2024-01-16

71 Washington Place Owners, Inc. v. Resnicow

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

----------X

71 WASHINGTON PLACE OWNERS, INC.,

Plaintiff,

- v -

NORMAN RESNICOW, BARBARA RESNICOW

Defendants.

INDEX NO. 151602/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110, 112, 114, 115, 116, 119, 121, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 167, 168, 169, 170, 171, 172, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 235

were read on this motion for SUMMARY JUDGMENT.

This action involves a long-standing dispute among tenant-shareholders of 71 Washington Place, New York, New York (the "Building"), owned by a cooperative housing corporation, 71 Washington Place Owners, Inc., (the "Co-op" or "Plaintiff"). In particular, the Co-op alleges that Defendants Norman and Barbara Resnicow (the "Resnicows" or "Defendants") have bullied and threatened shareholders, guests, and professionals that work in the Building for years, resulting in several different lawsuits.[1] In this action, the Co-op seeks

[1] Some of these disputes have been extensively litigated in related actions, including the Resnicows' action to dissolve the Co-op before this Court (*Resnicow, Barbara et al v 71 Washington Place Owners, Inc.*, Index No. 655566/2021 [Sup Court, NY County] [the

ejectment of the Resnicows, pursuant to a vote of termination by the Board of Directors of the Co-op.

Both parties now move for summary judgment. For the following reasons, Plaintiff's motion is granted, and Defendants' motion is denied. Plaintiff has demonstrated that the Co-op's decision to terminate the Resnicow's proprietary lease is protected by the business judgment rule, and Defendants have failed to rebut this showing by demonstrating that the Co-op board failed to comply with a condition precedent to termination or that the Co-op acted in bad faith, arbitrarily, or with discrimination or malice.

BACKGROUND

The Co-op operates the Building as a cooperative, allocating the residential units therein to its shareholders pursuant to proprietary leases (NYSCEF 72 ["Proprietary Lease"] at 2 § [b]). Defendants are shareholders of the Co-op, owners of 320 shares, and tenants of the Premises pursuant to the Proprietary Lease. The Co-op is governed through the By-laws and is managed by its Directors (NYSCEF 71 ["Bylaws"]). Article II, Section 7 of the By-laws provides the Directors with the authority to manage the affairs of the Co-op and to adopt rules and resolutions, as they may deem proper, to achieve the same (Bylaws, Art. II §7).

The Co-op adopted certain "House Rules," a breach of which is considered a default under the Proprietary Lease (Proprietary Lease § 13). Both the House Rules and the Proprietary Lease provide that a shareholder shall not make or permit any disturbing or unreasonable noises in the Building or do anything which will interfere with the rights, comfort, or convenience of

---

"Dissolution Action"]), and tenant-shareholder Justin Theroux's ("Theroux") action against the Resnicows in Civil Court (*Theroux, Justin v Norman J Resnicow et al.*, Index No. 154642/2017 [Civ Ct, NY County] [the "Theroux Action"]).

other shareholders (PSUF ¶9; House Rule¶4; Proprietary Lease § 18(b)). Section 24 of the Proprietary Lease also states that Lessee "shall always in good faith endeavor to observe and promote the cooperative purposes for the accomplishment of which the [Co-op] is incorporated." (Proprietary Lease § 24).

The Proprietary Lease may be terminated by the Co-op by service of a five days' notice of termination if, "at any time the Lessor shall determine, upon the affirmative vote of at least two-thirds of its then Directors, that because of objectionable conduct on the part of the Lessee, or of a person dwelling or visiting in the Apartment, repeated after written notice from the Lessor, the tenancy of the Lessee is undesirable," repeated after notice from the Co-op (Proprietary Lease §31(f)). Objectionable conduct is defined to include violating or disregarding the House Rules (Proprietary Lease §31(f)).

According to the Co-op, Defendants (in particular, Mr. Resnicow) have abused fellow shareholders and interfered with the management of the Building in violation of the Proprietary Lease by among other things, refusing to give access to Defendants' Premises for repairs by the Co-op; repeatedly trespassing on the shareholder of Apartment 2A/B's property despite written notice to stop; and engaging in verbal assault by Mr. Resnicow of two Directors (NYSCEF 105 [Plaintiff's Rule 19a Statement of Undisputed Facts ("PSUF") ¶7. In the *Theroux* Action, these actions necessitated a temporary restraining order as well as preliminary injunction enjoining the Resnicows from, among other things, using abusive language or posture in communications with any resident of 71 Washington place (NYSCEF 77, 79). Similarly, on October 27, 2020, in the *Theroux* Action, the First Department held that Mr. Resnicow repeatedly trespassed onto Apartment 2A/B's property (NYSCEF 74).

On May 29, 2019, the Co-op served Defendants with a letter detailing their objectionable conduct ("First Objectionable Conduct Letter"). The Letter advised Defendants that they are in violation of Sections 13 and 24 of the Proprietary Lease in that, Mr. Resnicow engaged in recurring objectionable conduct by, among other things, repeatedly screaming, cursing, and exhibiting menacing behavior towards: (a) shareholders and their guests; (b) staff and managing agents; and (c) professionals hired to work in the Building by the Directors (PSUF ¶14-15; NYSCEF 80). The Letter advised that if such conduct persisted, the Directors would be forced to take all appropriate actions pursuant to the Proprietary Lease and law, including terminating the Proprietary Lease (PSUF ¶16-17; NYSCEF 80).

On or about August 25, 2021, the Co-op served Defendants with a second objectionable conduct letter (the "Second Objectionable Conduct Letter") (NYSCEF 83). The Second Objectionable Conduct Letter advised that the Co-op would be considering whether to terminate the Proprietary Lease, pursuant to Section 31(f) thereof, due to Defendants continued objectionable conduct (PSUF ¶21; NYSCEF 83). The Second Objectionable Conduct Letter also advised Defendants that they were invited to attend a Special Meeting of the Directors, scheduled for September 28, 2021, at 4:00 P.M. (the "Special Meeting"), regarding the termination of the Proprietary Lease, and enclosed a copy of the Notice of Special Meeting that was being distributed to the Directors (PSUF ¶23-24; NYSCEF 83).

On September 28, 2021, the Directors held the Special Meeting at the offices of its then counsel to consider whether to terminate the Proprietary Lease (PSUF ¶25). All Directors attended the Special Meeting with the exception of Justin Theroux, who recused himself from the vote (*id.* ¶26). Defendants and their counsel attended the Special Meeting and made statements to the Directors (*id.* ¶¶27-28). After deliberation, the Directors unanimously

approved and adopted a resolution to terminate Defendants' Proprietary Lease (the "Resolution") (*id.* ¶30).

On February 8, 2022, in accordance with Sections 27 and 31(f) of the Proprietary Lease, the Co-op served upon Defendants a Five (5) Day Notice of Termination (the "Termination Notice"), advising Defendant that they were required to vacate and surrender possession of the Premises by February 15, 2022 (*id.* ¶¶32, 37). Defendants have failed and refused to vacate and surrender the Premises in accordance with the Proprietary Lease (PSUF ¶39).

Plaintiff commenced this action on or about February 22, 2022, bringing claims for ejectment, use and occupancy, and attorney's fees (NYSCEF 1). The Court denied Defendants' motion to dismiss this action because Defendants had not shown, as a matter of law, that Plaintiff waived its claims in this action or created a month-to-month tenancy by accepting certain rent payments from Defendants during the course of this litigation (NYSCEF 41 ["Decision and Order on Mot. Seq. 001"]). Defendants filed an Answer with Counterclaims on March 31, 2023, asserting claims for declaratory judgment, breach of contract, recovery of the Real Estate Tax Abatement, and damages for the deterioration of the Resnicow's apartment (NYSCEF 44).

DISCUSSION

Summary judgment will be granted if the movant establishes that no triable issues of fact exist (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once the party seeking summary judgment shows prima facie entitlement to judgment, the party opposing the motion must come forward with admissible proof establishing the existence of triable issues of fact or demonstrate an acceptable excuse for its failure to do so (*id.*). When faced with a motion for summary judgment, the court must view the evidence in the light most favorable to the

nonmoving party and give the nonmoving party all the reasonable inferences that can be drawn from the evidence (*Negri v Stop and Shop, Inc*., 65 NY2d 625, 626 [1985]).

A. Ejectment

Plaintiff's motion for summary judgment on its first cause of action for ejectment is granted. The Court of Appeals has held that a residential cooperative may properly terminate the proprietary lease of a tenant-shareholder who engages in a course of objectionable conduct, and that such a decision will be presumptively protected from judicial scrutiny by the business judgment rule (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 152 [2003]). "The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to the good faith decisions made by boards of directors in business settings" (*id.* at 153). Thus, a court will defer to a cooperative board's decision to terminate a tenant-shareholder's proprietary lease and cancel his or her shares as a result of "objectionable conduct" without scrutinizing the underlying facts of such a decision, as long as the board has acted: (1) within the scope of its authority; (2) in the interests of the cooperative; and (3) in good faith (*id.* at 154). Once these conditions have been satisfied, a co-op board's decision to terminate a proprietary lease is given deference.

On the other hand, "[t]o trigger judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose, or (3) in bad faith (*id.* at 155). As such, a tenant-shareholder bears the burden of first establishing that the board acted in one of these three impermissible ways (*Perry v 61 Jane St. Tenants Corp*., 2011 NY Slip Op 31244[U] [Sup Ct, NY County 2011]).

Here, the Co-op's decision to terminate the Resnicow's proprietary lease is protected by the business judgment rule. Paragraph 31 of the proprietary lease provides that the Co-op may

terminate the Proprietary Lease by service of a five days' notice of termination if, at any time the Co-op shall determine, upon the vote of at least two-thirds of its Directors, that the tenancy of Defendants is "undesirable" due to objectionable conduct on the part of Defendants, repeated after notice from the Co-op. Objectionable conduct is defined to include violating or disregarding the House Rules (Proprietary Lease §31(f)).

The record clearly demonstrates that these criteria have been satisfied. The Resnicows were sent the First Objectionable Conduct Letter and the Second Objectionable Conduct Letter (NYSCEF 80; 83). The Resnicows admit that they received these notices (NYSCEF 65 ¶¶13, 15, 16). Thereafter, the Co-op properly notified Defendants of the Special Meeting, held same with Defendants and their counsel present, Defendants presented to the Directors, and thereafter the Directors unanimously voted to terminate the Proprietary Lease, which was memorialized in the Resolution (NYSCEF 88 [Special Meeting Minutes]; NYSCEF 89 [Transcript of Special Meeting]; NYSCEF 90 [Board Resolution]; NYSCEF 91 [Notice of Termination]).

Additionally, Plaintiffs have demonstrated that the termination of the Resnicow's proprietary lease was in furtherance of a legitimate corporate purpose. The "co-op board has a fiduciary duty and obligation to act in the collective interests of the cooperative and all of its shareholders" (*Perry*, 2011 NY Slip Op 31244[U]). Here, the Co-op has created a sufficient record demonstrating that Defendants conduct has intentionally and unreasonably interfered with the rights of other shareholders in breach of the Proprietary Lease Section 18 (b) and House Rule 4, by, among other things, repeatedly screaming and abusing each other in the Premises at a volume that disturbs fellow shareholders and causes the shareholders to be concerned for Mrs. Resnicow's safety, as well as their own; interfering with the management of the Building; and verbally assaulting fellow shareholders. Indeed, "the record leaves this Court with the

inescapable conclusion that the Co-op board has been frustrated and exasperated with addressing this issue. Absent from this record is any meaningful and clear efforts from the [Resnicows] to de-escalate the tensions between [them] and [their] fellow cooperative shareholders" (*Perry*, 2011 NY Slip Op 31244[U]).

In response to Plaintiff's prima facie showing that the business judgment rule should apply, the Resnicows raises two arguments: (1) that there are defects with the notices served by the Co-op; and (2) that the Board acted outside its authority and in bad faith.

First, Defendants argue that the Corporation's failure to have "literally performed" the condition precedent to the termination of the Proprietary Lease precludes the Corporation from seeking the ejectment of the Resnicows. Defendants argue that First Objectionable Conduct Letter, the Second Objectionable Conduct Letter, the Notice of Special Meeting, the Board Resolution, and the Notice of Termination (the "Notices") are null because neither was given *by the Board Secretary* in compliance with the Proprietary Lease and the Corporation's Bylaws. In support of their argument, Defendants rely on cases in which there was *no* compliance with a particular express condition precedent to the enforcement of a contract (*see U.S. Bank Nat. Ass'n v DLJ Mortg. Capital, Inc.*, 141 AD3d 431, 432 [1st Dept 2016]; *S. Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011]).

Here, by contrast, Defendants' argument is that there are defects in the *form* of Notice. Defendants rely on the fact that the Bylaws provide that "[t]he president shall "make and sign in the name of the corporation all contracts, leases and other instruments which are authorized from time to time by the board" (Art. III, Sec. 3), and the Secretary "shall attend to the giving and serving of notices of the corporation" (Art. III, Sec. 4) to argue that the Notices, which are signed from the "Board of Directors", are therefore void.

However, section 31(f) of the Proprietary Lease states that the "Lessor shall give to the Lessee a notice…" with respect to their objectionable conduct (NYSCEF 9). "Lessor" is defined on page 1 of the Proprietary Lease as the Co-op (*id.*). Thus, the Notices as required under Section 31(f) were properly sent by the Board of Directors of the Co-op. And while the Bylaws state that the secretary "shall attend to the giving and serving of notices of the corporation," nothing in the Bylaws states that this provision strictly requires the secretary to give the notice personally. Nor does the Court find that the Notice of Special Meeting to be defective because it is not "signed" by the President. The cases cited by Defendants to support their argument are not relevant in this context (*see Park Health Ctr. v Country Wide Ins. Co.*, 1 Misc3d 906(A) [Civ Ct, Queens Co. 2003] [discussing the verification of a pleading]; *Paonessa v C & L Bldr./Dev., Inc.*, 50 AD3d 1334, 1335 [3d Dept 2008] [discussing a new promise to pay a debt under GOL 17-101]). Rather, courts routinely uphold sufficiency of typewritten signatures on notices (*see e.g.*, *Fairview Co. v Idowu*, 148 Misc 2d 17, 20 [Civ Ct, Richmond County 1990] [the typewritten name of landlord entity on notice of termination is the "signature" of landlord and proper]).[2] Thus, Defendants have failed to demonstrate that the cited provisions of the Bylaws are a condition precedent to termination.

In any event, even if there were some technical defect in the form of the Notices, those defects have been waived. The purpose of specifying methods by which a notice is to be given is

[2] Later in their own motion for summary judgment, the Resnicows submit that they "never argued McCorkle was required to sign the Notice of Special Meeting. The Resnicows argued he had no authority to sign the Notice of Termination, because it was not among the documents the By-Laws authorize the President to sign." (Reply at 4). However, their opening argument regarding the Notice of Special Meeting was "As a notice purportedly given by the President, the document fails for not being signed as required by Article III, section 3, of the By-Laws. David McCorkle's printed name does not suffice as a signature." (Memo Opp at 6).

to ensure that the defaulter has actual notice and an opportunity to be heard or an opportunity to cure the default, if so provided (*see Gucci Am., Inc. v Sample Sale Wholesalers, Ltd.*, 39 AD3d 271, 272-73 [1st Dept 2007]; *Rower v W. Chamson Corp.*, 210 AD2d 7, 7 [1st Dept 1994]). Here, Defendants admitted they received these notices (NYSCEF 65 ¶¶13, 15, 16), and that they showed up at the special meeting with their counsel and presented their defenses (NYSCEF 88 [Special Meeting Minutes]; NYSCEF 89 [Transcript of Special Meeting]). Furthermore, there is nothing in the record that indicates Defendants promptly objected to the letters sent to the Co-op, nor did Defendants raise this defense in their Answer. Thus, any defect has been waived as there is no prejudicial effect (*see e.g., Rower*, 210 AD2d at 7 [holding that where Notices of Termination and Notices of Cure were to be served by certified mail and not by registered mail under the proprietary lease, plaintiff's receipt of the certified mailing and his failure to object promptly to the defendant's service of the Notices constituted a waiver of the defect; service was not invalidated under the circumstances]; *Trump Plaza Owners, Inc. v Weitzner*, 47 AD3d 525, 526 [1st Dept 2008] [same]; *E. 82 LLC v O'Gormley*, 295 AD2d 173, 174 [1st Dept 2002] ["To dismiss this action for lack of such a seven-day notice would be 'to arrive at an unreasonable or absurd result'"]). Moreover, Defendants' claim that the Special Meeting was not properly held and was otherwise a settlement conference is not supported by the record (*see* Notice of Special Meeting; Transcript of Special Meeting at 6:15-18; *see, e.g., Surfair Equities, Inc. v Marin*, 66 Misc 3d 1216(A) at *6 [Civ Ct, NY 2020] ["all parties were aware that the proposed resolution would be voted on at the Special Meeting"]).

Second, the Resnicows have failed to demonstrate that the Co-op board acted in bad faith, arbitrarily, or with discrimination or malice (*Pullman*, 100 NY2d at 155). Defendants first argue that by repeatedly failing to give and serve proper notice, the Corporation's board acted outside

the scope of its authority, and therefore the business judgment rule does not apply. Unlike *13315 Owners Corp. v Kennedy* (4 Misc 3d 931, 946 [Civ Ct, NY County 2004] [Lebovits, J.]), where the court found that the respondent demonstrated that petitioner co-op acted both outside the scope of its authority and in bad faith in conducting its vote in view of the incorrect notice of the board meeting, the improper election of the board members, and the fact that respondent was not given an opportunity to be heard at the board meeting, here there is no such concern as the Resnicows do not claim to be confused by the notice sent them, they did attend the special meeting, were given the opportunity to present their defense, and they did so.

Nor have the Resnicows raised a genuine factual dispute that the board acted in bad faith or that the Resnicows suffered disparate treatment by the Co-op. "In order to overcome public policy that supports according deference to the business judgment rule, defendant must present the court with specific independent tortious acts of discrimination or similar wrongdoing committed by those involved in the decision to expel [the shareholder]" (*World of Residensea II, Ltd. v Villasenor*, 2007 AMC 1049 [SDNY 2007] [applying New York law]). The Resnicows' allegations that the Co-op had demonstrated disparate treatment, bad faith, and favoritism by failing to make certain repairs to their unit are insufficient to demonstrate disparate treatment such that the Board's decision to terminate should not receive the benefit of the business judgment rule. Defendants' claim that all windows in the Building were replaced except in in their unit has been rebutted by the affidavits submitted by the Co-op, wherein other shareholders aver that their windows have not been replaced, or that they have paid for the replacement or upgrades of their windows at their own expense (*see* NYSCEF 225 ["Dudley Aff."] ¶¶6-18; NYSCEF 228 ["Calcaterra Aff."] ¶¶6-18; NYSCEF 230 ["Theroux Aff."] ¶¶12-18; NYSCEF 222 ["McCorkle Aff."] ¶¶12-15). Further, Defendants submit no evidence aside from self-

serving affidavits that their skylights leaked and/or that the Co-op ignored any such leaks. Indeed, the Affidavit submitted by Mr. Resnicows admits that while the Co-op has not restored the affected portions of the living room walls due to a leak, "[t]he Corporation finally effected the necessary outdoor repair to stop this leak in November 2020" (NYSCEF 125 ["Resnicow Aff."] ¶44). Similarly, Defendants' claim of disparate treatment based on the tax abatement is not supported, as the affidavits submitted by the Co-op state that they have not yet received the proper credit for their portion of the cooperative tax abatement (Dudley Aff. ¶18; Calcaterra Aff. ¶18; Theroux Aff. ¶18; McCorkle Aff. ¶15). Finally, Defendants argue that the board members have demonstrated favoritism by actively supporting Mr. Resnicow's "arch enemy" in the *Theroux* Action. The Resnicows cite to affidavits submitted by individual shareholders in the *Theroux* Action that took the position that Mr. Resnicow was incorrect about a boundary dispute, and/or advised the Court of alleged retaliatory or threatening conduct by Mr. Resnicow (*see* Resnicow Aff. ¶¶16-28). Even if this could be considered favoritism by the Board, any such "favoritism" alleged is not related to retaliatory or selective enforcement of obligations under the proprietary lease (*76th St. Owners' Corp. v Elshiekh*, 27 Misc 3d 1237(A) [Civ Ct, Bronx County 2010] ["Respondents have failed to show that there has been any retaliatory or selective enforcement of obligations under their proprietary lease, and have only provided conclusory, unsupported and self serving allegation and conjecture. These allegations are insufficient to raise any triable issues of fact"]).

Indeed, even if the Court takes all of Defendants' allegations of bad faith and disparate treatment as true, Defendants have failed to raise an issue of fact because they have not demonstrated any connection between their allegations of disparate treatment and the board's well-supported determination to terminate the Proprietary Lease (*227-229 E. 14th St. Hous. Dev.*

Fund Corp. v Vaknine, 2017 NY Slip Op 31391[U], 10 [Sup Ct, NY County 2017] [assertion of bad faith and disparate treatment did not create an issue of fact because tenant did not show any connection between the uneven treatment and the board determination to terminate]; *Perry*, 2011 NY Slip Op 31244[U] [shareholder tenant failed to raise any factual issue "as to whether in voting to terminate [their] lease, [the co-op] did not act for the purposes of the cooperative, within the scope of its authority, and in good faith"], quoting *Trump Plaza Owners, Inc. v Wietzner,* 61 AD23d 480, 480 [1st Dept 2009]). Thus, the business judgment rule applies to termination of the Resnicow's proprietary lease, and summary judgment on the first cause of action for ejectment is granted in favor of Plaintiff.

B. Use and Occupancy

Summary judgment on Plaintiff's second cause of action is granted in favor of Plaintiff. As fully addressed in this Court's Decision on Mot. Seq. 002 (NYSCEF 236) — whereby Plaintiff sought, and this Court granted, the payment of rent arrears, ongoing maintenance, and reoccurring assessment, *pendente lite*— Defendants are obligated to pay monthly rent for before and after the termination of the Proprietary Lease. Specifically, Article 1 of the Proprietary Lease states that all rent is to be paid on the first of the month. In addition, Defendants are required to pay their pro rata share of any special maintenance charge (*i.e.*, assessment) and additional rent that may be charged by the Co-op. Further, Section 32(a) of the Proprietary Lease provides that if

Defendants' tenancy is terminated pursuant to Section 31(f), Defendants "shall continue to remain liable for payment of a sum equal to the rent which would have become due hereunder and shall pay the same in installments at the time such rent would be due hereunder." (NYSCEF 9 ["Proprietary Lease"]). Thus, in addition to owing to payment *pendente lite*, Defendants owe

outstanding rent and use and occupancy through and including the date that the Resnicows vacate the Premises. Defendants have not raised any factual disputes with respect to this cause of action in their opposition to this summary judgment motion. However, for the reasons stated in the Decision and Order on Mot. Seq. 002, Plaintiff is not entitled to a late fee.

C. Attorney's Fees

Summary judgment on Plaintiff's third cause of action is granted in favor of Plaintiff. Section 28 of the Proprietary Lease provides that the Co-op is entitled to payment of its expenses, including reasonable attorneys' fees, and disbursements by Defendants which were/are incurred in connection with Defendants' default. Thus, an award of attorney's fees is appropriate. Defendant's request for attorney's fees pursuant to RPL 234 is denied as Defendants have not been successful in this action. Plaintiff shall submit an affidavit and supporting documentation outlining its fees within two weeks of the date of the order in this motion.

D. Defendant's Counterclaims

Finally, Defendants did not oppose the Co-op's motion to dismiss Defendants' affirmative defenses and counterclaims. Thus, those affirmative defenses and counterclaims are dismissed in favor of Plaintiff.

Accordingly, it is

ORDERED that Plaintiff's motion for Summary Judgment (Mot. Seq. 003) is **GRANTED**; it is further

ORDERED that Defendants' motion for Summary Judgment (Mot. Seq. 004) is **DENIED**; it is further

ORDERED that Plaintiff shall submit an affidavit and supporting documentation for its reasonable attorneys' fees within two weeks of the date of the Order; Defendants shall have seven days thereafter to file any objections; and it is further

ORDERED that Defendants must pay Plaintiff all past due and future use and occupancy, on the first day of each month thereafter, through and including the date that the Defendants vacate the Premises; it is further

ORDERED that on upon submission of a proposed judgment in the appropriate form, the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendants (in accordance with the Court's decision on Motion Sequence No. 002 (NYSCEF 236) Plaintiff shall include past-due use and occupancy, ongoing maintenance, and the reoccurring assessment currently owed by Defendants, without any late fees) together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

20240116174320JMCOHEN1A37AA3712A7439281CAEB2A451F0344

1/16/2024
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE