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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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VERNON L. DUTTON, MARIA DUTTON, JOHN D. CUNDARI, FRANCES P. CUNDARI, BRUCE KAPP, CAROLYN KAPP, ROBERT P D'ANDREA and MAJORIE D'ANDREA,

Plaintiffs,

-against-

BOARD OF DIRECTORS OF NANCY LANE HOME OWNERS ASSOCIATION, INC.,

Defendants.

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DCM Part 6
Present:
Hon. Philip G. Minardo

DECISION AND ORDER

Index No. 102464/10

Motion Nos. 176-001
188-002

The following papers numbered 1 to 5 were fully submitted on the 29th day of March, 2012:

	Pages Numbered
Notice of Motion for Summary Judgment by Plaintiffs, with Supporting Papers and Exhibits (dated January 2, 2012)	1
Notice of Cross Motion for Summary Judgment by Defendants, with Supporting Papers and Exhibits (dated January 20, 2012)	2
Affirmation in Opposition by Plaintiff, with Supporting Papers and Exhibits (dated March 5, 2012)	3
Affirmation in Opposition by Defendants, with Supporting Papers and Exhibits (dated March 19, 2012)	4
Reply Affirmation by Defendants (dated March 26, 2012)	5

Upon the foregoing papers, plaintiffs' motion, inter alia, for summary judgment (Motion No. 176-001) is denied; defendants' cross motion for like relief (Motion No. 188-002) is granted.

Plaintiffs are a group of homeowners whose principal residences are located within the jurisdiction of Nancy Lane Homeowners Association, Inc. (hereinafter "HOA") (*see* Verified Complaint, para 4).[1] Plaintiffs comprise four of the twenty-three homeowners within the HOA. In the current action against the HOA's Board of Directors (hereinafter "defendants"), it is claimed, inter alia, that the undertaking of certain expenditures with association funds is/was outside the scope of defendants' powers as enumerated in the Offering Plan, the Declaration of Covenants, Easements, Restrictions, Charges and Liens (hereinafter "the Declarations"), HOA By-laws and its "House Rules". More specifically, plaintiffs allege that the expenditure of funds for the hiring of an engineer and the procurement of permits, designs and surveys in connection with a sewer connection project is unauthorized by said governing documents. In addition, plaintiffs deny defendants' authority to require the members of the association or to assess homeowners for the purpose (ultimately) of requiring the members to abandon their septic tanks and connect to the New York City public sewer system.

In this action, plaintiffs seek (1) a permanent injunction prohibiting defendants from the collection and expenditure of HOA funds to be used, inter alia, for permits, studies, designs, installation and connection to the New York City public sewer system; (2) an accounting of all assessments for the past three years; (3) a refund of unauthorized assessments allegedly collected by

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[1]To the extent relevant, in a prior Article 78 special proceeding initiated by the HOA along with other similarly situated homeowners associations (*see* Plaintiff's Exhibit "G", Order and Judgment dated December 2, 2003, *Jansen Ct Homeowners Assn, etc. v. The City of New York* , Index No. 15657/03, Supreme Court, Queens County), petitioners sought to annul a final determination of the City's Department of Environmental Protection directing them to abandon their existing septic/cesspool systems and connect their homes to the sewer system (id.). The petition was dismissed, and on appeal, the Appellate Division found that "[t]he plain language of the Administrative Code of the City of New York §27-901(e)(2)(b) clearly states that only homes whose property lines are within 100 feet of the sewer connection are required to connect to the public sewer. The code provision provides no exceptions for multiple homes on a single tract of land or for homes which are part of a homeowners association" (*Matter of Jansen Ct Homeowners Assn v. City of New York*, 17 AD3d 588 [2nd Dept 2005]). As a result of this ruling, only one homeowner/member of the subject HOA was required to connect to the New York City sewer system based on his or her location relative to the public sewer line.

defendants; (4) attorneys fees; and (5) damages for breach of contract.

In opposition, defendant cross-moves for summary judgment dismissing the complaint and a declaration that: (1) the hiring of an engineer is protected by the business judgment rule; (2) plaintiffs' demand for an accounting is moot as they are only entitled to a balance sheet and financial statement for the last three years, which has already been provided; and (3) special assessments held in reserve accounts for future improvements such as a sewer connection project are protected by the business judgment rule.

In support of these motions, the parties have submitted are copies of the governing documents, i.e., Offering Plan, Declarations, By-laws and House Rules for the HOA (*see* Plaintiffs' Exhibit "A", Defendant's Exhibit "A"), the relevant parts of which will be addressed as required.[2]

Also before the Court is the affidavit of James Ruggiero, defendant's treasurer, who attests that the Board would not proceed with any sewer installation project without the required percentage of homeowners support as provided in the governing documents (*see* Affidavit of James Ruggiero). In addition, defendant has attached a copy of the minutes of the HOA meeting of July 20, 2010, where the homeowners agreed by majority vote to obtaining an engineering plan and survey in order to determine the feasibility of making a sewer connection (*see* Defendant's Exhibit "H").

It is well settled that in order to establish its entitlement to injunctive relief, a party must establish, at a minimum, (1) a meritorious claim, (2) irreparable injury in the absence of the granting of an injunction, and (3) a balance of the equities in its favor (*cf.* CPLR 6301*; Di Fabio v. Omnipoint Communications, Inc*, 66 AD3d 635, 636 [2nd Dept 2009]). Of particular relevance here is the

[2] Since all of these documents were part of the same transaction, they may be regarded as integrated documents which were intended to be read together (*see generally Borress & Borress LLC v. CSJ LLC*, 27 AD3d 287, 288 [1st Dept 2006]).

second requirement, since "irreparable injury," for purposes of equity, regularly has been held to mean any injury for which money damages are insufficient (id. at 636-637). Conversely, where, as at bar, plaintiffs have failed to demonstrate the accretion of any non-economic damages, there is no entitlement to injunctive relief (*see Borress & Borress LLC v. CSJ LLC*, 27 AD3d at 288; *Arm v. 2148 Ocean Ave, LLC*, 31 AD3d 355 [2nd Dept 2006]). Notably, in this case, plaintiff Vernon Dutton testified at his deposition that the purpose of bringing this lawsuit was to ask defendants "to do the proper assessment, and to refund that money that's [sic] been illegally collected from the homeowners" (*see* EBT of Vernon Dutton, p 60). As a result of this focus on economic issues, injunctive relief at this stage of the proceedings is wholly unwarranted, and any untoward conduct on defendants' part may be fully redressed by an award of monetary damages.

This issue resolved, there is ample authority for the proposition that the business judgment rule is fully applicable to the actions of a condominium or housing association's board of directors (*see Strathmore Ridge Homeowners Assn, Inc v. Mendicino*, 63 AD3d 1038, 1039 [2nd Dept 2009]). Hence, in reviewing a board's exercise of authority, absent legitimate claims of fraud, self-dealing, unconscionability or other misconduct, the court is enjoined to limit its inquiry to whether the challenged action was authorized, made in good faith and taken in furtherance of the best interests of the homeowners association (*see Skouras v. Victoria Hall Condominium*, 73 AD3d 902, 903-904 [2nd Dept 2010]). This limited score of review has been deemed sufficient to protect the board's business decisions and managerial authority from indiscriminate attack, while permitting a court to review and correct alleged improprieties (*see Cababe v. Estates at Brookview Homeowner's Assn, Inc.* 52 AD3d 557, 558-559 [2nd Dept 2008]). In any event, it is undisputed that the board of directors is legally entitled to enforce the bylaws, rules and regulations of the HOA against individual homeowners (*see* Real Property Law §339-j; *Board of Mgrs of Stewart Place Condominium v. Bragato*, 15 AD3d 601 [2nd Dept 2005]).

At bar, defendants have satisfied met their prima facie burden of establishing that the board acted within the scope of its authority by submitting copies of its governing documents, the relevant minutes of two special meetings[3], and the sworn affidavit of the board's treasurer (*see Bay Crest Assn, Inc. v. Paar,* 72 AD3d 713 [2nd Dept 2010]; *Skouras v. Victoria Hall Condominium*, 73 AD3d at 903). Of especial relevance on this issue are Article IV, §2 of the Declarations, which invests the Board with the power to fix annual assessments in an amount sufficient to promote, inter alia, the health, safety and welfare of the residents "related to the use... of the Common Area including... repair, replacement and additions thereto" (id. at 1[b]), and Article III, §3(ii) thereof, reserving to the exclusive benefit of the association the right to connect, e.g., to such "sewers and drainage lines [as] may from time to time to be in or along the street... or other portions of the Common Areas". In furtherance of this authority, the above section also provides for the creation of "perpetual easements" for the construction, maintenance and repair of such sewers "in and over each Lot". Finally, Article IV, §1(a) of the by-laws specifically obligates all unit owners to pay such special assessments for capital improvements as may "from time to time" be "fixed, established and collected" by the board, the proceeds of which are to be deposited into a "capital reserve fund" to be kept separate and apart from all other funds of the association (Article VIII, §8.05).

In opposition, plaintiff's conclusory and speculative allegations of, e.g., misconduct by the board are legally insufficient to raise triable issues of fact regarding either its authority or good faith in acting upon the majority vote of the members of the HOA (*see Bay Crest Assn v. Paar,* 72 AD3d at 714; *Kaung v. Board of Mgrs of Biltmore Towers Condominium Assn*, 70 AD3d 1004 [2nd Dept 2010]).

[3] Insofar as it appears, at special meetings held on May 26, 2010 and again, on July 20, 2010, a majority of the homeowners agreed to go forward with the engineering survey to determine the feasibility of the proposed sewer system (*see* Defendant's Exhibits "G", "H", "I").

In addition, defendants properly note plaintiffs' lack of standing to assert their claim of damage to the common interest outside the context of a derivative cause of action (*see DiFabio v. Omnipoint Communications, Inc*, 66 AD3d at 637; *see generally Cardo v. Board of Managers, Jeffson Village Condo 3*, 67 AD3d 945, 946 [2nd Dept 2009]).

Plaintiffs have also failed to demonstrate their right to an accounting. Rather, it appears that they have already been provided with copies of the balance sheets and financial operating statements for the last three fiscal years to which they are entitled (*see* Article VIII, §8.03 of the By-laws [Defendant's Exhibit "F"]).

Accordingly, it is

ORDERED that plaintiffs' motion, inter alia, for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is granted to the extent that the complaint is dismissed; and it is further

ORDERED that the balance of defendant's motion has been rendered academic by the determination herein; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

/s/ Philip G. Minardo

J.S.C.

DATED: May 23, 2012