unit Owner for such sign(s).

As a result of the foregoing provisions, the plaintiff argues that when 5.7(A) and (E) are read together, there is a clear restriction on erecting or installing signage to the condominium's exterior, absent the consent of the condominium board.

Novack averred that during 2019, the plaintiff and defendant were in negotiations concerning plans for the defendant to do certain alternation work. He alleged that he was directly involved in these negotiations and that the issue of signage was only one of many issues being discussed as part of a global alteration agreement. He claimed that throughout the negotiations he repeatedly told the defendant's representative that unless the parties reach a written, signed global "alteration agreement" addressing all of the issues, that there was no agreement as to any of the issues. Moreover, Novack clarified that he had no authority to agree to any provisions, including

signage, and that any decisions had to be agreed to by the condominium board by vote. He concluded that the parties were ultimately unable to come to an overall agreement.

In opposition, defendant argues, *inter alia*, that based on the Declaration they are entitled to erect exterior signage without the approval of the condominium board, and that even if they are not, summary judgment is still premature. As to the first portion of their argument, defendant cites to Article 12 section (b) of the Declaration, which states in pertinent part:

The Commercial Unit Owner (including Sponsor) shall have the right, to the extent not prohibited by Law, without obtaining the consent or approval by the Condominium Board . . .

(A) to make alterations, additions and/or improvements (whether structural or nonstructural, interior or exterior, ordinary or extraordinary) in and to such Commercial Unit . . .

This argument, however, is unavailing inasmuch as an alteration made to the exterior façade of the building does not constitute an alteration made in or to the Commercial Unit. The Commercial Unit is specifically defined by Article 6(c) of the Declaration and states:

The boundaries of the Commercial Unit consist of the area measured (i) horizontally from the unit side of the glass or concealed block work or concealed concrete structural member of the exterior walls to the centerline of demising partitions and (ii) vertically from the top of the concrete floor to the underside of the concrete ceiling on each floor.

Thus, any alterations to the outside, rather than inside, of the exterior wall would constitute an alteration outside the permissions contemplated in 12(b) of the Declaration. Defendant's contrary interpretation to this general provision, when read in comparison or in conjunction to the specific signage provision of the By-Laws in Section 5.7(E), would render Section 5.7(A) of the By-Laws as ineffectual or false.

Nevertheless, defendant's argument that summary judgment is premature because there are triable issues of fact and the parties have not engaged in discovery is not without merit.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). As a result, no party should do anything to limit the other party from receiving "the fruits of the contract" (*id.*).


Here, defendant proffered some evidence that a previous commercial unit owner, "Ralph Lauren," used to have exterior signage on the subject façade. Additionally, the e-mails sent by Gerald Novack demonstrate that while the board of managers did not officially approve of the proposed signage, the board never expressed any concerns with respect to it. To the contrary, the e-mails tend to indicate that the board was okay with proposed signage as a concept, Novack approved of the signage, Erwin approved of the signage, and that the approval of the balance of the condominium board would be a mere formality. Moreover, although it is clear that Novack maintained that there was no agreement as to any signage without a global agreement as to all of the defendant's proposed alterations, it is unclear why that is the case. The mere existence of plaintiff's motion for partial summary judgment demonstrates that the issue of signage on the exterior façade can be resolved and is not inextricably intertwined with any of the other disputed alterations. As a result, questions of fact remain at this juncture as to whether the plaintiff acted arbitrarily or unreasonably in refusing to approve of the exterior façade signage (*see Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442 [1st Dept 2009]).

Accordingly, plaintiff's motion for partial summary judgment and an injunction is denied without prejudice with leave to refile at the completion of discovery.

Defendant 1055 Madison Avenue Owners LLC shall serve a copy of this order, together with notice of entry, on plaintiff within 30 days of the upload of this order onto NYSCEF.

Moreover, these parties are strongly encouraged to avail themselves of court sponsored mediation. Further information on offerings can be found at ww2.nycourts.gov/ip/adr/NYCSupreme.shtml [last accessed February 22, 2021].

This constitutes the decision and order of the Court.

<u>2/22/2021</u> DATE			 RICHARD G. LATIN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE