Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13

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Board of Managers of Village Mall At Hillcrest Condominium,

Plaintiff,

-against-

Sunil Banerjee and Sabita Banerjee,

Defendants.

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Index No: 14092/ 2014

Motion Date: June 17, 2016

Seq. No. 2

The following papers read on this motion by defendants Sunil Banerjee and Sabita Banerjee for an order enjoining plaintiff from placing unjustified charges on defendants' condominium account and removing those charges previously placed and granting summary judgment dismissing the complaint. Plaintiff Board of Managers of Village Mall at Hillcrest Condominium (Board of Managers) cross moves for an order granting summary judgment on its causes of action for injunctive relief and for declaratory judgment.

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Memorandum of Law	

Upon the foregoing papers the motion and cross motion are determined as follows:

Village Mall at Hillcrest Condominium (Village Mall) is located at Union Turnpike and 152nd Street, Queens County, New York. Village Mall consists of two

buildings, each with 14 floors. There is approximately a total of 458 units, of which 448 units have balconies. Each building has 18 lines (A through T, with no I and Q lines).

Defendants Sunil Banerjee and Sabita Banerjee became the owners of Unit 6S, Building 1, located at 150-38 Union Turnpike, Queens, New York, pursuant to a deed dated January 25, 1974 and recorded on February 4, 1974. The Banerjees installed a balcony enclosure in December 1979, almost thirty-seven years ago.

Plaintiff Board of Managers alleges that there are only three units, including that of the defendants, with enclosed balconies. Plaintiff commenced the within action against Sunil Banerjee and Sabita Banerjee on September 24, 2014 and defendants served an answer and an amended answer in December 2014.

Plaintiff previously moved for summary judgment, and in the alternative for a preliminary injunction and in the absence of that relief, to compel defendants to comply with discovery demands. This court in an order dated July 13, 2015 denied the plaintiff's request for summary judgment as its submissions were insufficient to meet its *prima facie* burden, denied the request for a preliminary injunction, and granted the request as it related to discovery to the extent that defendants were directed to serve a response to the demand for documents and to appear at a deposition.

Defendants did not appear for a deposition. Defendants' son, Survo Banerjee, a nonparty, was deposed on September 11, 2015. On October 5, 2015, the parties entered into a stipulation extending the plaintiff's time in which to serve an amended complaint to October 9, 2015, pursuant to CPLR 3025(b). Plaintiff served its amended verified complaint on October 9, 2015 and defendants served a verified answer to the amended complaint on October 18, 2015. It is noted that plaintiff has commenced separate actions against two other unit owners to compel them to remove their respective balcony enclosures. These actions have not been consolidated.

In the within action for injunctive and declaratory relief, plaintiff seeks to compel defendants Sunil Banerjee and Sabita Banerjee, to remove an enclosure on the balcony appurtenant to their apartment. Plaintiff alleges in its verified amended complaint that Village Mall has been "undergoing a major facade and balcony maintenance project, as required by local law for which all balcony tiles, carpets, unit dividers, railings, posts, enclosures and other items must be removed, so as to allow for concrete and inner post repair, and waterproofing of the top, bottom and outer membranes of the approved and/or reconstituted concrete slab." It is alleged that inspection and repair work on the balconies located in Building 1 is scheduled to commence after the completion of said work in Building 2, and anticipated that the balcony work would begin on April 1, 2016.

Plaintiffs allege that in order to perform said work, the balcony enclosure must be removed and that despite written demands dated February 14, 2014 and April 3, 2014, defendants have refused to remove the balcony enclosure or allow its removal. It is also alleged that the subject balcony enclosure was installed or maintained without the written permission of the Board of Managers or its managing agent, as required by Village Mall's bylaws, and therefore must be removed. The court notes that an enclosed balcony is completely visible and in plain sight on the outside of the edifice.

Plaintiff, in its first cause of action seeks a preliminary and/or permanent injunction in order to enable it to enter the defendants' unit and remove the enclosure, or allow the plaintiff to remove said enclosure at defendants' cost. The second cause of action seeks a preliminary and/or permanent injunction ordering the removal of the balcony enclosure, in the first instance by the defendants, and in the second instance by the plaintiff at defendants' expense. The third cause of action for declaratory judgment seeks a declaration that the defendants do not have a proper authorization under the bylaws, or otherwise, for the balcony enclosure and that it must be removed. The fourth cause of action seeks a permanent injunction enjoining defendants from maintaining the enclosure on the balcony appurtenant to their defendants' unit, and compelling defendants to remove the enclosure and restore the balcony to its original unenclosed condition, or alternatively allowing plaintiff to remove said enclosure at defendants' cost. The fifth cause of action seeks a preliminary and permanent injunction allowing an inspection of the balcony enclosure in order to assess its condition.

Defendants in their answer assert the affirmative defense of waiver and allege that they purchased Unit 6S in Building 1 in January 1974; that in a letter dated November 29, 1979, plaintiff's predecessor, Albert B. Ashforth, Inc., authorized defendants' balcony enclosure; that said letter was introduced in evidence at the September 11, 2015 deposition of defendants' son, Suvro Banerjee; and that Stuart Bethiel, plaintiff's managing agent testified at his October 5, 2015 deposition that he could not specify the contents of Village Mall's files.

Defendants now seek an injunction prohibiting plaintiff from placing unjustified charges on their condominium account and for summary judgment dismissing the complaint.

Plaintiff Village Mall cross moves in opposition and seeks summary judgment in its favor on each of its causes of action for injunctive and declaratory relief. The note of issue was filed in this action on February 24, 2016. The motion and cross motion were timely served within 120 days of the filing of the note of issue and will be considered on the merits (CPLR 3212[a]).

The "purpose of a preliminary injunction is to preserve the status quo pending a trial" and "the remedy is considered a drastic one, which should be used sparingly" (*Trump on the Ocean, LLC v Ash*, 81 AD 3d 713 [2nd Dept 2011]). "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Id.; Doe v Axelrod*, 73 NY2d 748 [1988]). "In exercising that discretion, the Supreme Court must determine if the moving party has established: (I) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction." (*Trump on the Ocean, LLC v Ash*, 81 AD3d at 715; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *W T. Grant Co. v Srogi*, 52 NY2d 496 [1981].) "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*L & M 353 Franklyn Ave., LLC v S. Land Dev., LLC*, 98 AD3d 721, 722 [2d Dept 2012] [citation and internal quotation marks omitted]).

In order to obtain a permanent injunction, the moving party must establish that there was a "violation of a right presently occurring, or threatened and imminent", that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]; *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). The court cannot grant the ultimate relief sought under the guise of a preliminary injunction (*see SportsChannel Am. Assocs. v Natl. Hockey League*, 186 AD2d 417, 589 N.Y.S.2d 2 [1st Dept 1992]). "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]; *see Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824 [2d Dept 2010]; *Village of Westhampton Beach v Cayea*, 38 AD3d 760 [2d Dept 2007]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347 [1st Dept 2003]).

Here, the defendants have failed to establish a likelihood of success on the merits, as they have failed to identify the claimed "unjustified charges" that they claim were placed on their account. The court notes that the evidence submitted by defendants pertains to the account of another unit owner and not to the defendants' account. In addition, an e-mail from the defendants' son to their counsel is insufficient to establish that any charges were improperly added to the defendants' account. Moreover, "[w]here, as here, a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue" (*Dana Distribs., Inc. v Crown Imports, LLC*, 48 A.D.3d 613 [2d Dept 2008]; *see also Matter of Rice*, 105 AD3d 962, 963 [2d Dept 2013]).

On a motion for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d at 557; CPLR 3212[b]).

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626[1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231[1978]).

Turning now to defendants' request for summary judgment, defendants' counsel asserts that defendants obtained the permission of Village Mall's Board of Managers to enclose their balcony, and that plaintiff has conceded the defense of waiver asserted in their answer to the amended complaint. It is undisputed that pursuant to Village Mall's bylaws, the balcony appurtenant to defendants' unit constitutes a common area. Prior to the commencement of this action, Section 8 of Article VIII of Village Mall's House Rules, included in its bylaws provided that no balcony may be enclosed without the prior written consent of the Board of Managers (or prior to July 21, 1994, the managing agent). Section 31 of the bylaws (House Rules), provides that "[a]ny consent or approval given under these rules and regulations may be added to, amended or repealed at any time by resolution of the Board of Managers."

This court notes that although defendants have failed to include a copy of the pleadings as required by CPLR 3212(a), plaintiff has supplied said pleadings in their cross motion for summary judgment.

Defendants seek to rely upon excerpts from the deposition of Suvro Banerjee and a copy of a letter dated November 29, 1979, that was introduced as an exhibit at said

deposition. Plaintiff's object to the use of said deposition transcript on the grounds that there is no evidence that it was presented to Survro Banerjee for review and signature 60 days prior to the service of said motion. Suvro Banerjee executed the deposition transcript on December 1, 2015. Plaintiff's objection is without merit, as plaintiff also submits excerpts from Mr. Banerjee's deposition in opposition to the defendants' motion and in support of its cross motion.

Defendants did not appear at a deposition and have not submitted an affidavit in support of the within motion. With respect to the affirmation of defendants' counsel, "[a]ffirmations of attorneys who have no personal knowledge of germane facts have no intrinsic evidentiary value ..."(*Morales v Coram Materials Corp.*, 51 AD3d 86, 96 [2d Dept 2008]). However, the failure to submit an affidavit by a person with knowledge of the facts is not necessarily fatal to a summary judgment motion where the proponent submits other proof with an attorney's affirmation (*see Olan v Farrell Lines Inc.*, 64 NY2d 1092 [1985]; *Notskas v Longwood Associates, LLC*, 112 AD3d 599 [2d Dept 2013]).

An affidavit or testimony from a knowledgeable party is an appropriate vehicle for authenticating and submitting relevant documentary evidence on a motion for summary judgment (*see Muhlhahn v Goldman*, 93 AD3d 418 [1st Dept 2012]). Electronically stored information (ESI) is a broad term generally used to describe information stored on computers, including, documents. ESI may, in certain contexts, be properly admitted into evidence. Such information may be authenticated according to the same principles governing authentication of other types of evidence (*see generally People v Johnson*, 51 Misc 3d 450, 457-458 [County Ct., Sullivan County 2015]).

The excerpts from Mr. Banerjee's deposition submitted by defendants in support of the within motion are fragmented and pertain to correspondence between one of his parents and the Board of Managers. Suvro Banerjee stated that his parents kept paper files pertaining to the condominium and that between 2004 and 2010 he began a process of scanning all the family's old documentation, which was not limited to the condominium. He stated that his parents have paper copies as well as scanned copies; that he performed the scanning at home; that the scanning was not well organized, making it difficult to search for documents; that the November 29, 1979 letter was located on a floppy disk, along with documents relating to his prior employment. He further stated that he transferred the files from the floppy disk onto his computer the previous evening; that the document may not be on the floppy disk anymore, as he transferred it to his desktop, and that he didn't remember if he cut and pasted it or copied it; and that he printed out the copy of said letter the evening before his deposition.

The November 29, 1979 letter, marked as an exhibit at the deposition, bears the name Hillcrest Towers Condominium, with the following addresses: 150-38 Union Turnpike and 152-18 Union Turnpike, Flushing, N.Y. 11367. Mr. Banerjee stated that Village Mall was called Hillcrest Towers. Said letter is addressed to Sunil Banerjee, and provides as follows: "This is to inform you that the Board of Managers of Village Mall has approved your request to enclose your terrace. No further action is required on your part". It is signed Albert B. Ashforth Inc. Agent, and is subscribed to by Evelyn Cohen.

Plaintiff, in opposition to defendants' motion and in support of the cross motion submits an affidavit from Louis Giano, who states that he is the property manager of Village Mall and an employee of Lovett Group, the condominium's managing agent. Mr. Giano states that the managing agent maintains apartment files and administrative files for the condominium, and is the custodian of its business records which are maintained in the ordinary course of business. He states that the managing agent's file for the Banerjee's Unit 6S (Building 1) contains four original letters dated December 28, 1979, January 28, 1980 ("Janauary 28, 1880" [sic]), February 1, 1980 and March 28, 1985. Said letters were also marked as exhibits at Mr. Banerjee's deposition, and provide as follows:

The letter from "S. Banerjee" dated December 28, 1979 and addressed to the Board of Managers, informed said Board that their terrace had been enclosed that day by Trisun Corporation.

The letter, dated "Janauary 28, 1980" from Alfred B. Ashforth Inc., Agent and addressed to Sunil Banerjee, setting forth a portion of Article 8, section 8 of the bylaws which provides that " No balcony or patio shall be enclosed, decorated, or covered by an awning or otherwise without the prior written consent of the Board of Managers", and stated that as Mr. Banerjee had not submitted a request in writing to the Board before enclosing the terrace, he was in violation of the bylaws, and that "until approval is given for your terrace enclosure, you will have to remove same".

The letter from Sunil Banerjee letter dated February 1, 1980 and addressed to Daniel Taine, President of the Board of Managers, stated that he had notified the Board on December 28, 1979 that he had enclosed the terrace, and that he had recently "received a letter from Ms. Evelyn Cohen, on your behalf. Apparently I understand that there has been some confusion and unintentional misunderstanding. Therefore I am asking for formal approval of the Board for the terrace enclosure".

The letter from the Board of Managers' counsel, dated March 28, 1985 and addressed to S. Banerjee, which stated, in pertinent part, that : "It has come to the

attention of the Board of Managers that you presently have a terrace enclosure as part of your Condominium unit. You are directed to supply the Board of Managers with a copy of the original written authorization permitting you to construct and utilize the aforesaid enclosure. In the event that you are unable to produce such documentation, and have in fact never obtained such authorization, you are further directed to make the appropriate arrangements to have the subject enclosure removed as quickly as possible."

In May 2015, Village Mall amended Article VIII of its House Rules, to provide that "[a]n enclosure of balcony or patio must be removed as per Local Law 11, 2012."

On February 4, 2016, the Board of Managers adopted a certificate of resolution specifically aimed at the defendants in the three separate actions, which ratified the Board's resolution that at "all terrace enclosures must be removed; that the Board "believes that the November 29, 1979 letter (which exists as a copy provided by the unit holder and not an original) is not authentic, as inconsistent with VM's own records and with Banerjee's later letter requesting approval for the enclosure"; that "in any event the Board has determined that new circumstances exist, and the enclosures must be removed"; and that "the terrace enclosures must be removed for all of these reasons, most imperative because the balcony restoration program requires their removal in order to VM to timely comply with the Facade Law."

Here, Suvro Banerjee's deposition testimony is sufficient to authenticate the November 29, 1979 letter that was in his parents' possession which he scanned, transferred to a floppy disk and then electronically stored. Plaintiff, in opposition, has failed to demonstrate that the November 29, 1979 letter was not issued on its behalf by its then agent. Mr. Giano does not state whether he made a search of all of the condominium's electronic and paper records maintained by Lovett Group and does not state that the Lovett Group is not in possession of the November 29, 1979 letter. In addition, neither Mr. Giano nor Mr. Bosetti state when Lovett Group became the condominium's managing agent, and how it came into possession of the condominium's records.

However, the above correspondence does not conclusively establish that the Board of Managers gave defendants written permission to enclose the subject balcony. These letters are inherently contradictory and do not eliminate every issue of fact as to whether the defendants requested permission to enclose the balcony prior to installing the enclosure, and whether the Board granted the defendants permission to enclose the balcony.

The evidence submitted by defendants is also insufficient to establish that the

plaintiff waived its bylaws (house rules) pertaining to balcony enclosures. Waiver is an intentional relinquishment of a known right (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184[1982]; *Springside Land Co., LLC v Board of Mgrs. of Springside Condominium I*, 56 AD3d 654, 658-659 [2d Dept 2008]). Defendants' counsel has mischaracterized the nature of the deposition testimony of the plaintiff's property manager Peter Betheil.[1] It is noted that defendants have only submitted excerpts from Mr. Betheil's deposition testimony. Mr. Betheil stated that he became the property manager in 2013 after the facade work was completed, and that he was not privy to the circumstances that resulted in the balcony enclosures and therefore could not comment on their validity (Tr 28). Mr. Betheil's statements, thus, are insufficient to establish a waiver of the House Rules on the part of the plaintiff. Accordingly, that branch of the defendants' motion which seeks summary judgment dismissing the complaint is denied.

Turning now to the plaintiff's cross motion for summary judgment on its claims for injunctive and declaratory relief, the evidence submitted herein establishes that pursuant to Article III, Section 6 of the bylaws, the Board of Mangers is empowered to "maintain and repair or replace all balconies", unless caused by the unit owner's negligence, and has the right of access to any unit and all portions of the common elements "for the purpose of carrying out any of its obligations under this Offering Plan, the By-Laws or the Declaration of the Condominium". In addition, Local Law No. 11 of the City of New York requires building owners to inspect and maintain in safe condition a building's exterior walls and appurtenances thereto, including balconies, every five years.

It is undisputed that the Board of Managers has undertaken an inspection and renovation project of the buildings exterior walls and common areas including balconies, in compliance with Local Law 11. The work on the exterior building walls has been completed. Cory Bosetti, the president of the Board of Mangers states in his affidavit that plaintiff is finishing the last quarter of balconies on Building 2 and then will proceed to perform balcony remediation in Buidling 1, where defendants' unit is located.

Village Mall, thus, has established that it has the authority to inspect the buildings' facades and balconies, and to perform maintenance and remediation work. In addition, Village Mall has the authority to access the balconies that are appurtenant to an owner's unit, and can require the removal of balcony enclosures in order to perform said

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[1]Plaintiff objects to the use of excerpts Mr. Betheil's deposition transcript on the grounds that it was not submitted to him for signature 60 days before the service of the within motion. However, as plaintiff also submits excerpts from Mr. Betheil's deposition, and as the motion and cross motion were adjourned several times, plaintiff's objections to the use of said transcript, pursuant to CPLR 3116(a), is without merit.

inspection, maintenance and remediation to the balcony. The evidence submitted herein, however, is insufficient to establish that the defendants were required to obtain a permit from the Department of Buildings in order to erect the subject balcony enclosure in 1979. Although plaintiff's assert that the materials used by the defendants in the balcony enclosure required a permit, it has failed to submit evidence, in admissible form, as to the nature of the materials used in the balcony enclosure.

No contractual right to install and maintain a balcony enclosure exists here, and plaintiff could either rescind any such prior approval or prohibit such enclosures, provided that such action was taken for the benefit of the condominium. Courts apply the business judgment rule when determining challenges to the decisions of a board of directors of cooperative and condominium corporations (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530[1990]; *Helmer v Comito*, 61 AD3d 635 [2d Dept 2009]). Under the rule, a court's inquiry "is limited to whether the board acted within the scope of its authority under the by-laws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" (*Schoninger v Yardarm Beach Homeowners' Assn.*, 134 AD2d 1, 9 [2d Dept 1987]). However, the rule does not serve to "shield boards from actions that have no legitimate relationship to the welfare of the condominium, or that deliberately single out individuals for harmful treatment" (*Perlbinder v Bd. of Managers of 411 E. 53rd St. Condo.*, 65 AD3d 985, 989 [1st Dept 2009], *citing Katz v 215 W. 91st St. Corp.*, 215 AD2d 265, 266-267 [1st Dept 1995]).

Village Mall has demonstrated that its decision to require defendants to remove the subject balcony enclosure in order to facilitate the inspection, maintenance and repair of the balcony, and in order to maintain a uniform building appearance, is protected by the business judgment rule (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 153-154 [2003]; *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]; *Jacobs v Grant*, 127 AD3d 924, 925-926 [2d Dept 2015]; *Walden Woods Homeowners' Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]; *Captain's Walk Homeowners Assn. v Penney*, 17 AD3d 617, 618 [2d Dept 2005]; *Hochman v 35 Park W. Corp.*, 293 AD2d 650, 651 [2d Dept 2002]). In opposition to plaintiff's prima facie showing on their cross motion for summary judgment, defendants have failed to raise a triable issue of fact by submitting evidence in admissible form that plaintiff acted "(1) outside the scope of [their] authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (*40 W. 67th St. v Pullman*, 100 NY2d at 155; *see Jacobs v Grant*, 127 AD3d at 925-926; *Walden Woods Homeowners' Assn. v Friedman*, 36 AD3d at 692; *Martino v Board of Mgrs. of Heron Pointe on Beach Condominium*, 6 AD3d 505 [2d Dept 2004]).

Therefore, that branch of plaintiff's motion for summary judgment on its first cause of action for a permanent injunction, permitting plaintiff to enter defendants' unit in order to remove the balcony enclosure, so that the inspection and remediation work may proceed, is granted.

That branch of plaintiff's motion which seeks summary judgment in its second cause of action which seeks a permanent injunction ordering the removal of the balcony enclosure on the grounds that it is structurally unstable, is denied, as plaintiff has not submitted any evidence which supports this claim.

That branch of plaintiff's motion which seeks summary judgment on the third cause of action for declaratory judgment, is granted to the following extent: It is the declaration of this court that even if defendants were to establish that they were granted permission to enclose the balcony in 1979, the May 2015 amendment of the House Rules, and the Board of Managers' resolution of February 4, 2016, make it clear that any such permission has been revoked, and defendants may not continue to maintain the balcony enclosure, and are required to remove said enclosure, within sixty days after the inspection by plaintiff of the balcony referenced below.

That branch of the plaintiff's motion which seeks summary judgment on its fourth cause of action for a permanent injunction enjoining defendants from maintaining the balcony enclosure, compelling them to remove the enclosure and restoring the balcony to its original unadorned condition, is denied. This cause of action is repetitive of the prior causes of action. Furthermore, plaintiff has failed to establish that any such restoration of the balcony is not part of, and included in, its remediation project.

That branch of plaintiff's motion which seeks summary judgment on its fifth cause of action for a permanent injunction allowing an inspection of the balcony enclosure in order to assess its condition, is granted solely to the extent that defendants shall grant plaintiff access to the balcony in order to assess the condition of the balcony, within fifteen days after service of a copy of this order with notice of entry.

Dated: December 22, 2016

Thomas D. Raffaele, J.S.C.