

Kirton v Historic Pastures Condominium Assn.
2024 NY Slip Op 35410(U)
May 9, 2024
Supreme Court, Albany County
Docket Number: Index No. 910544-21
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KERWYN KIRTON,

Plaintiff,

-against-

HISTORIC PASTURES CONDOMINIUM
ASSOCIATION,

Defendant.

DECISION, ORDER
AND JUDGMENT

(MOTION No. 1)

Index No. 910544-21

May 9, 2024

HISTORIC PASTURES CONDOMINIUM
ASSOCIATION,

Third-Party Plaintiff,

-against-

KERWYN KIRTON,

Third-Party
Defendant.

HON. DENISE A. HARTMAN, AJSC

Appearances:

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Hartman, J.

Pending before the Court in these consolidated actions is the motion of defendant/third-party plaintiff Historic Pastures Condominium Association (COA) for summary judgment on its causes of action for breach of contract, trespass, nuisance, and negligence against plaintiff/third-party defendant Kerwin Kirton (Kirton). The COA also moves for summary judgment dismissing Kirton's claims and counterclaims against the COA for declaratory judgment and damages.¹ Kirton opposes the motion.

The Court denies the motion, in part, insofar as it seeks dismissal of Kirton's declaratory judgment claim and, because no questions of fact exist, declares that Kirton has the legal right to use the exterior deck which connects to his condominium unit; and grants that portion of the motion, in part, and declares that the COA had a legal right to demand that Kirton's wooden structure be removed or to remove the structure itself at Kirton's expense. But it grants the COA's motion for summary judgment dismissing Kirton's claim for damages. The Court also grants the COA's motion for summary judgment to the extent that it holds Kirton liable as a matter of law for breach of contract,

¹ Kirton initially asserted identical claims against a second defendant Historic Pastures Homeowners Association (see NYSCEF Doc No. 1). The parties have since agreed that the COA is the proper defendant for his claims and that Historic Pastures Homeowners Association is not a proper party. By stipulation dated May 30, 2023, the parties discontinued the action against Historic Pastures Homeowners Association and amended the caption accordingly (see NYSCEF Doc No. 34).

but it finds questions of fact as to causation and damages for such breach. And the Court denies summary judgment on the COA's trespass, nuisance, and negligence claims and, upon searching the record, grants summary judgment in favor of Kirton dismissing those claims as duplicative of the COA's breach of contract claims.

Background

Kirton is the owner of condominium Unit No. 9 at 36 Westerlo Street, located in the Pastures Historic District, a neighborhood in the City of Albany, New York.² The COA is the condominium association that oversees the Pastures Historic District. Unit No. 9 is a second-floor, two-bedroom condominium unit. The focus of this litigation is Kirton's use and modifications of the open-air exterior space which abuts and is connected to Unit No. 9 by its rear door. The exterior space is situated on the rooftop portion of the condominium unit below.

Kirton completed his purchase of Unit No. 9 on June 25, 2020, and received a Unit Deed, which he recorded in the Albany County Clerk's Office on July 2, 2020 (see NYSCEF Doc No. 49). On July 8, 2020, in response to Kirton's request, Kate Willyard, the managing agent for Historic Pastures,

² Unit No. 9 has also been referred to as apartment 2 at 36 Westerlo Street. Because the Unit Deed and Declaration of Condominium refer to the unit as Unit No. 9, the Court will use that designation throughout this decision and order.

emailed Kirton the COA's Bylaws. Shortly after purchasing Unit No. 9, Kirton began performing work on the exterior space, including replacing a wrought iron railing that was connected to the perimeter of the exterior space with a wooden structure³ and adding a railing to a set of stairs leading from Unit 9's rear door to the platform of the exterior space. Kirton also placed rubber mats and patio furniture on the exterior space, which he used as a deck/patio area.

Upon discovering Kirton's work to the exterior space in late September 2020, the COA's property manager, as well as the COA's then-attorney, sent several communications to Kirton insisting that he cease his work. The COA's position was, and is now, that Kirton had no right to alter the exterior space without prior authorization from the COA, which Kirton had not obtained. The COA maintains that the exterior space is the roof of the unit below and, therefore, a common element. The COA also maintains that the exterior space is meant for emergency egress only and not for use as a deck or patio. Kirton refused to cease work on the exterior space, ultimately obtaining both a building permit and certificate of completion from the City of Albany. The COA later removed the wooden structure Kirton had installed on the exterior space. And the COA hired a contractor to perform structural repairs to the building.

³ The parties provide conflicting descriptions of the wooden structure. The COA characterizes it as a treated lumber privacy fence; Kirton characterizes it as a railing.

In December 2021, Kirton commenced the present lawsuit against the COA (*see* NYSCEF Doc No. 1). Citing the Condominium Offering Plan (Offering Plan) and the Global MLS listing that was posted when he purchased Unit No. 9, Kirton asserted a cause of action seeking a declaratory judgment that the exterior space is his property, namely his personal deck/patio that he has the right to use and that the COA had no right to remove the wooden structure he erected (*see id.* at ¶¶ 16-17). Kirton also asserted a cause of action for money damages for the COA's removal of the wooden structure he installed on the perimeter of the exterior space (*id.* at ¶¶ 22-25). The COA answered, denied the allegations in Kirton's complaint, and asserted numerous affirmative defenses (*see* NYSCEF Doc No. 5). The parties proceeded through discovery.

In February 2023, the COA commenced a lawsuit against Kirton under a separate index number (*see* NYSCEF Doc No. 43). The COA asserted four causes of action against Kirton arising from the work he performed on the exterior space sounding in breach of contract, trespass, nuisance, and negligence (*see id.* at ¶¶ 56-88). In substance, the COA alleged that Kirton breached the terms of the Declaration of Condominium (Declaration) and the COA's Bylaws and Rules and Regulations (collectively, the Bylaws) by performing work on the exterior space without obtaining prior written consent of the COA's Board. The COA argued that the exterior space abutting Kirton's

unit constituted the roof of the unit below, and that he failed to obtain “prior written authorization to use or construct steps and the treated lumber” structure he installed (*id.* at ¶ 8). Rather than open to Kirton’s own deck or patio space, the COA contended, the “door may have opened up onto a previously existing small, Juliet balcony, actually attached to the Premises when the condominium was established in 1984” (*id.* at ¶ 9). The COA also argued that Kirton’s installation of the wooden structure caused structural damage to both the main building and the unit below due to the added weight of the wood, furniture, and rubber mats, and because the structure caused snow retention. Kirton answered, denied the allegations in the COA’s complaint, asserted numerous affirmative defenses, and asserted as counterclaims against the COA the same two causes of action as contained in his complaint (*see* NYSCEF Doc No. 30).

On March 20, 2023, the Court so-ordered the parties’ stipulation to consolidate both actions under a single index number, close the index number assigned to the COA’s action, and amend the caption to reflect the parties’ status with respect to each action (*see* NYSCEF Doc No. 28). The COA now moves for summary judgment on its complaint and to dismiss Kirton’s claims with prejudice (*see* NYSCEF Doc No. 36, 37, 38, 48). Kirton opposes the motion (*see* NYSCEF Doc Nos. 72, 85, 92). The COA filed a reply (*see* NYSCEF Doc No. 99).

Analysis

“On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact. Only when the movant satisfies its obligation does the burden shift to the nonmovant to present evidence demonstrating the existence of a triable issue of fact” (*Aretakis v Cole’s Collision*, 165 AD3d 1458, 1459 [3d Dept 2018] [internal quotation marks and citations omitted]; *Howard v J.A.J. Realty Enters.*, 283 AD2d 854, 855 [3d Dept 2001] [“On a motion for summary judgment, a movant is required to establish by competent and admissible evidence a prima facie entitlement to judgment” (citations omitted)]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez*, 68 NY2d at 324 [citation omitted]). And “[o]n such a motion, the facts must be viewed in the light most favorable to the [nonmovant], and every available inference must be drawn in the [nonmovant’s] favor” (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016] [citations omitted]).

The COA first argues that, by installing the wooden structure on the exterior space without first obtaining written consent from the COA’s Board, Kirton breached the terms of his agreement with the COA as set forth in the

Declaration and Bylaws, and that such construction caused damage to the structure of the building and to the first-floor unit. In particular, the COA argues that Kirton's unauthorized construction caused the portion of the downstairs unit beneath the exterior space to separate from the main structure, as well as interior cracking and leaking in the first-floor unit. In support of its contentions regarding damages, the COA relies on the affidavit of Michael Bright (Bright), the COA's property manager, and three structural engineering reports from May and October 2021, and December 2022 (NYSCEF Doc Nos. 59-61).

The COA posits that the exterior space at issue is properly considered a roof, which is defined as a common element under the Declaration. The COA points out that the use of common elements is limited by the Bylaws to "only . . . those purposes for which they are reasonably suited and capable" and unit owners are prohibited from "mak[ing] any addition, alteration, improvement or change in or to any common element (including, but without limitation, the exterior of the building) without prior written consent of the Board" (NYSCEF Doc No. 37 at 11, quoting NYSCEF Doc No. 43 [Bylaws] at Art. VI, Section 2).⁴ The COA further points out that, even if the exterior space is considered a deck, that too would be a common element under the terms of the Declaration subject

⁴ References to page numbers correspond to the PDF page numbers generated by NYSCEF.

to the same limitations. And the COA contends that Kirton breached the Bylaws by obtaining a building permit from the City of Albany without having the COA's Board execute the permit, and by performing a "structural addition, alteration or improvement" that impacted the value of the first-floor unit without obtaining pre-authorization of the COA (*see id.*, quoting Bylaws at Art. VI, Section 12). Moreover, the COA posits that Kirton's unauthorized construction breached the Bylaws by causing the COA's insurer to drop coverage for 36 Westerlo Street, which the COA was forced to replace by obtaining a different policy with a higher premium.

The COA also argues that Kirton's claims and counterclaims must be dismissed because he is not entitled to the declaratory relief that he is authorized to use the exterior space as his own personal deck or patio because that space is either a roof or a deck, which the COA's governing documents define as common elements (*see* NYSCEF Doc No. 37 at 19). Similarly, the COA contends that Kirton's reliance on Schedule C to the Declaration fails to raise a triable issue of fact as to Kirton's rights to the exterior space because that document indicates that decks are "Common Elements of Direct Access" (*id.* at 14). Further, the COA contends that Kirton's reliance on the Offering Plan and Global MLS listing fail to raise a triable issue of fact because those documents "do not control the operation of the COA" (*id.* at 14, 19). And the COA argues that Kirton's claim for money damages based on the removal of the

unauthorized wooden structure must be dismissed because the controlling documents entitled the COA to remove the structure at his cost (*see id.* at 19). And the COA contends that its action of removing the wooden structure is entitled to deference pursuant to the business judgment rule (*see id.*).

Kirton opposes the motion, first arguing that the motion was made prematurely (*see* NYSCEF Doc No. 92 at 18). Kirton also contends that material issues of fact exist concerning both his interest in the exterior space and the destruction of his wooden structure that preclude summary judgment. With respect to his interest in the exterior space, Kirton argues that the exterior “space is not a common element, but is instead under his ownership” (*id.* at 9). In support, Kirton points to the Offering Plan, a June 2020 home inspection report, and the Global MLS listing as evidence that he is entitled to use the exterior space.⁵ Kirton further posits that, contrary to the COA’s position that the exterior space was meant for emergency egress only, the space has no stairs, ladder, or other means of egress to the ground level.

Kirton also argues that triable issues of fact exist as to whether he breached his agreement with the COA by installing the wooden structure on

⁵ Kirton also relies on an email exchange between his real estate agent, Ron Xiong, and the prior owner’s real estate agent, Sherry Cavallaro, concerning the prior owner’s use of the exterior space (*see* NYSCEF Doc No. 72 at ¶ 29). The exchange consists of entangled layers of hearsay; the Court does not consider it competent evidence in deciding the present motion.

the perimeter of the exterior space. Kirton contends that he merely replaced the pre-existing wrought iron railing with the wooden structure because the iron railing was unsteady, and that replacement does not constitute an addition, alteration, or improvement requiring pre-authorization from the COA's Board. Kirton also cites his June 2020 home inspection report for the proposition that structural damage to the building's exterior and rubber roof existed prior to his ownership and raises questions of fact as to whether his actions caused the separation and leaking alleged by the COA.

The COA's Motion for Summary Judgment is Not Premature.

A motion for summary judgment is "premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a codefendant" (*Metichcchia v Palmeri*, 23 AD3d 894, 895 [3d Dept 2005]; *Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 149 AD3d 496, 497 [1st Dept 2017]). The burden of demonstrating that a motion for summary judgment has been made prematurely rests with the nonmoving party, who must establish that "additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant" (*Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 966 [2d Dept 2014], citing CPLR 3212 [f]; see *Bevens v Tarrant Mfg. Co., Inc.*, 48 AD3d 939, 942 [3d Dept 2008] [citations omitted]). But "[t]he mere

hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*id.*; see *Bevens*, 48 AD3d at 942).

Kirton has failed to meet his burden of demonstrating that the COA's motion for summary judgment is premature. As set forth below, the parties' agreement and submissions provide a proper basis for the Court to rule on the parties' rights and obligations with respect to Kirton's use and modification of the second-floor exterior space outside Unit 9. Kirton's contentions that his expert has not yet had access to the first-floor unit or that he has not yet been able to depose Bright are of no moment to the present motion, as the COA has failed to establish entitlement to summary judgment as to causation and damages. Accordingly, as the burden never shifted with respect to these issues in the first instance, additional discovery was not necessary for Kirton to defend the motion. Kirton's request for fees and costs to defend the motion is therefore denied.

*Summary Judgment Is Granted on Kirton's
Claim/Counterclaim for Declaratory Judgment.*

The Court first addresses the COA's motion for summary judgment on Kirton's claim and counterclaim for declaratory judgment, as doing so helps

frame the remaining issues.⁶ Pursuant to CPLR 3001, a court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed” (*Salvador v Town of Queensbury*, 162 AD3d 1359, 1360 [3d Dept 2018]). “To constitute a ‘justiciable controversy,’ there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect” (*Hernandez v State of New York*, 173 AD3d 105, 109-110 [3d Dept 2019] [internal quotation marks and citation omitted]). With respect to contracts, “[a] declaratory judgment is a useful tool for providing clarity as to parties’ obligations” (*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 363 [2019]).

The parties’ disagreement over the nature of Kirton’s interest in the second-floor exterior space, which Kirton considers a deck off the rear door of his second-floor unit and the COA considers a roof of a first-floor unit, represents “a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect” (*Hernandez*, 173 AD3d at 109-110 [internal quotation marks and citation

⁶ When a party moves for summary judgment on a declaratory judgment claim and there are no questions of material fact, the proper remedy is a declaration of rights (see *200 Genesee St. Corp. v City of Utica*, 6 NY3d 761, 762 [2006]; *Bresky v Ace INA Holdings*, 287 AD2d 912, 913 [3d Dept 2001]).

omitted]). And no material issues of fact prevent the Court from addressing that dispute at this juncture.

Kirton's Unit Deed states, in relevant part, that it conveys "the condominium known and designated as Unit No. 9 in the building located at 36 Westerlo Street . . . together with an undivided 3.7327 percent interest in the common elements of the property as set forth, designated and described in the Declaration of Condominium dated December 17, 1984" (NYSCEF Doc No. 49). The Deed incorporates by reference all easements and reservations created under the Declaration (*see id.*). Further, paragraph 5 of the Declaration, titled "Units," states, "[a]nnexed hereto and made part hereof as Schedule C is a list of all Units, divided according to each Building, their designations, locations, number of rooms, approximate square foot areas and common elements to which each has immediate access (all as shown on the floor plans of each Building . . .) . . . and the percentage interest of each Unit in the common elements" (Declaration at ¶ 5).

Schedule C includes for each unit the number and description of rooms, approximate livable square footage, common elements of direct access, and percent of interest in common elements (Schedule C to Declaration). As relevant, Schedule C states that Unit No. 9 of 36 Westerlo Street includes as "Common Elements of Direct Access" a "[d]eck, public corridor & stairs[.]" and lists the percentage interest therein as "3.7327" (*id.*). The Declaration defines

“common elements” to include, among other things,” “[a]ll roofs” and “[a]ll terraces, balconies, decks, and porches” (Declaration at ¶ 8 [A] [a], [g]). And the Declaration defines “[l]imited [c]ommon [e]lements” as “[a]ll porches and decks adjacent to a Unit and to which the Unit Owner has sole access” and provides that such limited common elements “shall be reserved for the exclusive use of said Unit Owner” (Declaration at ¶ 8 [B] [a]). Moreover, the Declaration provides that “Owners of Units containing porches and decks shall have an easement to use such porches and decks” (*id.* at ¶ 12 [C]).

Based on the terms of the Declaration and Schedule C, which are incorporated by reference into Kirton’s Unit Deed, the exterior area at issue is a “deck” with respect to which Kirton has a 3.7327% interest (NYSCEF Doc No. 49; Schedule C to Declaration). And, because the exterior deck is “adjacent to [] Unit [No. 9]” and Kirton “has sole access” to the deck by reason of the rear door leading directly thereto, the deck is properly considered a “limited common element” that is “reserved for [Kirton’s] exclusive use” and for which Kirton has “an easement to use” (Declaration at ¶¶ 8 [B] [a], 12 [C]). The exhibits offered by Kirton—the MLS Listing, the Offering Plan, and photographs in Kirton’s Inspection Report—corroborate this conclusion.

The COA’s conclusory assertions that the deck area sits atop an “addition” to the unit below; that the rear door of the Unit leads to a “previously existing small, Juliet balcony, actually attached to the Premises when the

condominium was established in 1984”; and that the deck area is not intended to be accessed except as a means of emergency egress are unsupported by the record before the Court and do not warrant a different result. The COA has not proffered a floor plan or any other evidence to demonstrate that the deck was added to the building at some undisclosed time after creation of the controlling documents, which themselves refer to a deck at Unit No. 9. Nor has the COA proffered evidence in support of its claim that references to a deck in the governing documents actually refer to some prior existing but more limited area, such as a “small[] Juliet balcony” (NYSCEF Doc No. 43 at ¶ 9). Characterization of this area as a “balcony” conflicts with the unambiguous terms of the Declaration, as well as the Offering Plan, which both reference a “deck” in relation to Unit No. 9 (Schedule C to Declaration; NYSCEF Doc No. 75). And, had the space abutting Unit No. 9 been contemplated to be a “balcony,” the relevant documents could have identified it as such, since the Declaration explicitly contemplates common elements as including not only “decks” but also “terraces, balconies, . . . and porches” (Declaration at ¶ 8 [A] [g]). Similarly, though the platform of the deck indisputably sits atop the roof of the condominium unit below, the COA’s attempt to characterize the deck as solely a roof ignores Schedule C to the Declaration, a document the COA acknowledges is controlling, as well as the unambiguous distinction dawn

between roof and deck throughout the Declaration (*see* Declaration at ¶ 8 [A] [a], [g]).

The Court also rejects the COA's contention that the deck area is meant only for emergency egress. Although Bright advised Kirton in an October 25, 2020 email that the exterior space "is not to be used for any purpose other than emergency ingress/egress," no foundation is established for his statement (NYSCEF Doc No. 53). And the May 6, 2021 structural engineering report (NYSCEF Doc No. 59)—which was prepared *after* both Bright's October 2020 email and the 1984 Declaration—states only that the exterior space "should not be accessed except in the instance of an emergency on the second floor" (NYSCEF Doc No. 59 at 6). Such statement merely represents the engineer's recommendation based on his observations and analysis of the structural condition of the building in May 2021—and has no bearing on Kirton's property rights, which are defined by the terms of the Unit Deed and Declaration. Moreover, as Kirton points out and the COA does not dispute, there is no means of egress to the ground level from the deck area.

Given the absence of material issues of fact concerning Kirton's rights and ownership with respect to the deck space, the Court finds it appropriate to grant summary judgment as to Kirton's cause of action and counterclaim for a declaratory judgment to the extent that the Court declares that, under the Unit Deed, Declaration, and Schedule C, Kirton has a legal interest in the use of the

deck (*see* CPLR 3212 [b]; *Dickson v Slezak*, 73 AD3d 1249, 1250 n 3 [3d Dept 2010]; *John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; *see also Russell v Town of Pittsford*, 94 AD2d 410, 412 [4th Dept 1983]).⁷

On the other hand, the Court concludes as a matter of law that the COA is entitled to a declaration that the COA had authority to demand that Kirton remove, or to itself remove, the wooden structure that Kirton erected on the deck pursuant to Section 10 of Article VI of the Bylaws. As explained below in the discussion of the COA's breach of contract claim, the COA has established that Kirton erected the wooden structure without proper authorization and in violation of the Bylaws, and that Kirton was given notice of the COA's right and intention to itself remove it (*see* Bylaws at Art. VI, Section 10; NYSCEF Doc No. 52).⁸ Accordingly, the Court declares that the COA had a legal right to demand that the wooden structure be removed or to remove the structure itself

⁷ The Court's decision in this regard is limited to Kirton's rights to access and use the deck according to the terms of the parties' agreement. But the Court makes no determination as to the propriety of any continued access and/or use upon the COA establishing that structural and/or safety concerns require curtailment of such rights in the future.

⁸ Because the Court concludes, based on the unambiguous terms of the parties' agreement, that the COA is entitled to summary judgment on Kirton's claim /counterclaim for a declaration regarding the COA's authority to remove the structure, it does not reach the COA's invocation of its business judgment rule argument.

(*200 Genesee St. Corp. v City of Utica*, 6 NY3d 761, 762 [2006]; *Bresky v Ace INA Holdings*, 287 AD2d 912, 913 [3d Dept 2001]).

The COA Is Entitled to Partial Summary Judgment on Its Claim that Kirton Breached their Contract by Erecting the Wooden Structure.

“To recover for a breach of contract, a party must establish the existence of a contract, the party’s own performance under the contract, the other party’s breach of its contractual obligations, and damages resulting from the breach” (*Ironwoods Troy, LLC v Optigolf Troy, LLC*, 204 AD3d 1130, 1131 [3d Dept 2022] [internal quotation marks, brackets, and citations omitted]; see *Ampower-US, LLC v WEG Transformers USA, LLC*, 214 AD3d 1129, 1131 [3d Dept 2023]).

As stated above, Kirton accepted a Unit Deed upon his purchase of Unit No. 9, which provided, in relevant part, that such deed was “subject to the terms, conditions, covenants and provisions of the Declaration and By[]laws of the [COA,]” which “shall constitute covenants [that] shall bind any person having at any time any interest or estate in the Unit” (NYSCEF Doc No. 49). And paragraph 17 of the Declaration states that

acceptance of a deed or conveyance . . . of any Unit shall constitute an agreement that the provisions of this Declaration, the By-Laws and the Rules and Regulations, as they may be amended from time to time, and any duly authorized actions of the Board of Managers are accepted and ratified by such Owner . . . and all such provision shall be deemed and taken to be covenants running with the land and shall bind

any person having at any time any interest or estate in such Unit, as though such provisions were recited and stipulated at length in each and every deed or conveyance . . . thereof.

(Declaration a ¶ 17). The COA's Bylaws apply to the use of the "units, . . . common elements and limited common elements . . . owned in fee simple . . . and all easements, rights and appurtenances belonging thereto" (Bylaws at Art. I, Section 2). "All present and future Unit owners . . . are subject to the[] By[]laws, the Declaration and any Rules and Regulations established by the Board of Managers [of the COA], each as amended from time to time" and [t]he acceptance of a deed or conveyance . . . shall constitute an agreement that these By[]laws, the Declaration, and the Rules and Regulations, as they may be amended from time to time, are accepted, ratified and will be complied with" (*id.* at Art. I, Section 3). Accordingly, by accepting his Unit Deed, Kirton entered into a binding agreement with the COA pursuant to which his rights and obligations with respect to his unit and all common elements would be governed by the Declaration and Bylaws.

The Bylaws limit the use of common elements to those purposes for which they are reasonably suited and capable" (Bylaws at Art. VI, Section 14 [b]; *see id.* at Art. VI, Section 9 [b]). And "[n]o Unit Owner shall make any addition, alteration, improvement or change in or to any common element (including, but without limitation, the exterior of any building) without the

prior written consent of the Board of Managers” (*id.*). The Bylaws also provide that “[n]o Unit Owner shall make any structural addition, alteration or improvement in or to his Unit or which may affect the value of other Units, without prior written consent thereto of the Board[,]” and that “[t]he Board of Managers will execute any application or other document required to be filed with any governmental authority having . . . jurisdiction in connection with any such installation or structural addition, alteration or improvement” (*id.* at Art. VI, Section 12). But “[n]on-structural alterations and improvements to Units that do not affect the exterior of the building or the value of other Units may be made without the prior approval of the Board of Managers” (*id.*).

Kirton does not dispute that he never obtained prior written consent from the COA’s Board of Managers prior to installing the wooden structure on the deck, a limited common element. Accordingly, Kirton breached the binding terms of the agreement. And, although Kirton argues that the COA had no right to remove the structure he erected thereon, he does not contend that the COA failed to perform under the agreement. It was only after Kirton began his unauthorized construction that the COA intervened and attempted to restrict his access to the deck area. And, as discussed below, questions of fact exist as to whether such post-construction exclusion was warranted based on the structural concerns allegedly resulting therefrom.

Kirton's contention that his conduct of repairing or replacing the previously existing iron railing with his wooden structure does not constitute an addition, improvement or alteration requiring pre-authorization from the COA pursuant to the Bylaws is unavailing. Kirton's argument ignores the unambiguous language set forth in the Bylaws, which prohibit unit owners from "making any addition, alteration, improvement or change in or to any common element (including, but without limitation, the exterior of any building) without the prior written consent of the Board of Managers" (Bylaws at Art. VI, Section 14 [b]). Kirton's admitted act of replacing the original railing with the wooden structure effected an "alteration" and/or "change[]" to the deck, a limited common element on the exterior of the building.

Kirton's own documentary evidence also establishes that he altered and/or changed this limited common element by installing an entirely new structure on the deck. On his building permit application and permit, proffered by the COA, Kirton stated that he "repair[ed]" the railing to the "rear balcony" (NYSCEF Doc Nos. 62). But the certificate of completion, proffered by Kirton, states that the City of Albany's "inspection revealed" that the completed work consisted of the "installation of a new railing[] to the rear second floor balcony" (NYSCEF Doc No. 80). Based on the foregoing, the COA has established entitlement to summary judgment as to the issue of Kirton's liability for breach of the Bylaws.

However, the COA has failed to establish, *prima facie*, that Kirton's breach caused the damages it seeks. "In order to prove a breach of contract cause of action, the plaintiff must prove that a defendant's breach was the proximate cause of its damages" (*Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc.*, 59 Misc 3d 754, 783 [Sup Ct, New York County 2018] [collecting cases]; see *Fultonville Frozen Foods v Niagara Mohawk Power Corp.*, 91 AD2d 732, 733 [3d Dept 1982]). "In the law of contracts, as in torts, causation in fact is established if the defendant's breach of duty was a substantial factor in producing the damage. In other words, the test is satisfied if the defendant's actions would be thought of by people generally as having operated to an important extent in producing the harmful result" (*Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc.*, 59 Misc 3d at 783-784, quoting *Coastal Power Intern., Ltd. v Transcontinental Capital Corp.*, 10 F Supp 2d 345, 366 [SD NY 1998] [additional quotation marks omitted], *affd* 182 F3d 163 [2d Cir 1999]).

The COA relies on Bright's affidavit and three structural engineering reports from May and October 2021, and December 2022 (NYSCEF Doc Nos. 48, 59-61). Bright states in his affidavit that, upon recommendation of the structural engineer, "the COA had to engage a general contractor to remedy the structural issues caused by Kirton's unauthorized construction" and that the COA expended "[n]early \$30,000 . . . to remedy the structural issues"

(NYSCEF Doc No. 48 at ¶ 38). Bright's statements concerning causation, however, are conclusory and are not based on his personal knowledge; rather, they are based on his reading of the structural engineering reports. And The structural engineering reports are not accompanied by an affidavit of the engineer who authored them. The COA has proffered no excuse for its failure to present this expert proof in admissible form. Accordingly, the structural engineering reports do not constitute admissible evidence to support the COA's motion for summary judgment (*see Freitag v Village of Potsdam*, 155 AD3d 1227, 1231 n 2 [3d Dept 2017], citing *Fallon v Duffy*, 95 AD3d 1416, 1417 [3d Dept 2012]; *see Ellis v Willoughby Walk Corp. Apts.*, 27 AD3d 615, 616 [2d Dept 2006]).

Also absent from the COA's evidentiary proffers is any invoice, bill, receipt, or affidavit from the general contractor hired by the COA to perform structural repairs to 36 Westerlo Street. Moreover, although the COA correctly notes that, pursuant to the Bylaws, it is entitled to recoup the costs required for the removal of Kirton's wooden structure (*see* Bylaws at Art. VI, Section 10), the COA has neither asserted nor offered any competent proof in support of the cost of that endeavor. Based on the foregoing, the COA has failed to meet its burden to establish entitlement to summary judgment as to causation and damages resulting from Kirton's unauthorized construction.

Finally, the COA has failed to establish that Kirton's breach caused the building's insurance premium to increase and/or caused the insurer to drop the building's insurance policy in violation of the Bylaws (*see* Bylaws at Schedule A, Section 4). Kirton correctly points out that the COA's proof in support of this claim is insufficient. The COA has not proffered an affidavit from the COA's insurer or other competent evidence to establish this claim, and the statements regarding the increased insurance premium made by Bright in his affidavit (*see* NYSCEF Doc No. 48 at ¶¶ 38, 41-42) constitute inadmissible hearsay insufficient to establish the COA's entitlement to summary judgment.

*The COA Is Entitled to Summary Judgment Dismissing
Kirton's Claim/Counterclaim for Money Damages.*

The COA has established entitlement to summary judgment dismissing Kirton's claim for money damages caused by the COA's removal of the wooden structure from Kirton's deck. As stated above, pursuant to Section 10 of Article VI of the Bylaws, upon any breach of the Bylaws or Declaration and upon reasonable notice to the Unit Owner, the COA is permitted "to enter the Unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition that may exist therein contrary to the intent and meaning of the provisions hereof (provided, however, that no prior notice shall be required in

the event the Board of Managers shall determine that action is immediately necessary . . .” (Bylaws at Art. VI, Section 10).

Here, Kirton erected the wooden structure on a limited common element without prior authorization and, therefore in “breach of [Art. VI, Section 14 (b) of the] By[llaws” (By-laws at Art. VI, Section 14 [b]). The COA provided reasonable notice, as evidenced by Bright’s September 23, 2020 email in which he stated, “[p]lease be advised that without proper approval the COA retains the right to remove at your expense or have you remove any work completed to date, or in the future and that you are responsible for all consequences, financial and otherwise, of unauthorized work” (NYSCEF Doc No. 52). Kirton’s arguments in opposition that questions of fact exist as to his ownership of the outdoor space and whether the COA was authorized to remove his wooden structure, are unavailing given the unambiguous terms of the agreement. Accordingly, Kirton’s second cause of action and second counterclaim are dismissed.

The COA’s Tort Claims are Dismissed as Duplicative.

The COA has also asserted causes of action for trespass, nuisance, and negligence for which it now moves for summary judgment (*see* NYSCEF Doc No. 43 at ¶¶ 69-88; NYSCEF Doc No. 37 at 15-17). In opposition, Kirton contends that the COA’s tort claims should be dismissed as duplicative of the COA’s breach of contract claim (*see* NYSCEF Doc No. 92 at 12-16). In

particular, Kirton argues that the COA's tort causes of action are premised upon alleged breaches of legal duties which are not independent of those under the contract. The COA did not address Kirton's argument in this respect in its reply (*see* NYSCEF Doc No. 99). Although Kirton has made no cross-motion, the Court has searched the record and grants summary judgment dismissing these duplicative claims.

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 711 [2018], quoting *Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). Said another way, "where a party is merely seeking to enforce its bargain, a tort claim will not lie" (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 316 [1995]). And "where the damages alleged 'were clearly within the contemplation of the written agreement . . . [m]erely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*Dormitory Auth.*, 30 NY3d at 711 [2018], quoting *Clark-Fitzpatrick*, 70 NY2d at 390). "In determining whether claims are duplicative, [the Court] evaluate[s] the nature of the injury, how the injury occurred[,], and the harm it caused" (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 290-91 [2023] [internal quotation marks and citation omitted]).

Evident from its arguments in support of summary judgment, the COA's tort claims rely on the "[g]overning [d]ocuments" and attendant contractual obligations to demonstrate Kirton's liability and damages (NYSCEF Doc No. 37 at 17; *see id.* at 16, 18). In support of summary judgment on its trespass claim, the COA alleges that Kirton failed to obtain "prior authorization from the COA" to install the wooden structure on the deck area and that Kirton committed trespass by "entering the other roof he did not own, engaging in an unauthorized construction project thereon, and causing significant structural damage as a result to a neighboring unit" (*id.* at 16). With respect to its nuisance claim, the COA states that "Kirton's unauthorized construction project," "caused damage to the other unit's roof and structural soundness," which it posits was unreasonable because Kirton "ignored the COA's [g]overning [d]ocuments" despite being aware of same (*id.* at 17). And in support of its negligence cause of action, the COA alleges that Kirton breached his "duty of care" owed to the other unit owners and the COA by constructing the wooden structure without "prior authorization, as required," and that such construction caused damage to the building and the first-floor unit (*id.* at 17).

The COA's tort claims allege nothing more than violations of Kirton's contractual duties prohibiting him from altering, improving, or changing a common element without obtaining the prior written consent of the COA, engaging in activity that would damage the structural integrity of the building,

or negatively impacting the building's insurance coverage or value of another unit (see Bylaws at Art. VI, Sections 12, 14; Schedule A, Section 6, 7, 10). Further, the COA's tort claims are all premised upon the same injury allegedly caused to the building and first-floor unit by the construction he performed without obtaining the prior authorization as required under the Bylaws. And the COA's bare assertion that Kirton breached of a "duty of care" (NYSCEF Doc No. 43 at ¶ 83), without pointing to any duty independent of the parties' agreement, is insufficient to transform its contractual claim into tort claims (see *Dormitory Auth.*, 30 NY3d at 711 [2018]; *Clark-Fitzpatrick*, 70 NY2d at 390; see also *Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113, 119 [2d Dept 2008]).

Further, with respect to all of its claims, the COA seeks only "compensatory damages in an amount to be determined at trial" (NYSCEF Doc No. 43 at 11). Such damages consist of the cost of removal of Kirton's unauthorized construction, the structural repairs performed to the building and to the first-floor unit, and the increased insurance premium. Accordingly, the only damages the COA seeks with respect to its tort claims are expressly contemplated under the Bylaws and identical to those sought with respect to the COA's breach of contract claim. Where, as here, "[t]he only damages alleged under either theory of recovery' are 'identical for both claims,' such damages are 'within the contemplation of the parties under the contract' and the

noncontractual claims must be dismissed as duplicative” (*IKB Intl.*, 40 NY3d at 292, quoting *Dorm Auth.*, 30 NY3d at 712-713).

Because the COA’s tort claims are duplicative of its breach of contract claim, the Court has searched the record and grants summary judgment in favor of Kirton dismissing the COA’s causes of action for trespass, nuisance, and negligence (*see* CPLR 3212 [b]; *Dickson*, 73 AD3d at 1250 n 3; *see also John P. Krupski & Bros., Inc.*, 54 AD3d at 901). The COA’s second, third, and fourth causes of action are dismissed.

Accordingly, it is

ORDERED that the COA’s motion for summary judgment on its cause of action for breach of contract is granted, in part, on the issue of liability only as set forth in this decision and order; and it is further

ORDERED that the COA’s motion for summary judgment on its cause of action for breach of contract is otherwise denied; and it is further

ORDERED that the COA’s motion for summary judgment dismissing Kirton’s second cause of action and second counterclaim for money damages, is granted and Kirton’s second cause of action and second counterclaim are dismissed; and it is further

ORDERED that Kirton is partial granted summary judgment in his favor as to his first cause of action and first counterclaim, and that Kirton is

entitled to a declaration of his right to use the deck area adjacent to his condominium unit; and it is further

ADJUDGED AND DECLARED that Kirton has a 3.7327% interest in a limited common element, namely a deck, which is reserved for Kirton's exclusive use and for which Kirton has an easement to use; and it is further

ORDERED that the COA is granted partial summary judgment in its favor on Kirton's first cause of action and first counterclaim, and that the COA is entitled to a declaration that it had a right to access Kirton's deck and remove his unauthorized construction; and it is further

ADJUDGED AND DECLARED that the COA was empowered under the Bylaws to enter Kirton's deck area and summarily abate and remove, at Kirton's expense, the wooden structure he erected thereon without first obtaining written authorization from the COA Board in violation of the Bylaws; and it is further

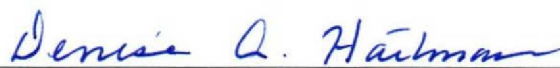
ORDERED that Kirton is granted partial summary judgment dismissing the COA's second, third, and fourth causes of action for trespass, nuisance, and negligence; and it is further

ORDERED that counsel shall attend a discovery compliance conference on _____, 2024, at ____:____ a.m./p.m., via Microsoft TEAMS.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County

Clerk. Upon such entry, counsel for plaintiff/third-party defendant shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
May 9, 2024


HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court



05/10/2024

Papers Considered

NYSCEF Doc Nos. 36-63, 72-92, 98-99