[* 1]

SHORT FORM ORDER

INDEX No. 09-16436

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-6-11 (#004)
MOTION DATE 11-22-11 (#005)
ADJ. DATE 11-22-11
Mot. Seq. # 004 - MG
005 - XMD

----------X

CLIFFORD WILLIAMS,

Plaintiff,

- against -

LEISURE KNOLL ASSOCIATION, INC., ELLEN DAVIS, THOMAS HORN, WILLIAM MUELLER, FRED HESS, WALTER SILBERT, ROGER PRICE, KAREN KLUBER and FRED FALCO,

Defendants.

----------X

HOWARD E. GREENBERG, ESQ.
Attorney for Plaintiff
180 East Main Street, Suite 308
Smithtown, New York 11787

LAW OFFICES OF VINCENT D. MCNAMARA
Attorney for Defendants
1045 Oyster Bay Road, Tower Square
E. Norwich, New York 11732

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated September 9, 2011, and supporting papers (including Memorandum of Law dated); (2) Notice of Cross Motion by the plaintiff, dated October 17, 2011, and supporting papers; (3) Affirmation in Opposition by the defendant, dated November 10, 2011, and supporting papers; (4) Reply Affirmation by the plaintiff, dated November 15, 2011, and supporting papers; (5) Other ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross motion by plaintiff for leave to serve the proposed amended complaint is denied; and it is further

ORDERED that plaintiff is granted leave to renew the motion to serve an amended complaint, but only as to the three proposed causes of action set forth in the proposed amended complaint which the Court determined were not palpably insufficient, and only to the extent that such motion is made within 20 days after service of a copy of this order with notice of its entry.

Plaintiff Clifford Williams is the owner of a condominium located in a private, adult-only community in Ridge, New York known as Leisure Knoll. Defendant Leisure Knoll Association, Inc., a not-for-profit corporation, is the owner of the community's recreational facilities and common areas. Each condominium owner of the community, also referred to as a unit owner, is a member of Leisure Knoll Association. The rights and obligations of members are set forth in the Association's Declaration of Covenants, Restrictions, Easements, Charges and Liens (hereinafter the Declaration), By-Laws, and Rules and Regulations. The community, which includes amenities such as a recreation center, a swimming pool, and tennis courts, is governed by a seven-member board of directors. Plaintiff allegedly purchased the condominium, a detached, single-family residence, in 2002 and presently resides there with his wife.

As relevant to the instant controversy, Article V of the Declaration gives every member of Leisure Knoll Association "a right and easement of enjoyment in and to the common areas" of the community. Article VI, however, also provides that the Association has the right, among other things, to suspend a member's rights and easement in such commons areas "for any period during which any assessment remains unpaid, and for any period not to exceed thirty days for any infraction of its published rules and regulations." Pursuant to Article IV, Section 4 of the Association's By-Laws and Rules and Regulations, all charges and expenses "chargeable to a condominium unit shall constitute a lien against such unit in favor of Leisure Knoll Association." Article V, Section 1 of the By-Laws states that members of the Board of Directors must be members of the Association, must be "in residence" at the community for at least ten months of the year, and must be "in good standing." The same section of the By-Laws defines the term "good standing" as meaning "current in all monetary obligations to the Association: i.e., regular assessments (common charges), special assessments, fines, legal fees and any other charges." Moreover, Section 12 of Article V states that the Board of Directors shall have the power "to make and enforce compliance with reasonable rules and regulations relative to the operation, use and occupancy of Association facilities and property and to amend the same from time."

Pursuant Schedule B of the Rules and Regulations, revised May 2, 2007, the Board of Directors may impose fines against homeowners for violations of the By-Laws and the Rules and Regulations. Paragraph 19 of Schedule B of the Rules and Regulations, added January 17, 2008, states, in part, that no owner, when present in the recreation room, craft room, administration office or other common area, shall engage in any form of conduct that annoys, harasses, disrupts or otherwise adversely affects the enjoyment of the facilities and common areas. It further states "no owner, occupant or guest shall engage in any form of conduct that annoys, harasses, disrupts or otherwise adversely interferes with Association employees, staff and volunteers," and that, if such rule and regulation is violated, "such individual will be notified in writing of such violation from the Board of Directors, which shall specify the penalty to be imposed." Under this provision, the penalties that may be imposed include "fines and/or prohibition from entering or using the Recreation Center, Craft Center and/or Administration/Maintenance Office." A person penalized for such conduct who wishes to contest the allegation made or the penalty imposed "shall, within three (3) days of receipt of the notice, submit to the Board a written request to be heard." Upon such notice, a meeting must be held by at least two members of the Board to determine whether there has been a violation and, if so, the appropriate penalty.

In May 2009, plaintiff commenced this action against Leisure Knoll Association, the individual

members of the Board of Directors, and two employees of the Board, namely defendants Karen Kluber and Fred Falco. The complaint asserts causes of action against all defendants for harassment, nuisance, breach of the covenant of quiet enjoyment, breach of contract, breach of the warranty of habitability, intentional infliction of emotional distress, negligent infliction of emotional distress, and counsel fees, nearly all of which are based on the same transactions. Vague, prolix, redundant and inartfully drawn, the complaint essentially alleges in the 257 numbered paragraphs that defendants improperly imposed fines against plaintiff during the period from June 2007 to April 2009, that they refused plaintiff's oral and written requests for hearings to determine the appropriateness of the fines, that they improperly filed a lien against plaintiff's condominium for unpaid fines, and that they prohibited plaintiff from erecting a fence on his property. It also alleges that defendants denied plaintiff the opportunity to participate in meetings open to Association members that were held in 2008 and 2009, denied him the opportunity to run for election in 2009 to the Board of Directors, and denied him the use of the community's common areas and recreational facilities. The complaint, however, does not include allegations explaining the conduct for which the Board imposed fines and penalties against plaintiff.

Defendants' answer denies nearly all of the allegations in the complaint, but admits that plaintiff was denied the use of the community's facilities, the opportunity to run for elected office to the Board of Directors, and the opportunity to participate in meetings open to members of the Association. It also asserts that plaintiff was not qualified to run for an elected position on the Board of Directors or to participate in a Meet the Candidates meeting conducted in September 2008. In addition, the answer interposes various affirmative defenses, including failure to state a cause of action, unclean hands, collateral estoppel, and failure to exhaust the remedies available under the Association's governing documents.

Defendants now move for an order granting them summary judgment dismissing the complaint on various grounds, including that the individual defendants are shielded from liability by the business judgment rule, and that there is no evidence that the individual defendants engaged in separate tortious acts or self-dealing. Defendants also argue that the complaint must be dismissed because it fails to allege that the individual defendants committed any tortious acts or other improper conduct. Further, defendants assert that the claims against the Association and the individual defendants must be dismissed under the principle of res judicata, as the accusations in the instant action were determined in previous small claims proceedings brought by plaintiff in District Court, Suffolk County.

Plaintiff opposes the motion and cross-moves for an order granting him leave to serve an amended complaint. Although omitting the causes of action for harassment and breach of the warranty of habitability asserted in the original complaint, the proposed amended complaint annexed to the moving papers sets forth 19 causes of action against defendants. The proposed amended complaint, which contains substantially the same factual allegations as the original complaint, as well as a new allegation that defendants had plaintiff arrested for trespassing on community property, includes causes of action seeking damages for prima facie tort, public nuisance, breach of contract, intentional infliction of emotional distress, false arrest, "selective enforcement," violations of 42 USC § 1983, and four causes of action for declaratory relief.

In opposition to the motion and in support of his cross motion, plaintiff argues that he was "personally targeted by the defendants, both collectively and individually," and that defendants "used their authority and positions" to injure him "by harassment, by denying him his legal rights, by denying him the use and enjoyment of the facilities he pays for, by having him arrested for attempting to participate in and utilize those facilities and by attempting to damage [him] in a general manner of [sic] any way possible." Plaintiff further alleges "a course of conduct on the part of each board member singling out plaintiff . . . for harsh and unjust treatment," and that the individual defendants have "conspired to injure [him] in any manner conceivable" and have breached their fiduciary duty to the community by placing "their personal agenda against [him] above the interests of the community." Due to such conduct, plaintiff argues, the individual defendants are not insulated from liability under the business judgment rule. In addition, plaintiff asserts that, except for the cause of action for false arrest, which is premised on an arrest that occurred in May 2010, the new causes of action "are based on the same series of transactions," and that defendants cannot demonstrate they will be prejudiced if leave to amend the complaint is granted, "as they have had full notice of all of the plaintiff's claims and should be aware of their own conduct."

As to defendants' motion for summary judgment, the condominium form of ownership of real property "is manifested as a division of a single parcel of real property into individual units and common elements in which an owner holds title in fee to his [or her] individual unit as well as an undivided interest in the common elements of the parcel" (***Murphy v State of New York***, 14 AD3d 127, 133, 787 NYS2d 120 [2d Dept 2004]; *see* Real Property Law § 339-I; ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006]; ***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d 1, 523 NYS2d 523 [2d Dept 1987]). Each owner of a condominium, therefore, holds a real property interest in his or her unit and its appurtenances, giving such owner an exclusive possessory interest in the unit, and an undivided interest in the common areas of the condominium (*see* Real Property Law §§ 339-g, 339-h; ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55). However, in purchasing a condominium unit, an individual gives up certain rights and privileges which traditionally accompany fee ownership of real property, subordinating such rights to the interests of the group (***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d 1, 6, 523 NYS2d 523; *see* ***Matter of Levandusky v One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807 [1990]; ***Murphy v State of New York***, 14 AD3d 127, 787 NYS2d 120).

Once a condominium is created by the filing of a declaration (*see* Real Property Law § 339-n), the administration of the condominium's affairs "is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners concerning their own units and the condominium's common elements" (***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d 1, 6, 523 NYS2d 523; *see* Real Property Law § 339-v; ***Board of Managers of Vil. View Condominium v Forman***, 78 AD3d 627, 911 NYS2d 378 [2d Dept 2010], *lv denied* 17 NY3d 704, 929 NYS2d 95 [2011]). Thus, despite the unit owners' undivided interest in the property, exclusive authority to manage the common elements and the finances of the condominium is vested in the board of managers (*see* Real Property Law §§ 339-e, 339-v; ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55). Further, a declaration and by-laws that are executed as part of the same transaction must be interpreted together (*see* ***Perlbinder v Board of Mgrs. of 411 E. 53rd St.***

Condominium, 65 AD3d 985, 886 NYS2d 378 [1st Dept 2009]; *see also* ***BWA Corp. v Alltrans Express U.S.A.***, 112 AD2d 850, 493 NYS2d 1 [1st Dept 1985]). It is a principle of contract interpretation that when parties set down their agreement in a clear, unambiguous and complete document, such agreement should be enforced in accordance with the plain meaning of its terms (*see* ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565 [2002]; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]; ***Willsey v Gjuraj***, 65 AD3d 1228, 885 NYS2d 528 [2d Dept 2009]).

Further, a condominium's board of directors is statutorily empowered to enforce the condominium's by-laws, rules and regulations (*see* Real Property Law § 339-j; ***Board of Mgrs. of Stewart Place Condominium v Bragato***, 15 AD3d 601, 789 NYS2d 907 [2d Dept 2005]; ***Board of Mgrs. of Ocean Terrace Towne House Condominium v Lent***, 148 AD2d 408, 538 NYS2d 824 [2d Dept], *lv denied* 75 NY2d 702, 551 NYS2d 906 [1989]). When an owner of a condominium unit challenges an action by a board of directors, the court must apply the business judgment rule (*see* ***Molander v Pepperidge Lake Homeowner's Assn.***, 82 AD3d 1180, 920 NYS2d 201 [2d Dept 2011]; ***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d 1, 523 NYS2d 523; *see also* ***Matter of Levandusky v One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807). Under the business judgment rule, court review of the actions of a board of directors is limited to whether the board of directors' actions were authorized, and whether they were taken in good faith and in the furtherance of legitimate interests of the condominium (*see* ***Skouras v Victoria Hall Condominium***, 73 AD3d 902, 902 NYS2d 111 [2d Dept 2010], *lv dismissed* 16 NY3d 729, 917 NYS2d 94 [2011]; ***Yusin v Saddle Lake Home Owners Assn., Inc.***, 73 AD3d 1168, 902 NYS2d 139 [2d Dept 2010]; ***Helmer v Comito***, 61 AD3d 635, 877 NYS2d 370 [2d Dept 2009]; ***Schoninger v Yardarm Beach Homeowners Assoc., Inc.***, 134 AD2d 1, 523 NYS2d 523). The duty owed by a director of a condominium or cooperative is the same duty owed by a fiduciary to a corporation and its shareholder (*see* ***Matter of Levandusky v One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807; ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55; ***Konrad v 136 E. 64 th St. Corp.***, 246 AD2d 324, 667 NYS2d 354 [1st Dept 1998]), and a party seeking judicial inquiry into the decisions of a condominium's governing body bears the burden of showing a breach of fiduciary duty through evidence of unlawful discrimination, self-dealing or other misconduct by board members (***Hochman v 35 Park W. Corp.***, 293 AD2d 650, 741 NYS2d 261 [2d Dept 2002]; *see* ***Gillman v Pebble Cove Home Owners Assn.***, 154 AD2d 508, 546 NYS2d 134 [2d Dept 1989]; ***Board of Mgrs. of Ocean Terrace Towne House Condominium v Lent***, 148 AD2d 408, 538 NYS2d 824). Here, as the complaint does not allege fraud or misconduct on the part of the Board members in connection with the actions complained about by plaintiff in this lawsuit, namely the imposition of fines, the denial of approval to erect a fence, the denial of eligibility to run for a seat on the Board of Directors, and the suspension of his right to use the common areas and facilities, a review of the actions of the Association and the Board members is governed by the business judgment rule (*see* ***Gillman v Pebble Cove Home Owners Assn.***, 154 AD2d 508, 546 NYS2d 134 [2d Dept 1989)

Summary judgment dismissing the causes of action against the individual defendants is granted. "Although unequal treatment of shareholders is sufficient to overcome the directors' insulation of liability under the business judgment rule, individual directors and officers may not be subject to liability absent the allegation that they committed separate tortious acts" (***Murphy v Hill***, 63 AD3d 680, 681, 881 NYS2d 133 [2d Dept 2009]; *see* ***Meadow Lane Equities Corp. v Hill***, 63 AD3d 699, 880 NYS2d 338

[2d Dept 2009]). Here, the complaint fails to allege that any of defendant members of the Association's Board of Directors engaged in independent tortious acts outside their capacity as board members (*see* ***Meadow Lane Equities Corp. v Hill***, 63 AD3d 699, 880 NYS2d 338; ***Pelton v 77 Park Ave. Condominium***, 38 AD3d 1, 825 NYS2d 28 [1st Dept 2006]; ***Brasseur v Speranza***, 21 AD2d 297, 800 NYS2d 669 [1st Dept 2005]). "Conclusory or speculative allegations of discrimination are insufficient to deprive corporate directors of the rule precluding judicial scrutiny of board decisions" (***Pelton v 77 Park Ave. Condominium***, 38 AD3d 1, 9, 825 NYS2d 28). Likewise, the complaint does not contain any allegations that Kluber and Falco, employees of the Association, affirmatively committed acts of negligence or other wrongful conduct against plaintiff (*see* ***Pelton v 77 Park Ave. Condominium***, 38 AD3d 1, 825 NYS2d 28)

Summary judgment dismissing the complaint against the Association also is granted. As to the first cause of action alleged in the complaint, New York does not recognize a common law cause of action to recover damages for harassment (*see* ***Mago, LLC v Singh***, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]; ***Ralin v City of New York***, 44 AD3d 838, 844 NYS2d 83 [2d Dept 2007], *lv denied* 10 NY3d 784, 857 NYS2d 19 [2008]). As to the second and fifth causes of action, the covenant of quiet enjoyment and the covenant of habitability are implied in the landlord-tenant relationship. A condominium owner is not a tenant, as a condominium constitutes real property (*see* Real Property Law § 339-g). Plaintiff, therefore, has no cognizable claims against the Association for breach of the covenants of quiet enjoyment and habitability (*see* ***Linden v Lloyd's Planning Serv.***, 299 AD2d 217, 750 NYS2d 20 [1st Dept 2002], *lv denied* 99 NY2d 509, 760 NYS2d 100 [2003]; ***Frisch v Bellmarc Mgt.***, 190 AD2d 383, 597 NYS2d 962 [1st Dept 1993]). As to the third cause of action, a party may be liable for a private nuisance upon poof of an intentional and unreasonable invasion of the use and enjoyment of another's land (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]; ***Broxmeyer v United Capital Corp.***, 79 AD3d 780, 914 NYS2d 181 [2d Dept 2010]). To establish such a claim for a private nuisance, a plaintiff must show an interference that is (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with the plaintiff's property right to use and enjoy the land, (5) caused by another's conduct in acting or failing to act (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169; ***Gedney Commons Homeowners Assn., Inc. v Davis***, 85 AD3d 854, 925 NYS2d 181 [2d Dept 2011]; ***Broxmeyer v United Capital Corp.***, 79 AD3d 780, 914 NYS2d 181; ***Aristedes v Foster***, 73 AD3d 1105, 901 NYS2d 688 [2d Dept 2010]). Plaintiff's nuisance claim, apparently premised on allegations that the Board denied him the use of the community's commons areas and facilities, cannot be maintained, as he does not have an ownership interest in such areas, only a right of easement (*cf.* ***Gedney Commons Homeowners Assn., Inc. v Davis***, 85 AD3d 854, 925 NYS2d 181).

As to the cause of action for breach of contract, the business judgment rule is not a defense to a cause of action for breach of contract (*see* ***Anderson v Nottingham Vil. Homeowner's Assn., Inc.***, 37 AD3d 1195, 830 NYS2d 882 [4th Dept 2007]; ***Dinicu v Groff Studios Corp.***, 257 AD2d 218, 690 NYS2d 220 [1st Dept 1999]). Nevertheless, having alleged that plaintiff was fined by the Association for infractions, the complaint fails to indicate how the suspension of his easement rights was outside the Associations's authority under Article V of the Declaration (*see* ***Quintas v Pace Univ.***, 23 AD3d 246, 804 NYS2d 67 [1st Dept 2005]; ***Silverman v Carvel Corp.*** 8 AD3d 469, 778 NYS2d 515 [2d Dept 2004], *lv denied* 4 NY3d 707, 795 NYS2d 517 [2005]). Similarly, the causes of action for intentional

and negligent infliction of emotion distress must be dismissed, as the complaint does not allege conduct by the Association "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 303, 461 NYS2d 232 [1983], *quoting* Restatement (Second) of Torts § 46 [d]; *see* ***McGovern v Nassau County Dept. of Social Servs.***, 60 AD3d 1016, 876 NYS2d 141 [2d Dept 2009]; ***Kaye v Trump***, 58 AD3d 579, 873 NYS2d 5 [1st Dept], *lv denied* 13 NY3d 704, 887 NYS2d 1 [2009]; ***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]).

Finally, the remaining cause of action for counsel fees also must be dismissed. Generally, "an attorney's fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties" (***Flemming v Barnwell Nursing Home & Health Facilities, Inc.***, 15 NY3d 375, 379, 912 NYS2d 504 [2010]; *see* ***Degregorio v Richmond Italian Pavillion, Inc.***, 90 AD3d 807, 935 NYS2d 70 [2d Dept 2011]; ***Blair v O'Donnell***, 85 AD3d 954, 925 NYS2d 639 [2d Dept 2011]). In fact, New York's public policy disfavors an award of attorney's fees to the prevailing party in litigation (*see* ***Matter of A.G. Ship Maintenance Corp. v Lezak***, 69 NY2d 1, 511 NYS2d 216 [1986]; ***Spodek v Neiss***, 86 AD3d 561, 926 NYS2d 904 [2d Dept 2011]; ***Horwitz v 1025 Fifth Ave. Inc.***, 34 AD3d 248, 825 NYS2d 5 [1st Dept 2006]). Here, the complaint fails to set forth a statutory or other basis for recovering legal fees (*see* ***Culinary Connection Holdings v Culinary Connection of Great Neck***, 1 AD3d 558, 769 NYS2d 544 [1st Dept 2003], *lv denied* 3 NY3d 601, 782 NYS2d 404 [2004]; *cf.* ***Centennial Contrs. Enters. v East N.Y. Renovation Corp.***, 79 AD3d 690, 913 NYS2d 274 [2d Dept 2010])

As to plaintiff's cross motion for leave to serve the proposed amended complaint, generally leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, patently devoid of merit, or would prejudice or surprise the opposing party (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Nisari v Ramjohn***, 85 AD3d 987, 927 NYS2d 358 [2d Dept 2011]; ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). Prejudice is not shown by the belatedness of the amendment or the mere fact that the defendant will be exposed to greater liability (***Loomis v Civetta Corinno Constr. Corp.***, 54 NY2d 18, 23, 444 NYS2d 571 [1981]; *see* ***Abrahamian v Tak Chan***, 33 AD3d 947, 824 NYS2d 117 [2d Dept 2006]). Instead, to establish prejudice a defendant must show that it "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (***Loomis v Civetta Corinno Constr. Corp.***, 54 NY2d 18, 23, 444 NYS2d 571; *see* ***Whalen v Kawasaki Motors Corp., U.S.A.***, 92 NY2d 288, 680 NYS2d 435 [1998]; ***Trans-World Trading, Ltd. v North Shore Univ. Hosp. at Plainview***, 64 AD3d 698, 882 NYS2d 685 [2d Dept 2009]).

The causes of action set forth in the proposed amended complaint as against the individual members of the Board of Directors are palpably insufficient as a matter of law, as they do not include allegations that such defendants breached their fiduciary duties by engaging in unlawful discrimination, self-dealing or other misconduct and, therefore, are not entitled to the protection afforded by the business judgment rule (*cf.* ***Kleinerman v 245 E. 87 Tenants Corp.***, 74 AD3d 448, 903 NYS2d 356 [1st Dept 2010]). Further, as with the original complaint, there are no claims Falco committed any tortious acts

against plaintiff.

As to Kluber, the proposed amended complaint alleges in support of the eighth cause of action that, in March 2010, she "had the plaintiff arrested while the plaintiff was conversing with another resident in the parking lot of the administration building," that she "claimed he was not a member in good standing so he could be arrested for trespassing," and that such claim was "outside [her] authority . . . and done in furtherance of a conspiracy to target [plaintiff] for harassment." It sets forth the same allegations against Kluber in support of the thirteenth cause of action for "Violation of the New York State Constitution." To establish the liability of a civilian defendant for false arrest, a plaintiff must show more than that the defendant reported the crime or participated in the prosecution (*see* ***Rivera v County of Nassau***, 83 AD3d 1032, 922 NYS2d 168 [2d Dept 2011]). Instead, the plaintiff must show that the complainant "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (***Du Chateau v Metro-North Commuter R.R. Co.***, 253 AD2d 128, 131, 688 NYS2d 12 [1st Dept 1999]; *see* ***Donnelly v Nicotra***, 55 AD3d 868, 867 NYS2d 118 [2d Dept 2009]; ***Lupski v County of Nassau***, 32 AD3d 997, 822 NYS2d 112 [2d Dept 2006]). "A civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" (***Du Chateau v Metro-North Commuter R.R. Co.***, 253 AD2d 128, 131, 688 NYS2d 12; *see* ***Williams v Amin***, 52 AD3d 823, 861 NYS2d 118 [2d Dept 2008]; ***Baker v City of New York***, 44 AD3d 977, 845 NYS2d 799 [2d Dept 2007], *lv denied* 10 NY3d 704, 857 NYS2d 36 [2008]; ***Wasilewicz v Village of Monroe Police Dept.***, 3 AD3d 561, 771 NYS2d 170 [2d Dept 2004]). Thus, the proposed amended complaint, which does not allege that Kluber played an active role in the prosecution of plaintiff for trespass, is palpably insufficient to assert a claim against Kluber for false arrest (*see* ***Oszustowicz v Admiral Ins. Brokerage Corp.***, 49 AD3d 515, 853 NYS2d 584 [2d Dept 2008]; *cf.* ***Mesti v Wegman***, 307 AD2d 339, 763 NYS2d 67 [2d Dept 2003]). Furthermore, the vague allegation in the thirteenth cause of action that Kluber, along with the other defendants, acted "with malicious intent and in gross negligence to deprive the right of the plaintiff guaranteed under the constitution of New York" is insufficient to plead an action against her under 42 USC § 1983 (*see* ***Payne v County of Sullivan***m 12 AD3d 807, 784 NYS2d 251 [3d Dept 2004]; ***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]; ***Konrad v Incorporated Vil. of Val. Stream***, 270 AD2d 459, 705 NYS2d 77 [2d Dept], *lv dismissed* 95 NY2d 886, 715 NYS2d 377 [2000]; ***Webb v Thalenberg***, 81 AD2d 665, 438 NYS2d 357 [2d Dept 1981]).

As to the Association, "[p]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch-all' alternative for every cause of action that cannot stand on its own legs" (***Bassim v Hassett***, 184 AD2d 908, 910, 585 NYS2d 566 [2d Dept 1992]; *see* ***Epifani v Johnson***, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]). Here, the proposed amended complaint is palpably insufficient, as there are no allegations that the Association's actions were motivated solely by disinterested malevolence or that plaintiff suffered special damages (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466 [1984]; ***Ford v Fink***, 84 AD3d 725, 924 NYS2d 94 [2d Dept 2011]; ***Epifani v Johnson***, 65 AD3d 224, 882 NYS2d 234; ***Del Vecchio v Nelson***, 300 AD2d 277, 751 NYS2d 290 [2d Dept 2002]). Further, relying upon the same legal principles underlying the earlier determination that the Association was entitled to

summary judgment dismissing the original complaint against it, the Court finds that the proposed causes of action for breach of the covenant of quiet enjoyment, private nuisance, breach of contract, intentional infliction of emotional distress, and negligent infliction of emotional distress are palpably insufficient (*see* ***McGovern v Nassau County Dept. of Social Servs.***, 60 AD3d 1016, 876 NYS2d 141; ***Kaye v Trump***, 58 AD3d 579, 873 NYS2d 5; ***Silverman v Carvel Corp.*** 8 AD3d 469, 778 NYS2d 515 [2d Dept 2004]; ***Culinary Connection Holdings v Culinary Connection of Great Neck***, 1 AD3d 558, 769 NYS2d 544; *see* ***Linden v Lloyd's Planning Serv.***, 299 AD2d 217, 750 NYS2d 20; ***Frisch v Bellmarc Mgt.***, 190 AD2d 383, 597 NYS2d 962; *cf.* ***Gedney Commons Homeowners Assn., Inc. v Davis***, 85 AD3d 854, 925 NYS2d 181).

The proposed cause of action seeking damages for public nuisance also is palpably insufficient. A cause of action to abate a public nuisance "exists for conduct that amounts to a substantial interference with the exercise of the common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" (***532 Madison Ave. Gourmet Foods v Finlandia Ctr.***, 96 NY2d 280, 292, 727 NYS2d 49 [2001]). A public nuisance is considered a violation against the State, and is actionable by a private person only if it is demonstrated that the person seeking relief suffered special injury beyond that suffered by the community at large (***532 Madison Ave. Gourmet Foods v Finlandia Ctr.***, 96 NY2d 280, 292, 727 NYS2d 49; *see* ***Matter of Agoglia v Benepe***, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]). Here, the allegations of an alleged "conspiracy" by the Association and its Board members and employees to harass plaintiff by denying him the right to access the common areas and facilities of the Leisure Knoll community are insufficient to state a private cause of action for a public nuisance (*see* ***Haire v Bonelli***, 57 AD3d 1354, 870 NYS2d 591 [3d Dept 2008]; *cf.* ***Matter of Agoglia v Benepe***, 84 AD3d 1072, 924 NYS2d 428). As with Kluber, the allegations in the proposed amended complaint also are insufficient to state a cause of action against the Association for false arrest, as there is no claim the Association actively encouraged the criminal prosecution of plaintiff for trespass (*see* ***Oszustowicz v Admiral Ins. Brokerage Corp.***, 49 AD3d 515, 853 NYS2d 584; *see also* ***Leviev v Bebe Stores, Inc.***, 85 AD3d 736, 924 NYS2d 822 [2d Dept 2011]).

The ninth cause of action in the proposed amended complaint, which seeks to recover damages for "selective enforcement," is insufficient. In support of such equal protection claim, the proposed amended complaint alleges that defendants "targeted plaintiff and conspired against him to cause damage, injury and harassment," and that they "treated the plaintiff differently than other similarly situated residents." It further alleges that the fines imposed on plaintiff were different from the fines imposed on other residents, and that defendants fined plaintiff for violations that other residents were only given warnings. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents" (***Sunday Lake Iron Co. v Wakefield Tp.***, 247 US 350, 352, 38 S Ct 495 [1918]). The basic guarantee of equal protection is that government "will act evenhandedly in allocating the benefits and burdens prescribed by law and will not, without at least a rational basis, treat similarly situated people differently" (***Weaver v Town of Rush***, 1 AD3d 920, 768 NYS2d 58 [4th Dept 2003]). Further, to establish a claim for violation of equal protection sounding in selective enforcement, a plaintiff must show (1) that, compared with others similarly situated, he or she was selectively treated, and (2) that

such treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad-faith intent to injure another (***Bower Assocs. v Town of Pleasant Val.***, 2 NY3d 617, 631, 781 NYS2d 240 [2004]). Here, the proposed ninth cause of action does not allege a violation of 42 USC § 1983 or that the challenged conduct was committed by the Association "under color of state law" (*see* ***Webb v Thalenberg***, 81 AD2d 665, 438 NYS2d 357).

As to the tenth, eleventh and twelfth causes of action in the proposed amended complaint, to state a claim under 42 USC § 1983, "the plaintiff must allege, at a minimum, conduct by a person acting under color of state law which deprived the injured party of a right, privilege or immunity guaranteed by the Constitution or the laws of the United States" (***DiPalma v Phelan***, 81 NY2d 754, 756, 593 NYS2d 778 [1992]). Stated differently, a plaintiff asserting a Section 1983 claim must show that the wrongful conduct occurred as the result of a state-created right or privilege, or by a state-imposed rule of conduct, and that the party charged with the deprivation of a constitutionally-protected right is a state official "or someone whose conduct is otherwise chargeable to the state" (***Dahlberg v Becker***, 748 F2d 85, 89 [2d Cir 1984]). "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful'" (***American Mfrs. Mut. Ins. Co. v Sullivan***, 526 US 40, 50, 119 S Ct 977 [1999], *quoting* ***Blum v Yaretsky***, 457 US 991, 1002, 102 S Ct 2777 [1982]). Plaintiff's proposed complaint does not allege conduct by the Association that could reasonably be attributed to the State. Rather, the proposed causes of action under Section 1983 simply allege that, having "been granted the benefits and protection of New York State Not for Profit Corporation Law . . . Defendants are operating under color of state law in that they operate a Board of Directors that acts as [sic] a quasi-governmental and quasi-judicial function." A private actor's alleged abuse of a valid state law, however, does not constitute actionable state action for purposes of 42 USC § 1983 (*see* ***Lugar v Edmondson Oil Co.***, 457 US 922, 102 S Ct 2744 [1982]; ***Dahlberg v Becker***, 748 F2d 85; ***McWilliams v Catholic Diocese of Rochester***, 145 AD2d 904, 536 NYS2d 285 [4th Dept 1988]). The tenth, eleventh and twelfth causes of action, therefore, are palpably insufficient to state claims for relief under 42 USC § 1983.

However, the proposed fourteenth cause of action for a judgment extinguishing a lien allegedly placed against the condominium by the Association is not palpably insufficient. The proposed amended complaint alleges that on October 15, 2008, defendants placed a lien against plaintiff's condominium for the fines levied against him by the Board of Directors, that the Declaration only authorizes the Association to assert a lien against unit owners' real property for unpaid charges and expenses chargeable to the unit, and that the Association acted outside its authority be placing a lien against plaintiff's property for fines imposed for violating the community's rules and regulations (*cf.* ***Walker v Windsor Ct. Homeowners Assn.***, 35 AD3d 725, 827 NYS2d 214 [2d Dept 2006]). Similarly, the declaratory judgment actions set forth in the proposed fifteen and sixteenth causes of action, which seek declarations that the Association's Board of Directors does not have a right to place a lien against plaintiff's condominium for unpaid fines, and that the Board violated the Declaration and Rules and Regulations of the Association by classifying him as not a member in good standing and by suspending his membership privileges for a period of years, are not palpably insufficient. The Court notes that these two claims for declaratory relief, each of which is in the nature of an action for breach of contract, are not time-barred (*see generally* ***Solnick v Whalen***, 49 NY2d 224, 229, 425 NYS2d 68 (1980).

Finally, the seventeenth and eighteenth causes of action in the proposed amended complaint, which seek declaratory judgments that defendants made unauthorized capital expenditures, are palpably insufficient. A unit owner may, under common law, bring a derivative action on behalf of an unincorporated condominium association (*see* ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55). However, where, as in this case, the condominium association is a not-for-profit corporation, a derivative action is authorized only if brought by five percent or more of any class of current members, or by the same percent of the holders of capital certificates or of the owners of a beneficial interest in such certificates (Not-For-Profit Corporation Law § 623 [a]). Further, the complaint in such action must set forth "with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board [or] the reason for not making such effort" (Not-For-Profit Corporation Law § 623 [c]; *see generally* ***Barr v Wackman***, 36 NY2d 371, 368 NYS2d 497 [1975]). Here, the proposed amended complaint fails to include allegations showing plaintiff has standing to bring a derivative action against the Association (*cf.* ***Bernbach v Bonnie Briar Country Club***, 144 AD2d 610, 534 NYS2d 695 [2d Dept 1988], *appeal dismissed* 74 NY2d 715, 543 NYS2d 401 [1989]). It also fails to set forth efforts made to have the Board of Directors bring an action with respect to the alleged improper expenditures or an explanation for failing to make such a demand of the Board (*see* ***Glatzer v Grossman***, 47 AD3d 676, 849 NYS2d 300 [2d Dept 2008]).

Accordingly, leave to serve the proposed amended complaint annexed to the cross-moving papers is denied. However, plaintiff is granted leave to make a new motion for permission to serve an amended complaint against the Association asserting a claim for extinguishment of the lien as contained in the fourteenth cause of action and claims for declaratory relief as contained in the fifteenth and sixteenth causes of action of the proposed amended complaint submitted with the cross-moving papers. Leave to renew the motion to amend the complaint to assert such causes of action is extended only until 20 days after service of a copy of this order with notice of its entry.

Dated: 5/1/12

Peter H. Mayer
PETER H. MAYER, J.S.C.