Ripley LLC v Board of Mgrs. of the Avery Condominium
2017 NY Slip Op 30240(U)
February 3, 2017
Supreme Court, New York County
Docket Number: 155133-2013
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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RIPLEY LLC and DR. THOMAS L. TAGLIANI,

Plaintiffs,

-against-

THE BOARD OF MANAGERS OF THE AVERY CONDOMINIUM and SLAVIN HAZIN, PRESIDENT OF THE BOARD OF MANGERS FOR THE AVERY CONDOMINIUM,

Defendants.

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Index No. 155133-2013

Motion Sequence Numbers 004 and 005

KENNEY, J.:

This action is brought by Ripley LLC (Ripley) and its principal Dr. Thomas L. Tagliani (Tagliani) (Tagliani and Ripley, collectively, plaintiffs) against The Board of Mangers of the Avery Condominium (Condominium Board) and its president Slava Hazin (Hazin) (Hazin and Condominium Board, collectively, defendants).

In motion sequence number 004, plaintiffs seek partial summary judgment as to liability for the following causes of action in its complaint: fourth (loss of revenue for plaintiffs' condominium unit due to the Condominium Board's alleged denial of plaintiffs' access to the electric meter room to activate plaintiffs' electric services); fifth (declaratory judgment voiding the Condominium Board's action as to the maintenance charged against plaintiffs' unit); and sixth (injunction mandating election of a "non-residential" representative to the Condominium Board).

Opposing plaintiffs' motion, defendants cross-move for summary judgment dismissing these causes of action. In motion sequence number 005, defendants seek partial summary judgment dismissing the fifth cause of action, on the ground that it is barred by the statute of limitations. Plaintiffs opposes defendants' motion and cross motion.

Motion sequences 004 and 005 are hereby consolidated for disposition.

Background

The following facts are derived from the parties' pleadings and are generally undisputed, except where otherwise indicated. On or about December 6, 2007, the Condominium Sponsor, CRP/EXTELL, submitted the Declaration establishing Avery as a New York condominium. Avery is a "mixed use" (residential and non-residential) condominium located at 100 Riverside Boulevard, New York City, having 266 residential units and 4 non-residential (commercial) units. Plaintiffs purchased its commercial unit (to be used as a dental office) on August 19, 2011.

Avery's Declaration and By-Laws set forth the governance and management of the condominium. Due to Avery's mixed use, the Residential Board is to govern the affairs of the residential unit owners, the Non-Residential Board is to govern the affairs of the non-residential unit owners, and the Condominium Board is to oversee the entire condominium, which is to consist of the combined members of the Residential and the Non-Residential Boards. Pursuant to Avery's By-Laws, the Condominium Board has, among other things, the power to determine the amount of general common charges for all unit owners (both residential and non-residential), and each unit's percentage share of such charges is set forth in Avery's Declaration.

Pursuant to section 2.4 of the By-Laws, the "First Condominium Board" is deemed elected by the Sponsor, with its members consisting of one non-residential and two residential owner representatives. It further provides that, within one year of the "First Closing," which is defined as "the date fee title to a residential unit is first conveyed to a purchaser," the Sponsor is required to call a meeting of the residential and non-residential unit owners for the purpose of electing the Residential Board and the Non-Residential Board. Hazin is the first purchaser who

took fee title to his residential unit (i.e. the First Closing) on December 27, 2007.

Pursuant to section 2.1.1 of the By-Laws, after the first annual meeting of the residential and non-residential unit owners, the Residential Board is to consist of five persons elected by residential unit owners (subject to the Sponsor's specified rights) and the Non-Residential Board is to consist of two persons elected by commercial unit owners. In sum, the Condominium Board is to consist of seven members: five Residential Board members and two Non-Residential Board members. According to the Nineteenth Amendment to Avery's Offering Plan, dated November 27, 2012, the Sponsor lost all control of the Condominium Board, including the Residential and Non-Residential Boards, on October 19, 2012. Since 2009 and thereafter, Avery has only five members on the Condominium Board, all of whom are representatives of residential unit owners. It is undisputed that there has never been any elected non-residential owner representative to the Non-Residential Board or the Condominium Board.

After plaintiffs purchased its non-residential unit in August 2011 from the Sponsor, it has notified Avery's management office of certain conditions that purportedly needed to be rectified, such as fixing the exterior stone facade and cleaning the area outside of the unit. Plaintiffs allege that such conditions were never rectified. Aggrieved that its unit did not receive proper services and believing that the unit's maintenance charges were too high, plaintiffs disputed such charges since the outset. Plaintiffs assert that it has deposited the disputed charges into an escrow account held by its attorney retained for this action, and that such money is still held in escrow.

This action stems largely from defendants' alleged refusal to establish a Non-Residential Board and to allow plaintiffs entry into Avery's electric meter room for the purpose of activating and connecting electrical services to plaintiffs' dental office. There was electric supply when

plaintiffs purchased its unit in August 2011, but when plaintiffs hired an architect and contractors to start outfitting the dental unit in December 2012, there was no longer any electrical power. After attempts to gain entry were allegedly refused by Avery's management, plaintiffs started this action in June 2014 seeking various relief, including a court order requiring defendants to provide plaintiffs access to the meter room (complaint's first cause of action). Defendants subsequently allowed plaintiffs and his electrician to enter the meter room on September 15, 2014. When electrical repairs and connections were re-established, electric power to plaintiffs' unit was restored on November 6, 2014. Therefore, the first cause of action (access to the meter room) is now moot. The second cause of action (reduction of maintenance) is also moot because plaintiffs have subsumed it into the fifth cause of action (voiding the Condominium Board's action with respect to all maintenance). The third cause of action (specific performance of required maintenance) is no longer pursued by plaintiffs, pursuant to a stipulation between the parties. Thus, only the fourth, fifth and sixth causes of action are being pursued by plaintiffs at this time.

Applicable Legal Standards

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals has noted, in *Alvarez v Prospect Hosp.*, the following:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of

material issues of fact which require a trial of the action.

68 NY2d 320, 324 (1986) (citations omitted); *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980) (movant must tender sufficient evidence, in admissible form, to establish its cause of action to warrant the court, as a matter of law, in directing summary judgment).

The courts routinely scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy,* 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Moreover, it is clear that bare allegations or conclusory assertions are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion. *Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 (1978).

Analysis

I. Defendants' Partial Summary Judgment Motion (Motion Sequence Number 005)

In this motion for partial summary judgment, defendants assert that the fifth cause of action (declaratory judgment voiding the Condominium Board's ultra vires determination with respect to the maintenance charges against Plaintiffs' unit) is barred by a four month statute of limitation in CPLR 217. Defendants' Moving and Reply Briefs (NYSCEF[1] 104 and 142) at 1. CPLR 217 applies to Article 78 proceedings and states that "a proceeding against a body or

[1] NYSCEF refers to the document number filed in this action by the parties with the New York State Supreme Court Electronic Filing System.

officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . ." Defendants assert that the four month limitations period in Article 78 applies to actions of boards of cooperatives and condominiums, including the Condominium Board. They further assert that after plaintiffs purchased its commercial unit in August 2011, the Condominium Board has assessed monthly maintenance charges against the unit, and that because this lawsuit was not commenced until June 2013, the fifth cause of action is now time-barred by the four month limitations period. (NYSCEF 104 at 5).[2]

Plaintiffs opposes defendants' motion and argues that Article 78 only applies to cooperative corporations, not condominiums. Plaintiffs' Opposition (NYSCEF 107 at 20 and NYSCEF 139 at 12), citing, among other cases, *Brasseur v Speranza*, 21 AD3d 297 (1st Dept 2005). In *Brasseur,* the appellate court noted that condominiums, which are generally regarded as unincorporated associations, "are not amenable to Article 78 proceedings in the nature of mandamus for claims of bylaw breach," particularly where the relief sought in that case against the condominium board was for the board to maintain the common elements of the condominium in good repair, which "involves more than a mere ministerial act." *Id.* at 297-298. Because the appellate court focused upon the nature of relief sought, rather than the defendant's form of ownership (i.e. condominium verus cooperative), to determine whether Article 78 would be applicable, plaintiffs' reliance on *Brasseur,* for the proposition of law that Article 78 only applies to cooperatives, not condominiums, is misplaced. Indeed, Article 78 has been used to challenge actions of condominium boards. *See e.g. Matter of Y&O Holdings v Bd. of Mgrs. of Exec. Plaza*

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[2] Defendants acknowledge that this motion does not address Plaintiffs' request that the Condominium Board's composition be altered going forward, because such request is not subject to the same four month limitations period. NYSCEF 104 at 1.

Condominium, 278 AD2d 173, 174 (1st Dept 2000) (court held that in the Article 78 proceeding, "petitioner need not commence a separate plenary action to seek the 'incidental' damages it has alleged" against respondent-appellants who were members of the condominium board); *see also Doo v Bd. of Mgrs. of Park Regent Condominium*, 58 AD3d 627, 627 (2d Dept 2009) (using "a hybrid proceeding" under Article 78 to challenge election results of the condominium board).

In their reply brief, defendants made a similar analysis of *Brasseur's* holding, as explained above. NYSCEF 142 at 3. Defendants also assert, however, that "[h]ere, as opposed to *Brasseur*, *the conduct challenged by the Plaintiffs is ministerial* – the [Condominium Board's] assessment of a charge according to a formulation contained in the *condominium's governing documents*." *Id.* at 3-4 (emphasis added). They further assert that their authority "to enforce the by-laws is not necessarily compromised by technical defects in its election and composition. By-law irregularities that are not critical do not invalidate all subsequent board actions." *Id.* at 7.

Defendants' assertions are unconvincing. First, the "governing documents" (i.e. Avery's Declaration and By-laws) require that the members of the Condominium Board be comprised of members of the Residential and Non-Residential Boards (By-laws, Art. 2, Boards of Managers), and it is undisputed that there was never a Non-Residential Board. Yet, in their opening brief, Defendants argue that "the [Condominium] Board has been operating without a non-residential unit owner representative since the Condominium Sponsor failed and/or neglected to designate a new non-residential board (as was its right) at the first annual meeting in or about December 2008," and therefore, "Plaintiffs became bound, within the meaning of CPLR 217, by the Board's determination to operate the condominium without a non-residential unit owner representative." NYSCEF 104 at 1. Apparently, Defendants rely upon the statements made by Hazin, who has

served as a member of the Residential Board since 2008, in his affidavit filed in support of this motion. NYSCEF 98 (Hazin Affidavit). Specifically, Hazin stated that when the first annual meeting was held in December 2008, "only one of the four Non-Residential Units had been sold and Sponsor retained ownership of the remaining [three] units," and since the "Sponsor did not vote its interests in the unsold Non-Residential Units to elect or designate the three-person Non-Residential Board," accordingly, "there was no Non-Residential Board and the Residential Board was the de facto Condominium Board." NYSCEF 98, ¶¶ 10-12. Notably, while confirming that since the first annual meeting the Condominium Board "has operated without the existence of a Non-Residential Board," Hazin also argued that the "mechanism for constituting or disbanding the Non-Residential Board is not within the control of the Condominium Board, as currently constituted." *Id.*, ¶¶ 14, 16.

Plaintiffs contends that Hazin stated an "unconvincing reasoning" for the lack of a Non-Residential Board. NYSCEF 107 at 3-7. Plaintiffs explains that because the owner of Non-Residential unit #4, a business entity that purchased Avery's parking facility from the Sponsor in 2008 before the first annual meeting, held "the vast bulk of voting power among the four Non-Residential Units" under the governing documents, the Sponsor "no longer dictated the result of the election of a Non-Residential Board" in 2008. *Id.* at 6-7. Plaintiffs further explains that since the remaining three non-residential units were sold in 2011, including the unit sold to plaintiffs in August 2011, the Sponsor divested all voting rights for a Non-Residential Board in 2011. *Id.* "Therefore, Mr. Hazin's attempt to blame the Sponsor [] for the failure to seat Non-Residential Board members for the past seven (7) years is dead wrong" and "the claim that he is waiting for the Sponsor to act is fatuous." *Id.* Plaintiffs asserts that the "true reason" for the improperly

constituted Condominium Board stems from its failure to follow the By-Laws provisions, including section 2.6 that deals with filling Board vacancies by electing missing Board members to fill such vacancies. *Id.* at 7-8. Plaintiffs also asserts that for the seven election cycles after the first annual meeting of 2008, "Avery's successive Boards [including the current Board] have failed to follow the By-Laws, and have acted without authority," and therefore "presents a clear and present danger to the legal interests of the condominium." *Id.* at 9-10.

Plaintiffs' explanatory statements are persuasive, particularly when defendants failed to address or rebut such statements in their subsequently filed reply brief. Instead, defendants merely assert, without giving an adequate explanation, that such "technical defects" or "by-law irregularities" do not compromise or invalidate the Board's election and composition. NYSCEF 142 at 7. Their assertion that the conduct challenged by Plaintiffs is "ministerial" (i.e. the Board's determination as to the amount of maintenance charges against Plaintiffs' unit) is also unavailing because, as stated in my prior decision dated September 2014, "the dispute here is not whether or not the board may make such determinations, but whether or not the board, as formed, was a valid board with the authority to make such determinations," and in addition, "the amount charged and its calculations are being disputed by plaintiffs." NYSCEF 42 at 3. Notably, in a recent First Department decision, the appellate court held that because the condominium board was improperly constituted due to the lack of commercial unit owner representation on the board, as required by the governing documents, several years of maintenance charges assessed by the board against the defendant commercial unit owner were invalid. *Bd. of Mgrs of the 85 8th Ave. Condominium v Manhattan Realty LLC*, 102 AD3d 548 (1st Dept 2013); *see also Bd. of Mgrs of Onyx Chelsea Condominium v 261 West LLC*, 2012 NY Slip Op 33394 (U), *8 (Sup Ct, NY

County 2012) ("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"). Here, plaintiffs asserts that due to the lack of the Non-Residential Board and the commercial unit owners having no representation on Avery's Condominium Board - even though plaintiffs had repeatedly demanded, to no avail, that the Condominium Board be constituted in accordance with the governing documents - defendants have improperly calculated and allocated the maintenance charges against its commercial unit.[3]

Moreover, defendants do not argue that the instant action must be brought pursuant to Article 78 or that Article 78 provides an exclusive remedy to plaintiffs' claims. Indeed, they have conceded that other claims asserted in plaintiffs' complaint, such as a modification of the Condominium Board's composition, are not subject to the limitation periods of Article 78. Further, because the relief sought in the fifth cause of action (a request for declaratory judgment voiding the board's acts as ultra vires) is not merely "ministerial," as explained above, Article 78 is inapplicable. *See Matter of Doo v Sie-En Yu,* 31 Misc 3d 1204 (A), *3 (Sup Ct, Queens County 2009) ("This action could not have been properly asserted in a proceeding brought pursuant to Article 78 because the plaintiffs is not seeking to enforce an obligation, and the

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[3] *See also* By-Laws section 2.2.2.3, which states, in relevant part: "The Non-Residential Board shall be entitled to make determinations with respect to . . . the amount of Non-Residential Common Charges, subject to the determination of the Condominium Board with respect to General Common Charges." Because of the lack of Non-Residential representation, Plaintiffs asserts that the allocation of General, Residential and Non-Residential Common Charges, which "requires a deliberative process," never existed at the Avery. NYSCEF 52 at 14.

matter is not in the nature of mandamus . . . Therefore, the four-month limitations period prescribed by CPLR 217 is inapplicable herein"). *See also Pomerance v McGrath*, 2014 NY Slip Op 31686 (U), *3 (Sup Ct, NY County 2014) (court ruled that defendants failed to cite to any authority for the proposition that Article 78 provided an "exclusive remedy" for the plaintiffs' first cause of action against defendants sounding in violation of bylaws and that there was "authority to the contrary"). Indeed, the *Pomerance* motion court, in support of its ruling, cited to *Brasseur v Speranza* (21 AD3d 297 [1st Dept 2005]), which held that a claim against the condominium board that it breached the bylaws would not be amenable to Article 78, particularly when the relief sought involved more than a ministerial act, as the authority contrary to the defendants' position. On appeal, even though the appellate court modified the motion court's ruling on other grounds, it stated that "plaintiffs' first cause of action, which alleges that individual board members violated the subject condominium's bylaws, *is not time barred,*" but the cause of action was insufficiently pleaded as against the defendants. *Pomerance*, 124 AD3d 481, 482 (1st Dept 2015) (emphasis added). The appellate court, similar to the motion court, also cited to *Brassuer* as the controlling authority.

In their reply papers, defendants failed to address *Pomerance*, the most recent decision in the First Department regarding, among other things, the applicability of Article 78 (and the limitations period therein) to condominium board actions, even though plaintiffs repeatedly and prominently referred to *Pomerance* in its opposition papers. NYSCEF 107 at 13, 14, 20-24. Accordingly, the relief requested in motion sequence number 005 is denied, as a matter of law.

II. Plaintiffs' Summary Judgment Motion and Defendants' Cross Motion (Sequence No. 004)

In this motion, plaintiffs seeks summary judgment, on the issue of liability only, with

respect to the following causes of action: fourth (loss of revenue due to defendants' alleged denial of access to the meter room for connecting electric services to plaintiffs' commercial unit); fifth (voiding defendants' acts with respect to maintenance charges assessed against plaintiffs' unit); and sixth (mandating the election of a Non-Residential Board). Defendants oppose the motion and cross-move for summary judgment dismissing all causes of action.

A. Fourth Cause of Action

The gist of this cause of action is that defendants allegedly refused plaintiffs access to Avery's meter room to connect electric service to its unit, rendering the dental office unsuitable for business operation, thus causing lost of revenue and damages. Opposing plaintiffs' motion, defendants refer to the affidavit of Avery's building manager, Raymond Murphy, and the email he sent to plaintiffs in November 11, 2011, to show that plaintiffs was not denied access to the meter room. NYSCEF 124 (Defendants' Opposition) at 7-8; NYSCEF 131 (Murphy Affidavit). Plaintiffs' reply states that it "does not dispute that the defendants were cooperative in 2011 and 2012," but adds the following: "In 2013, however, this changed since we never heard from Ray Murphy again after multiple requests for access." NYSCEF 139 at 3. Thus, Murphy's 2011 email is irrelevant.[4] Plaintiffs also asserts that in April 2013, Tagliani phoned Avery's managing agent, Ms. Babayeva, regarding access to the meter room, but she replied that "Ray Murphy does not know where the meter room is and he can't help you." NYSCEF 139 at 3 (referring to Tagliani's deposition testimony, which is undisputed by Defendants).

Thereafter, in an email by Tagliani to Ms. Babayeva, dated May 15, 2013, he wrote, in

[4] It is noteworthy that, as stated above, after receiving the necessary construction permits from the Buildings Department, in December 2012 Plaintiffs hired contractors to start outfitting its dental office unit, but discovered that there was no longer any electricity supply to the unit.

relevant part: "Con Ed tells me that I am legally entitled *to see and get* the meter number for the electric service for my unit. If Ray Murphy, the building manager cannot do this, then the building must get its engineer or a contractor to do this . . . ." *Id.* at 4 (Exhibit C) (emphasis added). In their opposition papers, defendants argue that the email did not request access, but only requested the meter number for service to Plaintiffs' unit. NYSCEF 124 at 9. This argument is disingenuous in that it disregarded the words "to see and get," and the fact that the meter number was already given to plaintiffs in December 2011. NYSCEF 87, ¶ 36. Defendants also failed to address the fact that the same email stated, in relevant part: "I want this to be done quickly . . . or there will be issues of '*prevention of use of my premises*' which will be dealt with . . . If [the building manager] cannot quickly do this, or *refuses to show me my meter receptacle*, I will refer this to an attorney for legal action." NYSCEF 139 (Exhibit C). When read in its entirety, Tagliani's email requested access to the meter room so as to "see and get" the electric meter number, and to be "shown my meter receptacle," such that electricity could be re-established for plaintiffs' unit. Responding to such mail, defendants' counsel (Stuart Saft, Esq.) wrote on May 18, 2013, in relevant part: "If you expect to receive any services from either the Board or the managing agent, you should be paying your common services since any service that you are receiving, would be paid by the unit owners, who are paying their common charges . . . ." NYSCEF 139 (Exhibit A). Apparently, defendants' conditioned the receipt of services upon Plaintiffs' payment of maintenance charges which, as noted above, were not paid, but were placed in escrow instead. Soon thereafter, plaintiffs commenced the instant lawsuit in June 2013, and the complaint's first cause of action demanded access to the electric meter room.

Subsequent correspondence between the parties, in July and August of 2013, indicated

that plaintiffs requested access to the meter room so as to mitigate economic damages arising from its inability to use its dental office due to the lack of electricity supply, and that defendants would cooperate and provide access, but conditioned such access as part of a global settlement. NYSCEF 52 (Exhibits T and U).[5] On September 15, 2014, after many months of litigation that encompassed defendants' opposition to Plaintiffs' various causes of action, including its demand for access, defendants allowed Plaintiffs access to the meter room. Consequently, plaintiffs no longer pursues the first cause of action, but instead seeks damages arising from its inability to use its unit during the period that access was denied (from May 18, 2013 to September 15, 2014). NYSCEF 139 at 4.

After access was granted, plaintiffs and his licensed electrician, Richard Mednick, entered the meter room, whereupon they discovered that wires leading to plaintiffs' electric breaker box were disconnected and re-routed to the equipment of another commercial unit owner, Releash, a pet grooming business. NYSCEF 88 (Mednick Affidavit). Therefore, defendants argue that Plaintiffs' inability to establish electricity service was due to the interference by Releash, which allegedly stole Plaintiffs' electricity by re-routing its electric circuits, and not due to defendants' actions. NYSCEF 124 at 10-11. This argument misses the point, because plaintiffs' claim is based on the denial of access, not the actual cause of the lack of electricity supply.

Defendants further argue that even if plaintiffs could establish its denial of access claim,

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[5] While the letters in Exhibits T and U may be deemed as settlement negotiations, and are thus inadmissible, the letter by Defendants counsel Stuart Saft, Esq. cannot be deemed as settlement negotiations because, by its terms, there was no offer of compromise, but conditioned the receipt of services only upon the payment of maintenance charges. *Nineteen Eight-Nine, LLC v Ichan*, 96 AD3d 603, 606 (1st Dept 2012) ("Neither the e-mail nor the draft presented any offer or acceptance of a compromise" and thus was not a settlement document).

it cannot sustain a claim under Real Property Law (RPL) § 853 which, according to defendants, is intended for tenants to vindicate their rights to leaseholds, but is inapplicable to condominium unit owners and their board of managers. NYSCEF 124 at 12. Defendants cited no statutory or decisional law in support their position.

RPL § 853 provides, in relevant part: "If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner . . . he is entitled to recover treble damages in an action therefor against the wrong-doer." The statute, on its face, does not distinguish between landlord-tenant and/or condominium owner-condominium board relations. Indeed, as noted by plaintiffs, the statute has been applied to all real property rights, other than just leasehold rights, where one property owner changed the locks to deny the co-owner access. NYSCEF 139 at 15-26, *citing Matter of Neustein*, 28 Misc 3d 1236 (A), *3, 2010 NY Slip Op 51612 (U) (Sur Ct, Kings County 2010) (noting that under the statute, trebling of damages is discretionary with the court), *affd* 97 AD3d 684 (2nd Dept 2012), *lv to appeal denied*, 20 NY3d 858 (2013).

Based on the correspondence, affidavits and deposition testimony of the parties and their professionals, the preponderance of evidence leads to the conclusion that plaintiffs was denied access until September 15, 2014, which negatively impacted its use of the dental office, resulting in economic loss. Any economic damages arising therefrom will be determined in a future trial.

B. Fifth Cause of Action

As discussed, Plaintiffs seeks to void the Condominium Board's decision as ultra vires with respect to the maintenance charges accessed against his commercial unit, and defendants move to dismiss this cause as action as being time-barred. As also discussed, defendants' motion to dismiss this claim (sequence number 005) is denied, for the reasons stated above.

In its moving papers, plaintiffs asserts that the Condominium Board's actions with respect to the determination of maintenance charges are null and void, supporting its assertions with citations to relevant facts and applicable law. NYSCEF52 at 17-19; 38. Opposing plaintiffs' instant motion (sequence number 004), Defendants raise the following arguments, in addition to those stated in their motion to dismiss (sequence number 005). First, they argue that because the Sponsor, the prior owner of plaintiffs' unit, never objected to paying the Condominium Board's assessment against that unit from 2008 to 2010 (and that plaintiffs had notice of such assessment prior to purchasing his unit in 2011), and because plaintiffs did not acquire any greater rights than the Sponsor in the purchase, plaintiffs could not revive the four month's statute of limitations period, which had expired before plaintiffs became owner of the unit. NYSCEF 124 at 14-15, citing *7 Vestry LLC v Dept of Fin. Of City of N.Y.*, 22 AD3d 174, 182 (1st Dept 2005) (buyers of condominium units were presumed to have notice of the tax assessments against their units, and when they purchased their units from the sponsor, they did not purchase greater rights than the sponsor had against the taxing authority). Defendants' reliance on *7 Vestry* is misplaced because the facts are readily distinguishable. Here, unlike in *7 Vestry* where the defendant is a duly constituted governmental agency with the authority to make tax assessments, the Condominium Board is a private entity formed under Avery's "governing documents," and importantly, the dispute here is whether the Board, as formed, is a valid board with the authority to make assessment decisions.

Defendants also argue that the "alleged irregularity in the [Condominium] Board's composition had been ratified by a majority of the commercial unit owners." NYSCEF 124 at 15-16. Apparently, defendants argue that a majority of the commercial unit owners had either

waived or ratified the acts of the Condominium Board, despite its irregularity. Yet, as plaintiffs points out, defendants failed to provide any evidence of the alleged ratification, and since the first annual meeting and thereafter, the Sponsor no longer held a majority vote with respect to the commercial unit owners because, prior to that meeting, one of the commercial units (unit #4) was sold to the entity that operates and manages Avery's parking facility, which held the majority vote. NYSCEF 139 at 14. Notably, and as pointed out by plaintiffs, defendants failed to include the affirmative defense of "ratification" in their amended answer, and as such, this newly minted defense was waived by defendants. *See* CPLR 3018 (b).

As shown above, defendants have failed to tender sufficient evidence, in admissible form, to establish the existence of material facts to require a trial of this cause of action, on the issue of liability. However, plaintiffs concedes that it has not paid the maintenance charges for its unit since it purchased the unit in August 2011 and that the amount of such charges has been paid into escrow. Such non-payment will be taken into consideration, when determining the amount of charges that may be voidable, due to the improperly constituted Condominium Board.

C. Sixth Cause of Action

As discussed above, the parties agree that there has been no Non-Residential Board at Avery representing the interest of the commercial unit owners, and that Avery's governing documents provide that the Condominium Board is to consist of seven members, two of whom are members of the Non-Residential Board. While acknowledging, at one point, that "election and formation of the Commercial Board will occur in due time and in accordance with the governing documents and by-laws" (NYSCEF 52, Exh. U, defendants' counsel letter of August 20, 2013), defendants now take the position that "Plaintiffs' demand for an order directing the

election of a non-residential representative to the Board cannot be sustained without the non-party Sponsor." NYSCEF 124 at 16. Defendants argue that "the mechanism for constituting or disbanding the Non-Residential Board is not within the control of the Condominium Board or the Residential Board." *Id.* They quote, selectively, to limited language in the By-Laws to stand for the proposition that, when a vacant board seat is the result of termination of the Sponsor's Non-Residential Board designee and its subsequent failure to designate a replacement member, under section 2.6 of the By-Laws, the Sponsor "shall have the sole right to designate a replacement for such member." *Id.* at 17. Because the Sponsor failed/neglected to exercise that right, defendants argue that "neither the Board as currently constituted nor the Court has the power to designate a non-residential board without participation of the Sponsor . . . ." *Id.*

Defendants' arguments are unpersuasive. The relevant text of section 2.6 provides, as follows: "in the case of a vacancy on the Board created by the resignation, removal or any other cause which results in any Board member designated by the [Sponsor] ceasing to be a member of any such Board, [Sponsor] shall have the sole right to designate a replacement for such member." As explained by plaintiffs, the foregoing provision only applies to the *designation* or *appointment* by the Sponsor of a previously designated Board member ceasing to be a member of the Board due to resignation, removal or any other cause, and does not apply to the *election* of a new Board member, when elections were to begin, which started after the first annual meeting in December 2008. NYSCEF 139 at 17. Moreover, as explained above, by December 2008, the Sponsor was no longer in the majority, and its failure to designate a new Non-Residential representative was irrelevant, because the owner of commercial unit #4 (Avery's parking lot operator) has held the majority vote since its purchase of that unit in early 2008. In other words,

after 2008, there were no more Sponsor appointed or designated Non-Residential Board members, only elected ones. Thus, defendants' assertion that they need the Sponsor's participation in the election of Non-Residential members is unpersuasive. Interestingly, defendants also acknowledge that the Condominium Board and the Sponsor have failed to designate the Non-Residential Board. *See* NYSCEF 124 at 4 (heading). Other than the purported reason that the Sponsor has the "sole right" to designate a replacement Board member, defendants do not oppose the election of a Non-Resident Board. Accordingly, Plaintiffs is entitled to summary judgment in its favor on this cause of action, and defendants' cross motion in opposition is denied.

Conclusion

Accordingly, for all of the foregoing reasons, it is hereby

ORDERED that the plaintiffs' motion for summary judgment on the issue of liability (sequence number 004) is granted with respect to the fourth, fifth and sixth causes of action asserted in the complaint, and the defendants' cross motion thereto is denied; and it is further

ORDERED that the defendants' motion for summary judgment dismissing the fifth cause of action of plaintiffs' complaint is denied; and it is further

ORDERED that the parties proceed to mediation/trial, forthwith.

Dated: 2/3/17

ENTER:

J.S.C.
JOAN M. KENNEY
J.S.C.