| **Etkin v Sherwood Residential Mgt. LLC** |
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| 2024 NY Slip Op 33801(U) |
| October 8, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 655734/2021 |
| Judge: Nancy M. Bannon |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. NANCY M. BANNON** **PART** **61M**

***Justice***

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WILLIAM ETKIN,

Plaintiff,

- v -

SHERWOOD RESIDENTIAL MANAGEMENT LLC,THE BOARD OF MANAGERS OF THE 500 WEST 21ST STREET CONDOMINIUM, THE 500 WEST 21ST STREET CONDOMINIUM

Defendants.

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**INDEX NO.** 655734/2021

**MOTION DATE** 06/26/2024

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 258, 259, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307

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

## I. INTRODUCTION

In this nuisance and breach of contract action, the defendants, Sherwood Residential Management LLC (the "Managing Agent") and The Board of Managers of the 500 West 21st Street Condominium (the "Board"), move pursuant to CPLR 3212 for summary judgment, dismissing the three remaining cause of action of the complaint. The plaintiff, William Etkin, opposes the motion. The motion is granted.

## II. BACKGROUND

The Board and Managing Agent oversee and manage a residential condominium building located at 500 West 21st Street, New York, NY 10011 (the "Condominium"). Etkin owns Unit 7A on the seventh floor of the condominium. Beginning in late 2015, Etkin noticed a significant smoke condition Unit 7A and on the seventh floor, which was emanating from the fireplace in the penthouse unit above Unit 7A ("Unit PHA"). Etkin claims that this smoke caused him physical discomfort, and that he reported this issue to the defendants numerous times. Furthermore, beginning in March 2021, Etkin noticed that concrete mortar and water had been

raining down from the Unit PHA balcony above Unit 7A, causing damage to Etkin's balcony at Unit 7A, specifically to the balcony's glass and metal railing.

Etkin commenced this action on September 30, 2021, alleging six causes of action against the Board and Managing Agent. By order dated May 25, 2022, the court (Ostrager, J. [Ret.]), dismissed Etkin's third, fourth, and sixth causes of action (MOT SEQ 001). Thus, the remaining causes of action are as follows: first: derivatively against the Managing Agent for breach of the Management Agreement; third: derivatively against the Board for breach of the Condominium Bylaws; and fifth: individually against the Board for private nuisance.[1] Etkin seeks $500,000.00 in damages for his first and third causes of action, and $1,500,000.00 for his fifth cause action. Discovery was completed, Etkin filed a Note of Issue on December 22, 2023, and the defendants filed the instant motion on February 20, 2024.

## III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of their motion, the defendants submit, *inter alia*, the subject Condominium Bylaws, Declaration (which incorporates the Condominium Bylaws), and Offering Plan (under which the Management Agreement is included as an exhibit). The defendants also submit an affidavit of Ilya Shtulberg, a Senior Associate in Structural Engineering with Howard L. Zimmerman Architects & Engineers D.P.C, who inspected the balconies at Unit 7A and Unit PHA, as well as the other balconies on the "A" line on March 15, 2022, and August 28, 2023. Shtulberg's reports and photographs from these inspections are also submitted. The defendants also submit an affidavit of Steve Novick, president of the Board of the Condominium, as well as contracts and invoices with outside contractors hired to address the smoke conditions in the

[1] The court's May 25, 2022, order also dismissed Etkin's fifth cause of action as against the Managing Agent.

Condominium. In opposition, Etkin submits, *inter alia*, reports and photographs from Elson Wang, a structural engineer hired by Etkin who inspected the Unit 7A balcony on four occasions, the transcript from Wang's deposition testimony, and various communications from Etkin to the Board regarding the smoke conditions in the Condominium.

(A) Breach of Contract: First and Third Causes of Action

To successfully prosecute a cause of action for breach of contract, the party making the claim is required to establish (1) the existence of a contract, (2) the party's performance under the contract; (3) the opposing party's breach of the contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). There can be no dispute that the Condominium Bylaws, Declaration and Offering Plan, as governing documents, are contracts. See Parc 56, LLC v Board of Managers of Parc Vendome Condo., 217 AD3d 416 (1st Dept. 2023). Furthermore, "[t]he violation of bylaws is akin to a breach of contract." Pomerance v McGrath, 124 AD3d 481, 482 (1st Dept. 2015); see Mason v Central Suffolk Hosp., 3 NY3d 343 (2004); Rosenthal v Board of Managers of Charleston Condo., 216 AD3d 442 (1st Dept. 2023). "A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract." Goldman v White Plains Ctr. for Nursing Care, LLC, 11 NY3d 173, 176 (2008). A contract should not be read to render any portion of it meaningless (Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 39 [2018]),

i. First Cause of Action: Breach of the Management Agreement Against the Managing Agent

In his first cause of action, Etkin alleges that the Managing Agent breached the Management Agreement by failing to monitor the Unit PHA balcony and the Condominium's flue and ventilation systems. However, Etkin's complaint states that the Managing Agreement is a contract between the defendants, and does not plead that Etkin is a party or beneficiary in any way to the Management Agreement. Furthermore, Etkin's motion papers in opposition make no mention of the Management Agreement, and instead refers to the Offering Plan, under which the Management Agreement is included as an exhibit. However, the parties under the Offering Plan are the sponsor, Sherwood 21 Associates LLC, and the selling agent, Corcoran Sunshine Marketing Group. Etkin's motion papers fail to establish how Etkin is a party to the Offering Plan or is a third-party beneficiary in anyway. See State of California Pub. Employees' Retirement

Sys. v Shearman & Sterling, 95 NY2d 427, 434-35 (2000), Edge Mgt. Consulting, Inc. v Blank, 25 AD3d 364, 368 (1st Dept. 2006). Therefore, Etkin's first cause of action against the Managing Agent must be dismissed for lack of standing.

ii. Third Cause of Action: Breach of the Condominium Agreement Against the Board

Etkin alleges that the Board breached the Condominium Bylaws by failing to make necessary repairs to the Unit 7A and Unit PHA balconies, and to repair the Condominium's flue and ventilation systems.

1. The balcony

In the Declaration, which incorporates the Condominium Bylaws, a balcony is considered a "Terrace", which in turn is a "Residential Limited Common Element". Section 5.1(A)(iv)(a) of the Condominium Bylaws states that repairs to Residential Limited Common Elements must be made by the Board if it involves "structural or extraordinary maintenance…including any leaks", while Section 5.1(A)(iv)(b) states that the unit owner is responsible for making repairs to Residential Limited Common Elements involving "non-structural ordinary maintenance…including without limitation, the removal of snow, ice, and accumulation of any water on any Terrace."

The affidavit of Ilya Shtulberg, a professional engineer who inspected the balconies at Unit 7A and PHA, as well as the other balconies on the "A" line on March 15, 2022, and August 28, 2023, establishes that were no structural issues to the Unit 7A balcony or PHA balcony, that there was no "water leak", and that there was no need for structural repairs. Shtulberg also avers that Etkin's complaints relate to rainwater that had dripped down from heavy rainstorms from the Unit PHA balcony onto the Unit 7A balcony, and that the rainwater caused white residue and staining on the glass and railings of the Unit 7A balcony. However, this residue can be easy cleaned by Etkin. The defendants also submit Shtulberg's written reports and photographs from her inspections. Etkin, in opposition, provides no admissible proof to rebut Shtulberg's findings. Etkin relies on Elson Wang, a structural engineer who inspected the Unit 7A balcony four times. However, Etkin fails to provide a sworn affidavit or affirmation from Wang to establish Wang's credentials and support his reports. Without an accompanying affidavit, the reports constitute competent evidence. See Ladd v Thor 680 Madison Ave. LLC, 212 AD3d 107 (1st Dept. 2022), 70 Pinehurst Ave. LLC v RPN Mgt. Co., Inc. 123 AD3d 621 (1st Dept. 2014). Furthermore, Wang's own deposition testimony establishes that he did not have concerns over

the structural integrity of the PHA and 7A balconies, and that while he saw some cracks and dusting, this is normal for balconies. Thus, the defendants' submissions establish that the alleged conditions in the Unit 7A balcony were not structural or related to water leaks, and thus, the Board was not responsible under Section 5.1(A)(iv)(a) of the Condominium Bylaws to make the necessary repairs. Instead, Etkin is responsible for these repairs under Section 5.1(A)(iv)(b), as they involve non-structural, ordinary repairs to the balcony.

2. The Smoke Condition.

Etkin alleges that smoke from the fireplace in Unit PHA spreads to the seventh floor and into Unit 7A, and that the Board's failure to rectify this problem is a breach of the Condominium Bylaws. However, Section 5.1(A)(i) of the Condominium Bylaws state that any maintenance, "whether structural or non-structural, ordinary or extraordinary" inside a Unit, including HVAC filters, fireplace, firebox, and flue, are to be made by the unit owner. Thus, any issue with a fireplace, whether in Unit 7A or other "A" line unit in the condominium is the responsibility of the unit owner, not the Board. In opposition, Etkin points to Section 5.1(A)(ii) of the Condominium Bylaws, arguing that the Board is responsible for repairs of "General Common Elements", and that the Condominium Bylaws defines General Common Elements to include HVAC systems. However, a cursory look through the governing documents shows that Section 7.2 of the Declaration, which defines General Common Elements, does not include HVAC systems, fireplace, or flues. Meanwhile, Section 6.3 of the Declaration states that the unit owner is responsible for all mechanical systems in their unit, including HVAC systems, flue, fireplace, and firebox. Thus, the Board is not in breach of the Condominium Bylaws for failure to rectify any smoke related conditions caused by the fireplace in Unit PHA.

(B) Fifth Cause of Action: Private Nuisance Against the Board

[T]he elements of the common law cause of action for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with the plaintiff's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.'" 61 West 62 Owners Corp. v CGM EMP LLC, 77 AD3d 330, 334 (1st Dept. 2010), quoting Copart Indus. v Cons. Edison Co. of N.Y., 41 NY2d 564, 570 (1977); see Broxmeyer v United Capital Corp., 79 AD3d 780 (2nd Dept. 2010). Furthermore, "nuisance imports a continuous invasion of rights[.]" See Nussbaum v Lacopo, 27 NY2d 311, 312 (1970). That is, "[n]uisance is characterized by a pattern of continuity or recurrence of objectionable conduct." Berenger v 261 West LLC, 93 AD3d 175, 182 (1st Dept. 2012).

i. The Balcony.

Etkin, in bringing a private nuisance claim against the Board as an individual unit owner, lacks standing to bring this claim for injuries related to the balcony, as the balcony is a common area. The Declaration defines a balcony as a "terrace", and a terrace, in turn, is considered a "Residential Limited Common Element". Furthermore, the declaration considers a Residential Limited Common Element" as part of a broader category of "Common Elements". Thus, the balcony is considered a Common Element under the Declaration. A plaintiff unit owner filing suit in their individual capacity for injury related to a common area lacks standing to bring such a suit. See Davis v Prestige Mgt. Inc., 98 AD3d 909 (1st Dept. 2012), Leonard v Gateway II, LLC 68 AD3d 408 (1st Dept. 2009). Indeed, Etkin's own memorandum of law in opposition concedes in a footnote that "pursuant to the Offering Plan, balconies appurtenant to individual units are owned by the [Condominium], not by the owner of the unit".

ii. The Smoke Condition.

The defendants' submissions, namely the affidavit of Steve Novick, establishes that, while it was the unit owner's responsibility to repair and maintain the fireplace and flue, the Board continually took steps to address the smoke issue alleged by Etkin from 2016 to 2022, and thus, makes a *prima facie* case to dismiss a private nuisance claim. Novick avers that the Board contracted with various outside vendors to address the smoke condition and odor issues. Such services, include, *inter alia*, replacing air filters, performing camera inspections of every flue in the "A" line to determine that there were no open penetrations, and conducting various smoke tests in the building. The defendants also submit the contracts and invoices between the Board and the outside vendors, detailing the services provided and the costs incurred by the Board for these services. These submissions establish that the defendants have not caused the smoke condition by their actions or failure to act.

Etkin, in opposition, fails to raise a triable issue of fact as to whether the smoke condition was caused by the defendants' actions or failure to act. Etkin points to emails he sent to Board members where he complained about the smoke conditions, to which the Board members rebuffed his complaints. However, these communications do not refute the plethora of evidence submitted by the defendants establishing that the defendants took many efforts to address Etkin's concerns for six years. Indeed, Etkin even submits a December 18, 2023 email from the defendants to the Condominium tenants in the "A" line asking them to not use their fireplace

until additional tests are completed, showing that the defendants have continued to address this issue. Thus, there is no act or failure to act on the part of the defendants that can give rise to a cause of action of private nuisance.

Furthermore, while it has long been held that "noxious vapors" may constitute an interference with a right to use and enjoy land, *i.e*. a nuisance (see Rosenheimer v Standard Gaslight Co., 36 A.D. 1, 4 [1st Dept. 1898], it is also well settled that "not every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other ... If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life". Nussbaum v Lacopo, 27 NY2d 311, 315 (1970) quoting Campbell v Seaman, 63 NY 568, 577 [1876]).

## IV. CONCLUSION

Accordingly, upon the foregoing papers, and after oral argument, it is

ORDERED that the motion of the defendants Sherwood Residential Management LLC and The Board of Managers of the 500 West 21st Street Condominium for summary judgment dismissing the remaining causes of action of the complaint is granted, and the complaint is dismissed in its entirety; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/8/2024
DATE

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