Board of Mgrs. of the Onyx Chelsea Condominium v 261 West LLC
2012 NY Slip Op 33394(U)
March 9, 2012
Sup Ct, New York County
Docket Number: 104912/2010E
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice PART 12

Index Number : 104912/2010
BD OF MGRS THE ONYX
vs.
261 WEST LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 104912/2010E
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

Dated: 3/9/2012

Paul G. Feinman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

THE BOARD OF MANAGERS OF THE ONYX CHELSEA CONDOMINIUM AND THE ONYX CHELSEA CONDOMINIUM,

Plaintiffs,

-against-

261 WEST LLC,

Defendant.

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Index Number 104912/2010E
Mot. Seq. No. 003

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Papers considered in review of the e-filed motion and cross motion:	**E-Filed Document Numbers:**
Notice of motion, Anderson affirm. and annexed exhibits A - S, and plaintiff's memo. of law	43 - 44
Notice of cross motion, Haymes Affidavit, Herbst affirmation and exhibits A - R and defendant's memo. of law	47 - 48
Patten reply affidavit, Anderson reply affirm. and exhibits T - V, and memo. of law in reply and opposition to cross motion	50 - 53
Haymes reply affidavit in further support of cross motion, Stanziale affirm. and annexed exhibits S - W	54 - 56
Transcript of oral argument	57

PAUL G. FEINMAN, J:

Plaintiff, the Board of Managers of the Onyx Chelsea Condominium and the Onyx Chelsea Condominium (collectively referred to here as "plaintiff") moves for summary judgment on the first cause of action of the complaint, sounding in breach of contract, and the third cause of action directing an award of attorneys' fees, late fees and interest, and to dismiss the first, second and eighth counterclaims contained in the answer and directing, pursuant to CPLR 603, severance of all five of defendant's remaining counterclaims. Defendant, 261 West LLC,

opposes and cross-moves for partial summary judgment on its second counterclaim for breach of contract and its eighth counterclaim for attorney's fees, costs and expenses, plus interest thereon. Plaintiff opposes the cross motion.

For the reasons provided below, the motion and cross motion are each denied in their entirety.

Background

I. General background

This action is one of several pending before this court related to the Onyx Chelsea Condominium (the "Condominium") in New York, New York. A more detailed account of the background facts may be found in the court's prior decision and order in this action, *The Bd. of Mgrs. of the Onyx Chelsea Condominium and the Onyx Chelsea Condominium v Chelsea Condominium*, Sup Ct, NY County, Jan. 7, 2011, Feinman, J., index no. 104912/2010, mot. seq. no. 001, and also in the recent decision and order of this court in another matter commenced by the Board against defendant, titled *The Bd. of Mgrs. of the Onyx Chelsea Condominium v 261 West LLC, et. al.*, Sup Ct, NY County, March 5, 2012, Feinman, J., index no. 114230/2010, mot. seq. nos. 001, 002, 005 and 006). The instant action centers on the Board's[1] allegations of unpaid common charges and special assessments against the sponsor of the Condominium, defendant, 261 West LLC ("Sponsor"), and Sponsor's claims that certain actions taken by the Board with respect to the allocation of common charges and special assessments were in violation of the provisions of the Condominium's Offering Plan, Declaration and By-Laws.

[1] As used in this decision, the "Board" refers to the five Residential Unit Owner members of the Condominium's board of managers.

The Condominium a luxury apartment building comprised of 52 Residential Units and two Commercial Units. Sponsor owns the two Commercial Units, known as the "Retail Unit" and "Community Facility Unit." Plaintiff is the board of managers of the Condominium (the "Board"). Under the Condominium's Offering Plan, the Board consists of 5 members elected by the Residential Unit Owners and two members appointed by the Commercial Unit Owners.

II. Condominium's governing documents

As an initial matter, the parties have not filed complete copies of the Offering Plan or the Condominium's Declaration under the motion sequence number associated with the instant motion and cross motion. However, these documents were previously submitted as exhibits in connection with motion sequence number 001, e-filed as documents # 28-1 and 43-2. Moreover, the parties have submitted as exhibits under this motion sequence number the affidavits, affirmations and memorandum that were submitted in connection with the prior motion. As such, the court finds no prejudice would result from deeming the previously filed Declaration and Offering Plan as part of the record considered under motion sequence number 003.

The Condominium's Declaration and By-Laws set forth the relevant rules that govern the Condominium's affairs, and thus are essential to the resolution of the issues involved in the instant motion and cross motion. The Condominium's Offering Plan may also be relevant in itself, of in assisting the court with interpreting the By-Laws and Declaration. As such, the court must begin with a description of those documents.

Throughout the Condominium's governing documents, different rules are put in place with regard to the Commercial Units and the Residential Units. For example, in the "Special Risks" portion of the Offering Plan, at paragraph 19, it provides that no amendment,

modification, addition or deletion of the Declaration, By-Laws or any Residential Rules and Regulations, "shall be effective (a) against Sponsor unless Sponsor has given its written consent thereto, or (b) to modify the permitted uses of a Commercial Unit or to adversely effect a Commercial Unit Owner unless the affected Commercial Unit Owner has given its prior written consent thereto ..." (Doc. 28-1, ex. 4, Plan at 5). Exhibit C to the Plan defines "adverse effect" to include, among other things, "any action or proposed change with respect to any Unit Owner ... that such action or change could, if realized (i) materially increase the Common Charges payable by such Unit Owner ...." Page 15 of the section titled "Introduction to the Plan," provides that "[c]ertain budgeted items, as set forth in the First Year's Budget, are allocated between the Residential Units and the Commercial Units on a basis which reflects actual benefit and/or use associated with that particular item of expense or exclusive control of particular Common Elements" (Doc. 24-1, ex. C, Plan at 15). It further states that the "...Board may not modify these allocations without the consent of a Majority of the Commercial Unit Owners" (*id.*). Schedule B to the Plan sets out the projected budget for the Condominium for its first full year in operation (Doc. 24-1, ex. D, Plan at 43-51). The accompanying "Notes to Schedule B" indicate that the "allocation of General Common Expenses to be borne by the Retail Unit and Community Facility Unit have been allocated on the basis of the Retail Unit and Community Facility Unit respective Percentage of Common Interest, 5.7835% and 1.0596%, except as otherwise noted" (*id.* at 44). The Notes then provide several exceptions where the Commercial Units are to allocated based on factors other than their percentage of Common Interest to reflect an estimation of actual use or the Residential Unit's exclusive access. In the section titled "Commercial Units," the Plan states that "[e]ach of the Commercial Unit Owners will be obligated to pay their portion of the

Common Charges in accordance with the Schedule B allocations ...," and that "[c]ertain budgeted items (See the 'Notes to Schedule B' for further details) are allocated between the Residential Units and the Commercial Units on a special basis which reflects actual benefit and/or use associated with that particular item of expense or exclusive control of particular Common Elements" (Doc. 24-1, ex. E, Plan at 65-66). Next, it provides a "summary of certain additional rights and obligations of the Commercial Unit Owners to the use and ownership of the Commercial Units ...," which includes "(v) the Condominium Documents may not be amended or modified so as to adversely affect a Commercial Unit Owner without the prior written consent of the affected Commercial Unit Owner ...," and "(ix) any decisions by the Condominium Board which affect a Commercial Unit may be made only with the consent of the affected Commercial Unit Owner" (*id.* at 66). The Plan again reiterates, in a section called "Common Charges: Determination and Assessment," that Common Expenses are "allocated among Unit Owners in proportion to the Unit's respective Common Interest in the case of Residential Units or based on usage of services and facilities as set forth in Schedule B in the case of Commercial Units" (Doc. 24-1, ex. F, Plan at 107). Finally, it should be noted that each purchasing agreement entered into by the Unit Owners incorporated the terms of the Offering Plan.

Like the Offering Plan, the By-Laws contemplate a governance structure for the Condominium that gives the Commercial Unit Owners power to act, or prevent the Board from acting, with respect to certain matters. Section 6.1 (A) of the By-Laws grants the Board authority to prepare and adopt a budget, determine the aggregate amount of Common Charges necessary to meet the Common Expenses, and to allocate and assess such Common Charges amongst the Unit Owners "*in accordance with allocations set forth in the First Year's Budget*" (Doc. 43-3, ex. O,

By-Laws at 315 [*emphasis added*]). As mentioned above, the First Year's Budget allocated certain expenses to reflect "actual benefit and/or use." Although the Board may, "at its sole discretion, from time to time increase or decrease the amount of Common Charges allocated to the Units and payable by the Unit Owners ...," and "may modify its prior determination of the Common Expenses for any fiscal year so as to increase or decrease the amount ...," the By-Laws expressly state that "no such revised determination of Common Expenses shall have a retroactive effect ..." (*id.* at 315). In addition, section 6.1 (C) grants the Board the right, subject to the restrictions found in section 2.5, to levy special assessments to meet the Common Expenses. Section 2.5 (B) (ii), in turn, imposes a limitation of the Board's power with respect to determinations which affect only the Commercial Units and do not materially and adversely affect the use and operation of the Residential Units, reserving such determinations for the two members of the Board designated by the Commercial Unit Owners. "All Special Assessments relative to the General Common Elements shall be levied against all Unit Owners in proportion to their respective Common Interests and all Special Assessments related to the Residential Units Owners in proportion to their Residential Common Interests ..." (*id.* at 315). However, section 6.1 (E) notes that Common Expenses have been allocated amongst the Residential Units, in the aggregate and the Retail Unit and the Community Facility Unit, "on the basis of usage rather than Common Interest" (*id.* at 316). It adds, "[t]he First Year's Budget sets forth the percentage of each line item, if any, to be paid for by the Residential Units and the Commercial Units, which percentages are deemed presumptive evidence of reasonableness" (*id.*). Finally, section 6.1 (E) expressly states "[t]he Condominium Board may not modify these allocations without the consent of a Majority of the Commercial Unit Owners. Any new line items which may be added

to [the] budget by the Condominium Board in the future shall be paid for on the same basis" (*id.*).

III. Facts leading to this dispute

Pursuant to the By-Laws, the Condominium was initially governed by the "Initial Board" comprised of three individuals designated by Sponsor: Evan Haymes; Matthew Bronfman; and Edward Curty. Subsequently, several Residential Unit Owners, in their individual capacities, commenced an action in this court against Sponsor and the individual Sponsor-designated Board members to compel turn over of control to the Residential Unit Owners as provided in the By-Laws, titled *Ackerman v 261 W. LLC*, index no. 113176/2009. That action was disposed of by a stipulation of discontinuance with prejudice entered into after Sponsor agreed to call the first Unit Owner Annual Meeting, on October 8, 2009. At that time, a new Board was elected consisting of five Residential Unit Owner members and two members appointed by Sponsor, on behalf of the Commercial Units.

Shortly before control of the Board turned over as a result of the October 8, 2009 meeting, Sponsor's principal and then-president of the Board, Evan Haymes, sent a copy of a letter to the Condominium's managing agent, dated October 1, 2009, stating that a review of the Condominium's financials, certified by its independent auditor, showed that Sponsor was owed $88,519.00 by the Condominium and the Condominium was owed $32,950.00 by Sponsor, for a net difference of $55,569.00 (Doc. 43-2, Oct. 1 letter excerpt). "In view of [the Condominium's] present limited liquidity," Haymes "accept[ed]" on behalf of the Condominium, Sponsor's proposal "to deem the net difference of $55,569.00 as prepaid common area and/or assessment charges for the Retail Unit and Community Facility" (*id.*). He added that "[a]s of December 1,

2009, these monthly charges are respectively, $2,265.17 and $394.42. [The accepted proposal would] approximate 21 months of such charges and [would] provide a transition period for the Association to adjust its liquidity" (*id.*).

On November 17, 2009, a meeting was held of the newly-elected Board. A draft of the "minutes" of this meeting, which were prepared by Steven. S. Anderson, Esq. of Anderson & Ochs, LLP, plaintiff's counsel in this and other pending actions against Sponsor, shows that after Anderson discussed with the Board the Common Charges owed and historically paid by the Commercial Unit Owners, the Board voted to authorize Anderson to "clarify and advise accordingly as to [his] view that the proper and lawful amount of common charges owed by the Commercial Unit [O]wners, under the Offering Plan, is 6.8431% of total common charges," and "to take any and all appropriate legal action to collect any arrears owed, at the amount and allocation ..." of 6.8431% (Doc. 47-3, ex. A, Draft Nov. 2009 minutes at 2). This proposal was approved by the five Residential Unit Owners and opposed by the two Commercial Unit Owners. The Board also voted, five to two, in favor of "reimburs[ing] unit owners individually for all attorneys' fees they incurred as expended in the lawsuit *Ackerman et. al. v 261 West LLC, et. al.*, Sup. Ct., N.Y. Co.[,] pursuant to authority of counsel's November 17, 2009 letter to the Board" (*id.*).

Thereafter, by letter dated December 11, 2011, Anderson wrote directly to Haymes, copying Sponsor's counsel, claiming that based on his review of the Condominium documents and applicable law, the Commercial Unit Owners have "been paying unlawfully only approximately 4.2% of total common charges, rather than 6.8431%, the Commercial Units' percentage of Common Interests as specified in Schedule A of the Plan" (Doc. 47-3, ex. B, Dec.

11 letter). Anderson again wrote directly to Haymes on March 4, 2010, emphasizing that Sponsor could not withhold Common Charges on the basis of any "credit" granted by virtue of Haymes's October 1, 2009 letter (Doc. 47-3, ex. D, Mar. 4 letter). He claimed that $13,268.24 was due from the Commercial Units for February and March of 2010, and that this amount reflected both the recent increases for Commercial Unit Owners in monthly Common Charges, a special assessment, and $100 in late charges. Anderson also claimed that an additional $45,897.31 was owed for underpaid Common Charges from 2007 through January of 2010 (*id.* at 2).

IV. Procedural background

This action was commenced by plaintiff on or around April 14, 2010. The complaint asserts the following three causes of action: (1) breach of contract, based on Sponsor's failure and refusal to pay Common Charges and special assessments and other monies due pursuant to the By-Laws; (2) a declaratory judgment that any portion of the By-Laws, including section 6.1 (E), that purports to give the Commercial Unit Owners authority to veto any determination of the Board as to the allocation of Common Charges is void and unenforceable; and (3) recovery of attorneys' fees and other charges pursuant to section 6.4 (A) and (B) of the By-Laws and §§ 339-z and 339-aa of the Condominium Act.

Sponsor served its answer, dated May 24, 2010, containing five affirmative defenses and the following eight counterclaims: (1) a declaratory judgment that the reallocation of November 17, 2009, is void and unenforceable, so that any demands by the Board based on this reallocation are also void and unenforceable; (2) breach of contract for plaintiff's breach of the terms of the Offering Plan; (3) monetary damages in the amount of $55,569.61 representing payments made

by Sponsor while in control of the Board that were the Condominium's obligations; (4) conversion based on the Condominium's refusal to turn over $6,630.02 received from an insurance company for a claim filed by Sponsor; (5) permanent injunctive relief ceasing any further Board meetings or actions without the required notice to all members; (6) a declaratory judgment that all actions taken at meetings of the Condominium's Board for which all Board members were not noticed are deemed ultra vires and null and void; (7) breach of contract for wrongful exclusion of Commercial Unit Members from Board meetings; and (8) recovery of attorney's fees and expenses related to defendant's enforcement of its rights under the Offering Plan.

On June 25, 2010, Sponsor moved for partial summary judgment on its first counterclaim for a declaratory judgment, and, on July 28, 2010, plaintiff cross-moved for summary judgment on their breach of contract and declaratory judgment claims. Before those motions were fully submitted, plaintiff moved, by order to show cause signed August 20, 2010, for an order directing Sponsor to continue to pay monthly common charges during the pendency of the action and restraining Sponsor from entering into any future leases for the Commercial Units while it was in default. However, at oral argument on the order to show cause, the parties entered into a stipulation, which was so-ordered on October 13, 2010, pursuant to which plaintiff agreed to withdraw the order to show cause, subject to its reservation of certain rights, in recognition of the fact that Sponsor had paid common charges and special assessments in the amount of $68,231.96, and was current on its obligations from February of 2010 (Doc. 47-3, ex. K, Stip). Plaintiff agreed not to take any actions to hold Sponsor in default provided that, pending the court's decision on the summary judgment motions, Sponsor would pay all charges going

forward at 6.8341% of common interests as calculated under the revised allocation formula. The stipulation also shows that a late fee of $300 was removed as against the Community Facility Unit.

Subsequently, on January 7, 2011, the court rendered its decision and order on the pending motion and cross motion for summary judgment, which denied Sponsor's motion and granted, in part, plaintiff's cross motion, and directed the parties to settle order (*The Bd. of Mgrs. of the Onyx Chelsea Condominium and the Onyx Chelsea Condominium v Chelsea Condominium*, Sup Ct, NY County, Jan. 7, 2011, Feinman, J., index no. 104912/2010, mot. seq. no. 001). Subsequently, the court signed the order and judgment on February 23, 2011, which denied Sponsor's motion for partial summary judgment in its entirety and granted plaintiff's cross motion for summary judgment on the second cause of action for a declaratory judgment to the extent that it adjudged and declared: (1) that after the Initial Control Period, the Board became vested with the power to assess "common expenses" in accordance with Real Property Law § 339-M; (2) "that pursuant to resolution ...by the Board, at its December 15, 2009 meeting ... (i) [e]ffective February 1, 2010, the lawful share of total Condominium common charges was, and is, in accordance with the Commercial Unit Owners' common interests ... (ii) [t]he special assessment ...approved at the December 15, 2009 Board meeting was, and is, effective as of February 1, 2010" (*The Bd. of Mgrs. of the Onyx Chelsea Condominium and the Onyx Chelsea Condominium v Chelsea Condominium*, Sup Ct, NY County, Feb. 23, 2011, Feinman, J., index no. 104912/2010, Order and Judgment). The branch of plaintiff's cross motion for summary judgment on its first cause of action for breach of contract was held in abeyance.

In reviewing the papers submitted in connection with the instant action, particularly the

By-Laws, the court has been compelled to reexamine some of the determinations made in its January 7, 2011 decision and order. The court will address these issues in greater detail below in section IV.

Analysis

I. Plaintiff's motion for summary judgment

A movant seeking summary judgment in its favor has the initial burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant has made such a showing, the burden shifts to the opposing party who, to defeat the motion, must demonstrate the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, if the movant fails to meet its initial burden, the motion will be denied regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

1. *First cause of action for breach of contract*

Plaintiff's first cause of action alleges that Sponsor has "breached the By-Laws" by its alleged failure and refusal to pay Common Charges and Special Assessments pursuant to the By-Laws. A prima facie showing of a cause of action sounding in breach of contract requires plaintiff to show through competent evidence each of the following elements: (1) the existence of an enforceable agreement between the parties; (2) performance of the contract by the injured party (3) a breach by the other party; and (4) damages resulting from the breach (*see Noise in the Attic Productions, Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004]).

Here, plaintiff's motion fails because it has not provided sufficient evidence as to the

second element. Although the Board is vested with the power to determine the amount of Common Charges to be imposed upon all Unit Owners, it cannot modify how these Common Charges are allocated as between the Commercial Unit Owners and Residential Unit Owners so as to increase the percentage charged to the Commercial Unit Owners, unless a majority of the Commercial Unit Owners consents to the change (*see* By-Laws, sec. 6.1 [A], [E]). It is undisputed that no such consent was provided. Furthermore, to the extent the complaint seeks to compel the Commercial Unit Owners to pay $45,897.31 for "underpaid Common Charges and related charges from November 2007 through January 2010," based on the difference between the percentage charged to the Commercial Unit Owners under the original allocation of Common Charges set forth in the Offering Plan and the revised allocation approved by the Board in its December 2009 resolution, such claim not only fails under both section 6.1 (E), but also under section 6.1 (A) of the By-Laws, which prohibits the Board from retroactively applying any charges as a result of revisions that are made to the amount of Common Expenses for any previous time period (Doc. 43-3, ex. O, By-Laws at 315).

The court notes that although generally the Board's actions are protected from judicial scrutiny under a rule analogous to the business judgment rule, the Board's reallocation of Common Charges in violation of the express requirements of the By-Laws is not entitled to such deference because it was performed outside of the authority granted to the Board in the Condominium's governing documents (*see Bd. of Mgrs. of the 229 Condominium v JPS Realty Co.*, 308 AD2d 314, 316 [1st Dept 2003] [it "is well established that the business judgment rule does not apply where the board fails to act within the scope of its authority ..."]); citing *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]). Moreover, to the extent the

Board's reallocation was intended to, and had the effect of, raising the amount of Common Charges imposed upon the Commercial Unit Owners while decreasing the percentage owed by the Residential Unit Owners, the court notes that the business judgment rule does not shield boards from actions that deliberately single out individual unit owners for harmful treatment (*see Perlbinder v Bd. of Mgrs. of the 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009]).

However, although under the By-Laws plaintiff could not increase the proportion of Common Charges levied against the Commercial Unit Owners absent their consent, the Board was nonetheless empowered to impose Common Charges against all Unit Owners in accordance with the allocations set forth in the First Year's Budget of the Offering Plan (By-Laws, sec. 6.1 [A] [iii]). The Board also did not need to obtain prior consent from the Commercial Unit Owners prior to increasing by 5% the total amount being levied upon all Unit Owners (By-Laws, sec. 6.1 [A] [ii]). Even limiting plaintiff's claims to comply with these provisions, summary judgment is still not warranted because there are material issues of fact as to whether the Board acted outside of its authority in assessing expenses related to the Residential Common Elements and Limited Residential Common Elements to all Unit Owners, thereby requiring the Commercial Unit Owners to pay for a portion of the Residential Units' expenses in violation of the condominium documents (*see Bd. of Mgrs. of the 229 Condominium*, 308 AD2d at 316).

Furthermore, Sponsor has raised additional issues of fact regarding a claimed "credit" granted to the Commercial Unit Owners towards future Common Charges and special assessments, which was evidenced by the October 1, 2009 letter referenced above. Contrary to plaintiff's contention, Sponsor is not merely seeking to avoid payment by asserting a claim

prohibited by section 6.2 (E) of the By-Laws for diminution or abatement as a result of "... inconvenience or discomfort arising from ..." the failure or interruption of service of utilities, making repairs or improvements to a Unit or the Common Elements, or actions taken "by the Condominium Board or the officers of the Condominium to comply with Law." In contrast, Sponsor's claim is not that it should not have to pay, but that it already has paid because of the "credit."

Although the October 1, 2009 transaction may not be entitled to the deferential standard analogous to the business judgment rule that generally applies to a board's actions because the circumstances in which the "credit" was granted involved Haymes, as then-president of the Condominium, accepting the proposal of Haymes, as Sponsor's principal, thus involving an inherent conflict of interest, (*see Bd. of Mgrs. of the 229 Condominium*, 308 AD2d at 316), this alone does not require the court to reach the conclusion that the "credit" was necessarily invalid. Sponsor has offered evidence in support of Haymes's contention that issuing the "credit" was in the best interests of the Condominium in light of the Condominium's limited liquidity at the time, as well as the conclusion reached by Sponsor, the former managing agent and the Condominium's accountant that the Condominium owed Sponsor an estimated $55,569.00 for expenses paid by Sponsor during the Initial Control Period that were properly chargeable to the Condominium. This contention is not purely conclusory, and Sponsor has previously submitted documentation describing expenses that were paid by Sponsor but should have been paid by the Condominium, for example, $78,519.00 paid by Sponsor for the Condominium's electricity, and a further $10,000.00 for start up capital (Doc. 15-1, exs. D-F). While, even prior to commencement of this action, plaintiff has consistently denied the validity of this "credit," these

denials have largely been conclusory and are not based on any specific proof that Sponsor was not owed any money by the Condominium at the time the "credit" was issued in October of 2009. As such, the existence of this "credit" is a question of fact that precludes an award of summary judgment. Accordingly, the first branch of plaintiff's motion for summary judgment on its breach of contract claim is denied.

2. *Third cause of action for attorney's fees, late fees and interest*

In light of court's denial of plaintiff's motion for summary judgment on its breach of contract cause of action, any award of attorney's fees at this time would be inappropriate because plaintiff has not met its burden to demonstrate that it is the prevailing party on the central claims advanced in this action, and that it has received substantial relief as a consequence (*see Bd. of Mgrs. of the 229 Condominium*, 308 AD3d at 317; *Bd. of Mgrs. of 55 Walker St. Condominium v Walker Street, LLC*, 6 AD3d 279, 280 [1st Dept 2004]). Even if plaintiff had shown that it has prevailed on some portion its claims, it has not shown the absence of issues of fact regarding its claimed attorney's fees. Plaintiff admitted in the reply affirmation of its attorney, Anderson, that at least some of the tasks referred in Anderson's first affirmation and supporting documentation as proof of its entitlement to attorney's fees in the amount of $113,213.10, were incorrectly included. Specifically, Anderson conceded that $2,507.50 was inadvertently submitted.

Plaintiff has also failed to meet its initial burden with respect to its claim for interest under its third cause of action because any such claims are contingent upon a determination as to Sponsor's liability for Common Charges and special assessments, which, in turn, requires the resolution of the outstanding issues regarding the purported "credit" granted to Sponsor towards future charges.

For the same reasons, the court need not reach plaintiff's claim for late fees pursuant to the By-Laws, other than to note that the evidence submitted by the parties raises issues of fact as to, among other things, the rate at which any late fees should be charged. Although plaintiff claims entitlement under the By-Laws at section 6.4 (B) to collect a late of $150 per month for Common Charges, the record also contains a memorandum, dated November 3, 2008, from the Condominium's managing agent at the time, that notified all Unit Owners that it would be instituting a late payment policy that would impose a fee of $50.00 for payments that were not made within 10 days of the due date. Similarly, the account history documentation submitted by plaintiff and demand letters sent by plaintiff's attorney to Sponsor on several occasions all apply a late fee of $50.00 (Doc. 47-3, ex. D, Mar. 2010 letter). Additional issues are raised by the parties' October 2010 "stand-still" stipulation to the extent specifically provides that a "$300 late charge [was] to be removed on [the] Community Facility Unit," (Doc. 47-3, ex. K, Oct. 2010 stip). Accordingly, the branch of plaintiff's motion that seeks summary judgment on its third cause of action is denied.

3. ***Plaintiff's motion to dismiss/severe the first, second and eighth counterclaims***

Plaintiff also moves to "dismiss" Sponsor's first, second and eighth counterclaims, without specifying whether it seeks dismissal under CPLR 3211 or CPLR 3212. Plaintiff argues that the first and second counterclaims must be dismissed because each relies upon Sponsor's allegation that the Board unlawfully modified the Commercial Unit Owners' allocation of Common Charges, but these "claims [have been] flatly and definitively rejected by the Decision and Order and Judgment" (Doc. 44, Plaintiff's memo. of law at 11). However, as described in greater detail below, and implicit in the court's determination above that plaintiff was not entitled

to summary judgment on its breach of contract claim, the court erred in its January 7, 2011 decision and order to the extent that it held that the Board was empowered to modify the allocation formula set forth in the First Year's Budget without complying with the express requirement found in the By-Laws and other Condominium documents that the Board must obtain the consent of the majority of Commercial Unit Owners for any such modification. Accordingly, because plaintiff offers no other arguments or evidence in support of dismissal, the branch of plaintiff's motion seeking dismissal of Sponsor's first and second counterclaims is denied.

Plaintiff next argues that Sponsor's eighth counterclaim for attorney's fees must be dismissed because no provision in the By-Laws affords Commercial Unit Owners a right to attorney's fees if successful in litigation (Doc. 44, Plaintiff's memo. of law at 11). This argument overlooks sections 9.2 (B) and 9.4 of the By-Laws, which, respectively, give the Commercial Unit Owners the right to bring an action to enjoin, abate, or remedy the continuation or repetition of any violation of the rights granted to the Commercial Unit Owners, and provides for the payment of all sums of money expended, and all costs and expenses incurred, by the Commercial Unit Owners in connection with any such action. Furthermore, plaintiff cannot establish as a matter of law that Sponsor has not, or cannot, prevail on the central claims of this action. Accordingly, the branch of plaintiff's motion seeking dismissal of Sponsor's eighth counterclaim is denied.

Finally, plaintiff argues that the remaining five counterclaims should be severed in the interest of judicial economy, and to avoid further delay in entering summary judgment in plaintiff's favor (Doc. 44, Plaintiff's memo. at 12-13; citing CPLR 3212 [e]). While the court is

mindful of possible advantages of severing one or more of the counterclaims, in light of the numerous separate cases related to the Condominium's governance and operations that are presently or were previously pending before this court, the interest of judicial economy will not be better served by severance.

II. Sponsor's cross motion for partial summary judgment

1. *Second counterclaim for breach of contract*

Sponsor's second counterclaim alleges plaintiff wrongfully reallocated Common Charges to the Commercial Unit in contravention of the terms of the Offering Plan and By-Laws. As described above in connection with plaintiff's motion, the Board's reallocation of the percentage of total Common Charges to be levied against the Commercial Unit Owners without obtaining their consent was a direct violation of the express requirements of section 6.1 (E) of By-Laws. Furthermore, the Board's attempt to apply its revised allocation formula retroactively was in violation of section 6.1 (A). Because the Board's actions were not authorized by the express terms of the Condominium's By-Laws, and because the Board's allocation constituted disparate treatment in that it sought to increase only the amounts to be charged to the Commercial Unit Owners, there are sufficient facts to support a finding that the Board is not entitled to a deferential review standard analogous to the business judgment rule (*see Konrad v 136 E. 64th St.*, 246 AD2d 324, 325-326 [1st Dept 1998]).

However, Sponsor has not sufficiently demonstrated the absence of triable issues of fact as to its own performance under the By-Laws, and, as such, thus does not establish its prima facie entitlement to judgment as a matter of law. For example, as noted above, issues of fact have been raised as to whether Sponsor complied with its obligations to pay common charges and

special assessment because of a "credit" that was purportedly granted towards future common charges and special allocations. Accordingly, Sponsor's motion for summary judgment on its first counterclaim is denied.

2. ***Eighth counterclaim for attorney's fees, costs and expenses***

Sponsor's eighth counterclaim seeks reimbursement from plaintiff of all legal fees and disbursements incurred by Sponsor in defending and enforcing its rights under the Offering Plan, pursuant to Article 9 of the By-Laws. In support of this counterclaim, Sponsor argues that it has successfully prevailed on the issue of retroactive reallocation of Common Charges, and thus seeks summary judgment awarding that portion of its attorneys' fees, costs and expenses, plus interest. It claims that section 9.2 (B) of the By-Laws authorizes the Commercial Unit Owners to assert counterclaims as it has done here, and section 9.4 provides that "[a]ll sums of money expended, and all costs and expenses incurred ... [are] immediately payable by ...[the] offending party (i.e., the Condominium Board or the Unit Owner) to ...the Commercial Unit Owners ... which amount shall, in either event, bear interest (to be computed from the date expended) at the rate of 2% per month ..." (Doc. 43-3, ex. O, By-Laws at 327). Sponsor therefore seeks $98,853.52 and continuing, plus costs and expenses totaling $2,344.02, "all such amounts having been paid in full by [Sponsor], plus additional fees, costs and expenses incurred from May 1, 2011 forward" (Doc. 48, Sponsor's memo. at 6).

In opposition, plaintiff argues that section 9.4 of the By-Laws only provides for the recovery of "costs and expenses," not legal fees (Doc. 53, Plaintiff's reply memo. at 7-8). It claims that it "is hornbook law that the terms 'costs' and 'expenses' do not include attorney fees in the absence of express language to that effect in the contract or a statute" (*id.* at 8; quoting

Golub v Bd. of Mgrs. of Greentree at Murray Hill, 73 AD3d 570, 571 [1st Dept 2010] [court properly found that the stipulation in connection with the Homestead action, which provided that each party "bear its own costs and expenses," did not bar defendant's claims for legal fees, since the terms "costs" and "expenses" do not include attorney fees in the absence of express language to that effect in the contract or a statute]). Furthermore, plaintiff notes that while other sections of the By-Laws, such as sections 6.4 (A) and (B), expressly provide for the recover of attorney's fees but section 9.4 does not. Finally, plaintiff disputes any suggestion by Sponsor that it has "won" in connection with any claim in this action.

The court is not convinced that it is "hornbook law" that an agreement's reference only to "costs" and "expenses" precludes any recovery of attorney's fees. In *Bd. of Mgrs. of Amherst Condominium v CC Ming (USA) Ltd.*, 17 AD3d 183, 185 (1st Dept 2005), one issue was whether the Board was entitled to summary judgment on its claims for litigation expenses, under section 9.4 of the relevant bylaws, which, based on the relevant portion quoted in the decision, contained identical language as the Condominium's By-Laws does here. Thus, the absence of a specific reference to attorney's fees did not preclude recovery of "litigation expenses" in that case, because "all sums of money expended, and all costs and expenses incurred ..." was found to be broad enough to include legal fees (*see Bd. of Mgrs. of the Gateway Condominium v Leonard*, 2010 NY Slip Op 31597 [Sup Ct, NY County 2010] [distinguishing the broad bylaw provisions in *Amherst* from those requiring a unit owner to pay "all costs of enforcement," which the court interpreted as meaning the cost of repairing, abating or otherwise addressing a condition or breach of the condominium's bylaws, but not legal fees]). In yet another case involving a similar section 9.4 of a condominium's bylaws, the Appellate Division, First Department, interpreted the

provision as including attorney's fees and litigation costs (*see Bd. of Mgrs. of the Warren House Condominium v Pike*, 46 AD3d 344, 345 [1st Dept 2007] [although judgment of attorney's fees was vacated because, at that juncture, there had been no judicial determination of a violation, breach or default]). Thus, Sponsor may be entitled to attorney's fees under section 9.4 of this condominium's By-Laws, once a proper showing has been made.

Sponsor is entitled to "[a]ll sums of money expended, and all costs and expenses incurred ...," including attorney's fees, under section 9.4 of the By-Laws as against the Board, but only if it has been determined that the Board has been in "violation or breach of any of the terms of the Condominium Documents with respect to any rights, easements, privileges, or licenses granted to ...the Commercial Unit Owners" (Doc. 43-3, ex. O, By-Laws at 327, sections 9.2 [B]; 9.4; *see also Bd. of Mgrs. of the Warren House Condominium*, 46 AD3d at 345).

Although Sponsor has seemingly prevailed on many of the central claims involved in this action thus far, there are several outstanding issues of fact that make summary judgment in its favor premature. For example, as noted above, an issue of fact exists as to Sponsor's claim that it had received a "credit" towards future common charges and assessments. Because resolution of these issues of fact will affect whether any particular party ultimately recovers "substantial relief," this branch of Sponsor's motion is denied.

III. The court's January 7, 2011 decision and order

The court acknowledges that several determinations made in this decision and order differ from those previously stated by the court in its January 7, 2011 decision and order, and incorporated into the related order and judgment of February 23, 2011.

Specifically, the prior decision erroneously stated that "...it cannot be disputed that after

September 2009, the Board was entitled to charge the Commercial Units in accordance with their common interests, which is 5.7835% for the Retail Unit and 1.0596% for the Commercial Facility Unit ..." (*see The Bd. of Mgrs. of the Onyx Chelsea Condominium*, Sup Ct, NY County, Jan. 7, 2011, Feinman, J. at *7). As set forth above, under section 6.1 (E) of the By-Laws, among other provisions, the Board's power to modify the allocation of common charges set forth in the First Year's Budget of the Offering Plan, was expressly subject to the Board obtaining consent of a majority of the Commercial Unit Owners. Although the court correctly noted that Sponsor's authority to assess common charges expired when the Initial Control Period ended and voting control of the Board was turned over to the Residential Unit Owners, Sponsor, as owner of the two Commercial Units, would have to consent to any modification of the common charge allocation found in the First Year's Budget under the By-Laws. The court mistakenly ignored the By-Laws and instead focused on certain provisions of the Offering Plan that related to Sponsor's rights, as the sponsor, but not Sponsor's rights as owner of the Commercial Units. Also, the court's January 7, 2011 decision's fifth footnote was incorrect in stating "[t]o the extent that the Bylaws purport to address rights pertaining to special allocations beyond what is explicitly listed in the special risks section of the plan, such provisions are unlawful under Real Property Law § 339-m and shall be deemed null and void" (*id.* at 8, n 5; citing *Zack v 3000 E. Ave. Condominium Assoc.*, 306 AD2d 846 [4th Dept 2003]). However, there was no discussion in *Zack* related to any requirement that special allocations be listed in the special risks section of the plan. That decision only held that the "split" or "hybrid" method of allocating common expenses to the various units employed by the board was contrary to the provisions of RPL § 339-m as it was not "based on special or exclusive use or availability or exclusive control of particular units or

common areas by particular unit owners." In any case, *Zack* only suggests that the important documents to be examined in assessing the validity of an allocation of common charges are the declaration and the by-laws.

Because the court's January 7, 2011 decision and order was based, at least in part, upon several errors, the related order and judgment of February 23, 2011, was also flawed. Therefore, the decretal paragraphs, which start at the bottom of page 2, of the order and judgment are hereby vacated in their entirety and the following language should be substituted:

> ORDERED that defendant's motion for partial summary judgment is granted to the extent provided below; and it is further
>
> ORDERED, ADJUDGED and DECLARED that the Board's resolutions that were passed and approved at the Board's December 15, 2009 meeting, were null and void to the extent that any of these resolutions purported to modify the percentage of total common charges or special assessments apportioned to the Commercial Unit Owners without obtaining the consent of a majority of the Commercial Unit Owners as required by section 6.1 (E) of the By-Laws; and it is further
>
> ORDERED that plaintiff's cross motion for summary judgment on the second cause of action of the complaint for a declaratory judgment is granted solely to the extent provided below; and it is further
>
> ORDERED, ADJUDGED and DECLARED that after the Initial Control Period terminated, the Residential Unit Owner-controlled Board was vested with the power to determine the amount of "common expenses," subject to the limitations stated in the By-Laws; and it is further
>
> ORDERED that the plaintiff's cross motion for summary judgment on the first cause of action for breach of contract is held in abeyance.

IV. *Conclusion*

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its first and third causes of

action, for dismissal of the first, second and eighth counterclaims, and severance of all of defendant's remaining counterclaims is denied in its entirety; and it is further

ORDERED that defendant's cross motion for partial summary judgment on its first and eighth counterclaim is denied in its entirety; and it is further

ORDERED that the decretal paragraphs, which start at the bottom of page 2 of the February 23, 2011 Order and Judgment are hereby vacated in their entirety and the following language substituted:

> ORDERED that defendant's motion for partial summary judgment is granted to the extent provided below; and it is further
>
> ORDERED, ADJUDGED and DECLARED that the Board's resolutions that were passed and approved at the Board's December 15, 2009 meeting, were null and void to the extent that any of these resolutions purported to modify the percentage of total common charges or special assessments apportioned to the Commercial Unit Owners without obtaining the consent of a majority of the Commercial Unit Owners as required by section 6.1 (E) of the By-Laws; and it is further
>
> ORDERED that plaintiff's cross motion for summary judgment on the second cause of action of the complaint for a declaratory judgment is granted solely to the extent provided below; and it is further
>
> ORDERED, ADJUDGED and DECLARED that after the Initial Control Period terminated, the Residential Unit Owner-controlled Board was vested with the power to determine the amount of "common expenses," subject to the limitations stated in the By-Laws; and it is further
>
> ORDERED that the plaintiff's cross motion for summary judgment on the first cause of action for breach of contract is held in abeyance.

This constitutes the decision and order of the court.

Dated: March 9, 2012
New York, New York

Paul G. Feinman
J.S.C.

(2012 Pt 12 D&O_104912_2010_003_daz[sj_Condo_Fees])