SUPREME COURT OF THE STATE OF NEW YORK
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FROM: Kaon Lai, Assistant Law Clerk

SUBJECT: Roberts v. Lake Osiris (Index No. 31672012)

DATE: July 29, 2014

PAGES: 25 (including cover sheet)

COMMENTS: Please see attached:

Decision and Order

COPY

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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STEPHEN P. ROBERTS, ROBIN LYNN ROBERTS, JOHN GALLI, GEORGANN GALLI, VICTOR TOLEDO, ALIX-MARIE HALL, JOANNE G. BRENSILVER, DANIEL J. GROGAN, and NORMAN WASSERMAN, individually and derivatively as shareholders/members on behalf of THE LAKE OSIRIS ASSOCIATION, INC.,

Plaintiffs,

-against-

DECISION AND ORDER
INDEX NO.: 3167/2012
Motion Date: 4/14/2014
Sequence No. 2

THE LAKE OSIRIS ASSOCIATION, INC., THE LAKE OSIRIS ASSOCIATION, INC. BOARD OF DIRECTORS, and SANDY ALTMAN, THAD WEISSMAN, LORI FARRELL, PATRICIA GARRISON, LINDA EICHHORN, CHRISTINE TORRES, ROBERT WAHATOVICH, CRAIG KISH, BETH TANGO, BERNADETTE GILLESPIE, MARTY ROSENBLUM, DOUG COOPER, and CARLOS LLORENS, individually and as current and/or past officers and/or members of the Board of Directors of THE LAKE OSIRIS ASSOCIATION, INC.,

Defendants.

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SCIORTINO, J.

The following papers numbered 1 to 51 were read in connection with defendants' cross-motion[1] to dismiss plaintiffs' complaint pursuant to Civil Practice Law & Rules 3211(a)(1) and (7):

[1] Plaintiffs' motion for a preliminary injunction was granted by separate Decision and Order dated May 6, 2014.

PAPERS	NUMBERED
Order to Show Cause/Affirmation/Affidavit/Exhibit A/ Exhibits B1-B5/Exhibits C-K	1-19
Notice of Cross-Motion/Affidavit of Kolbrenner/Exhibit 1/ Affidavit of Altman/Exhibits 2-4/Affidavit of Gubits/ Exhibit 5/Affidavit of Garrison/Exhibit 6	20-30
Defendants' Memorandum of Law In Support	31
Reply Affidavit of S. Roberts/Reply Affidavit of R. Roberts/ Reply Affidavit of Toledo/Reply Affidavit of Brensilver/Exhibits A-I[2]	32-44
Plaintiffs' Reply Affirmation/Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion to Dismiss	45-46
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Background and Procedural History

Lake Osiris Park was opened in 1948 as a seasonal recreational lake community, open to its members each year from April 15 to October 15. Lake Osiris Park is owned, operated and maintained by defendant Lake Osiris Association (LOA). Plaintiffs are among 52 owners of improved and unimproved lots in Lake Osiris Park. All property owners are members of the LOA; all pay membership dues to LOA.

For more than 60 years, LOA has provided water to its members during the operating season (April through October) through a community water supply owned, operated, and maintained by LOA. The Lake Osiris Park properties receive water through a well system, pumped to each residence. A tank and the pump are housed in a pump house on LOA property. A portion of the members' dues paid to LOA is used to maintain the well system.

Over the course of the last 30 years, a number of Lake Osiris Park properties have been converted to year-round homes. Some of the LOA members who converted their houses, and others who continued to use their houses seasonally, have drilled private wells on their lots. The

[2] Papers submitted by plaintiffs in support of their motion for preliminary injunction were considered herein to the extent that they provide evidence pertinent to the Court's consideration of defendants' cross-motion to dismiss.

LOA members who installed private wells remain connected to the community water supply and some owners continue to use both sources of water; however, the community water supply is the sole source of water for the plaintiffs' properties. Plaintiffs are the only members of the LOA who have not drilled private wells.

In June 2009, LOA engaged the services of M.A. Day Engineering to perform a survey of the well. A report was issued on June 10, 2010 (Exhibit 4 to defendants' papers). The report estimated the cost of the replacement of the pump house between $25,000 and $30,000. The recommendation was the abandonment of the existing pump house, and the installation of a new pump, to be placed in a manufactured wooden shed, along with the chlorination system and pump controls. The estimated cost for that work was $12,000. The report also recommended replacement of the existing galvanized piping; no estimate of the cost of such replacement was given. However, the report indicated that, with those improvements, there would be a "clean, efficient water supply that will serve your need for many years."

By August 2012, approximately 47 of the 52 LOA members had installed private wells. At that time, defendants sent LOA members a "well survey." The well survey described the well, well building, well tank and electrical system as "unsafe and badly in need of replacement by all" (Exhibit E to plaintiffs' papers). However, no showing of such unsafe conditions has been presented to this Court.

The survey further noted that the well pump had been replaced in July 2012 with the cost paid by an insurance company (apparently, after a lightning strike) and the new pump had a 5-year warranty. It further referenced the creation of a community well committee. The Executive Committee of the LOA asked LOA members to select among four options for the future use of the community water supply. The options included:

1. "Let the system go, as is, until it no longer works (maximum of five years) and put all users on notice that the association will be out of the water business at that time...."
2. "Lease or license the well to the six primary users and any secondary users for a minor fee, to be operated at the sole expense of those users;"
3. "Offer each of the six well users a $2,000 'buyout' toward drilling their own individual wells and give notice that the community well will be shut down at the end of the 2013 season;" and
4. "Upgrade the existing system to code in a new shed and replace the piping." (This option included a cost estimate of up to $90,000).

Twenty-three of the 52 members responded to the survey. The results of the survey were sent to LOA members on October 25, 2012 (Exhibit F to opposing papers). Eight members voted for the first option; three voted for option 2; twelve voted for option 3. The e-mail showed no votes for option 4, although plaintiffs Roberts aver that they voted for that option.

The October 25, 2013 mailing also included a ballot to vote "yes" or "no" on adopting option 3, the buy-out/shut-down provision (Vote 1). That option provided for a "$2,000 offer toward drilling individual wells, to be made to the six current homeowners who rely exclusively on the system for water. LOA will bear no additional responsibilities. The LOA well would be shut down permanently on September 25, 2013." The mailing called for ballots to be returned within 7 days, but the Executive Committee of the LOA board extended the deadline to November 30, 2012.

Mid-way through the 2013 season, on or about July 30, 2013, the results of Vote 1 were distributed, showing that out of the 51 ballots distributed, 33 were reported to have been returned. Twenty-four members voted "yes" to option 3 (Exhibit 3 to Reply Affidavits).

However, six weeks earlier, on or about May 28, 2013, the Executive Committee of the LOA Board sent each of the plaintiffs a letter, indicating that by a 3-1 margin of the members had voted to abandon the well at the end of 2013 and to offer each plaintiff $2,000 toward the cost of drilling a well. The offer was made contingent on each plaintiff giving up all rights to the well and releasing defendants and the LOA from any liability. Plaintiffs were informed that the well would be permanently shut down at the end of the 2013 season and that the $2,000 offer would be withdrawn if not accepted within 45 days (Exhibit G to opposing papers).

Notwithstanding the letter and the distributed results of the first ballot, a second proposal was raised and voted on at LOA's annual meeting on August 25, 2013 (Vote 2). There were two proposals: first, to spend $4,500-$5,500 to open the well for the 2014 season; second, to accept the $2,000 buyout/release proposal. The second proposal included an extension of the deadline to accept the release to March 15, 2014.

The results of Vote 2 were mailed to LOA members on or about November 1, 2013 (Exhibit E to Reply Affidavits). The e-mail indicated that votes were still "trickling in" but indicated that the first proposal received 3 yes votes (all by mail) and 33 no votes (9 by mail). The second proposal received 28 yes votes (10 by mail) and 7 no votes (1 by mail).

The within matter was commenced on or about September 12, 2013, with the filing of the Complaint and Order to Show Cause. By Interim Stipulation dated September 12, 2013, so-ordered by Judge Marx, defendants agreed to continue water service until the end of the 2013 season, October 15th. By Order of this Court dated May 6, 2014, plaintiffs' application for a preliminary injunction was granted and defendants were restrained, enjoined and prohibited from abandoning, discontinuing, disconnecting or terminating well water service in the Park for

the pendency of this action. A cross-motion for dismissal of the complaint was filed on or about March 28, 2014.

Cross-Motion to Dismiss

In the instant application, defendants move for an order pursuant to Civil Practice Law & Rules 3211(a)(1) and (7) dismissing Plaintiffs' complaint. Plaintiffs claim that defendants' plan to shut down the community well is in breach of covenants running with the land contained in plaintiffs' respective chains of title as well as a covenant contained in the governing documents of defendant Lake Osiris Association (LOA),[3] and that, in breaching these covenants, defendants have unlawfully interfered with plaintiffs' ability to use and enjoy their land.

Plaintiffs further contend that defendants have engaged in conduct that constitutes an *ultra vires* and unlawful attempt to amend the LOA's Certificate of Incorporation, and that defendants have breached their fiduciary duties in allowing the community water supply facilities to fall into disrepair in a self-serving attempt to avoid the expenses associated with proper maintenance of said facilities.

In moving to dismiss plaintiffs' complaint, defendants counter that there is no covenant running with the land contained in plaintiffs' chains of title obligating defendants to provide well water service to plaintiffs' homes in perpetuity; and that no such obligation arises from any covenant allegedly contained in LOA's governing documents. Defendants further assert that there has been no unreasonable interference on the part of defendants with any legally cognizable property right of plaintiffs. They assert that any procedural defects in the amendment of LOA's Constitution and Certificate of Incorporation is *de minimus*, and that any decisions made by defendants regarding such amendments, the maintenance of water facilities, the

[3] Plaintiffs in their complaint refer to the Lake Osiris Association as "HOA."

termination of service from the community well, and the assessments charged to LOA members for certain services are insulated from judicial inquiry by the business judgment rule.

For the reasons set forth herein, defendants' motion is granted in part and denied in part.

Discussion

Standard of Review

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... a defense is founded upon documentary evidence...." CPLR § 3211(a)(1). A court may grant a 3211(a)(1) motion "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. MutualLife Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). "The evidence submitted in support of such motion must be 'documentary' or the motion must be denied." *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714 (2013) (citations omitted). "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of Civil Practice Law & Rules 3211(a)(1)." *Id.* (citations omitted).

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the pleading fails to state a cause of action...." CPLR § 3211(a)(7). In evaluating a party's papers, the court is to construe pleadings liberally and ignore all defects that do not prejudice a substantial right of a party. CPLR § 3026. In considering a 3211(a)(7) motion, the court must "determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." *Campaign for Fiscal Equality v. State of New York*, 86 N.Y.2d 307, 318 (1995) (internal quotation marks omitted). In determining a reasonable view of the facts, "[t]he pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give

the pleader the benefit of all favorable inferences that may be drawn from the complaint." *Dunn v. Gelardi*, 59 A.D.3d 3585, 386 (2d Dept. 2009).

In essence, a 3211(a)(7) motion "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 32nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks omitted). When considering a 3211(a)(7) motion, "The court may consider factual affidavits submitted by petitioners to remedy defects in the pleading but should not consider documents submitted by respondents in support of dismissal." *Matter of Albany Law School v. New York State Off. of Mental Retardation and Dev. Disabilities*, 81 A.D.3d 145, 148 (3d Dept. 2011).

Analysis

First Cause of Action: Covenants Running With the Land

Plaintiffs' first cause of action alleges that defendants' plan to abandon the community well is "in violation and breach of their covenant and agreement contained in the chain of title in the deeds to Plaintiffs' lots...." Complaint at ¶ 80. Defendants argue in their Memorandum of Law in Support of Defendants' Cross-Motion to Dismiss (Defendants' Memo #1) that "None of the deeds for the plaintiffs' properties contain language entitling them to an easement granting the homeowner a permanent right to well water service." Defendants' Memo #1 at 4. Plaintiffs respond in their Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Plaintiffs' Opposition Memo) by pointing out that their claims in this cause of action are not based only on language in plaintiffs' deeds, "but also on any 'covenant and agreement contained in the chain of title....'" Plaintiffs' Opposition Memo at 7.

Plaintiffs claim that defendants' intended conduct breaches "a continuing covenant and agreement running with the land." Complaint at ¶79. Affirmative covenants are "disfavored in the law because of the fear that this type of obligation imposes an 'undue restriction on alienation or an onerous burden in perpetuity.'" *Eagle Enters. v. Gross*, 39 N.Y.2d 505, 509 (1976). Such covenants are not *per se* invalid, however, and "may be enforced against subsequent holders of the originally burdened land whenever it appears that (1) the original covenantor and covenantee intended such a result; (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened; and (3) the covenant touches or concerns the land to a substantial degree." *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 245 (1959). A covenant is deemed to touch or concern the land when it affects "the legal relations – the advantages and the burdens – of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general...." *Neponsit Prop. Owners' Assn. v. Emigrant Indus. Sav. Bank*, 278 N.Y 248, 257 (1938).

Assuming all of the factual allegations in plaintiffs' complaint to be true, and affording plaintiffs the benefit of all favorable inferences, as this Court must when considering defendants' Civil Practice Law & Rules §3211(a)(7) motion, plaintiffs have not adequately pled a cause of action for breach of covenants and agreements contained in plaintiffs' chains of title. Plaintiffs allege that defendant "[L]OA, by and through its predecessors, covenanted and agreed, *inter alia*, to allow all Lake Osiris Park owners to 'use all road and paths and the said Lake and the waters thereof in common with the owners of the other properties in said Park' and to afford all owners 'a right of way [which] shall be forever kept opened and maintained for water supply and electric and telephone systems for the common benefit of all owners of property in the aforesaid

Park.'" Complaint at ¶ 78. Plaintiffs further assert that "The foregoing is a continuing covenant and agreement running with the land." Complaint at ¶ 79.

The covenant pled by plaintiffs can properly be said to run with the land. In the words "shall be forever kept opened," the requisite intent of the makers of such a covenant that it run with the land is evident. Defendants apparently do not dispute that there has been a continuous succession of conveyances between the original covenantor and defendant LOA. As an "easement or right of common enjoyment with other property owners," the covenant pled by plaintiffs touches and concerns the land. *See Neponsit, supra,* at 259-260. However, plaintiffs' claim must necessarily fail because the intended action of which plaintiffs complain – the shutdown of the community water supply – does not fall within the parameters of the covenant pled.

Defendants have not exhibited any intention to interfere with plaintiffs' ability to "use all road and paths and the said Lake and the waters thereof," nor have they threatened to obstruct or otherwise interfere with any "right of way... maintained for water supply and electric and telephone systems...." *See* Complaint at ¶ 78. The covenant pled by plaintiffs in their first cause of action simply does not state that defendants are required to operate a well and provide water to plaintiffs. Thus, defendants' intention to discontinue operation of the community well does not breach the covenant pled in the complaint. As for plaintiffs' assertion in their memorandum that the governing documents of defendant LOA establish a covenant to provide such well service, (*see* Plaintiffs' Opposition Memo at 5), plaintiffs have in effect misplaced an argument more properly addressed to their second cause of action.

Accepting as true the allegations contained in plaintiffs' complaint, and affording plaintiffs all favorable inferences therefrom, this Court finds that plaintiffs have not adequately

shown the existence of an agreement or covenant running with the land, found in their respective chains of title, requiring defendants to provide well water service to plaintiffs' properties. There can thus be no breach of such a nonexistent covenant. Defendants' motion to dismiss this cause of action is therefore granted for failure to state a cause of action.

Second Cause of Action: Breach of LOA's Constitution and Certificate of Incorporation

Plaintiffs' second cause of action alleges that defendants' plan to abandon the community well is "in violation and breach of their covenant and agreement contained in [L]OA's Constitution and Certificate of Incorporation...." Complaint at ¶ 87. The covenant to which plaintiffs refer in this cause of action arises from language in the governing documents of defendant LOA to the effect that the "purpose" of the LOA is, *inter alia*, to "aid in the upkeep and maintenance of the Lake, roads, water supply, and the surrounding property thereto, and to own, operate, conduct and maintain all necessary buildings, property and facilities in order to carry out such purposes." Complaint at ¶ 84. The Constitution of a corporation may be interpreted to create a contract between the association and its members. *Hellenberg v. Dist. No. One of Indep. Order of B'nai Berith*, 94 N.Y. 580, 584 (1884).

Defendants respond by arguing that the governing documents of defendant LOA do not "contain an obligation to provide well water service, or to do so in perpetuity." Defendants' Memo #1 at 7. Defendants further assert that the LOA's "duty is limited to maintenance of the system to the extent that the LOA elects to keep the system in use." *Id.* at 9. This issue has been considered and ruled upon by this Court in connection with plaintiffs' motion for a preliminary injunction. By Order of this Court dated May 6, 2014 (Order of May 6), plaintiffs' application was granted and defendants were restrained, enjoined and prohibited from abandoning,

discontinuing, disconnecting or terminating well water service in the Park for the pendency of this action.

In ruling on plaintiffs' application for injunctive relief, this Court found "that plaintiffs have satisfied the requirement of showing a likelihood of success on the claim that defendants have breached the covenants and agreements of the governing documents pertaining to the LOA." Order of May 6 at 9. The Court disagreed with defendants' argument that the obligation arising from LOA's governing documents "is limited to the maintenance of the system, to the extent that the LOA elected to keep the system in use." *Id.* at 8. The Court examined the Constitution and the Certificate of Incorporation of the LOA and found that "[t]he plain and unambiguous language of the [current] governing documents provides that the purpose for the existence of the LOA, *inter alia*, is the upkeep and maintenance of the water supply and the surrounding property thereto." *Id.* Defendants' motion to dismiss the second cause of action pursuant to §3211(a)(7) is therefore denied.

Third Cause of Action: Actions of LOA's Board Members

Plaintiffs' third cause of action alleges that the decision of defendants' "Board of Directors and/or some of its individual members is illegal, *ultra vires*, and null and void" for two reasons: "because it was contrary to the terms and provisions of [L]OA's Constitution and Certificate of Incorporation" and "because it was made in violation of the procedural requirements of the [L]OA...." Complaint at ¶¶ 90-91. Plaintiffs argue that, as established by LOA's Constitution and Certificate of Incorporation, "one of the primary purposes for which the Association was incorporated is the upkeep of the water supply and the operation of all necessary buildings and facilities to carry out such purpose" and that defendants' actions deviate from this stated corporate purpose and constitute, in effect, an attempt to amend the LOA's

statement of purpose without complying with lawful procedure. Plaintiffs' Opposition Memo at 10-12.

In response, defendants argue that the LOA's governing documents do not obligate it to provide well water service. *See* Memorandum in Further Support of Defendants' Cross-Motion to Dismiss (Defendants' Memo #2) at 6. This Court has already ruled that the current governing documents of the LOA give rise to the responsibility to provide water service and that "[t]here is nothing in the documents to suggest that defendants had any right to abrogate that responsibility." Order of May 6 at 8.

Defendants further argue that any purported defect in the alleged attempt to amend the governing documents is *de minimus* and therefore cannot support plaintiffs' claim. *See* Defendants' Memo #2 at 6. Plaintiffs point out that "approval by a majority vote of its members at a regular meeting" is only the first step to amending the LOA's Certificate of Incorporation (COI). Plaintiffs' Opposition Memo at 10. Plaintiffs appear to concede that defendants have performed this preliminary step. Plaintiffs argue, however, that defendants' purported amendment is defective because no certificate of amendment was delivered to the secretary of state and because any certificate of amendment seeking to eliminate defendant LOA's purpose of maintaining the water supply and related facilities, would require approval of a justice of the supreme court. *Id.* at 10-11.

The only documentary evidence available in connection with this cause of action is the Certificate of Incorporation and the Constitution, the terms of which weigh in favor of plaintiffs. Order of May 6 at 8. Defendants therefore have not established a defense as a matter of law. Defendants do not dispute plaintiffs' allegations that the LOA failed to seek judicial approval for its purported amendment to its Certificate of Incorporation and failed to file a certificate of

amendment with the secretary of state. Rather, defendants argue that the LOA need not comply with the mandates of Not-For-Profit Corporation Law §§ 803 and 804(a)(ii). Defendants' Memo #2 at 7-9.

Defendants assert that their failure to comply with the mandates of Not-For-Profit Corporation Law §§ 803 and 804(a)(ii) does not render the Board's actions *ultra vires* and null and void. Defendants make four arguments in support of this conclusion. First, defendants assert that "a challenge to a board's conduct based on its purported failure to comply with proper procedure *must* be brought by an Article 78 proceeding." Defendants' Memo #2 at 7 (emphasis added). While an Article 78 proceeding is the proper vehicle for a claim for mandamus "predicated upon the failure of defendants to abide by their bylaws," (*see Villanova Estates, Inc. v. Fieldston Prop. Owners Assn., Inc.*, 23 A.D.3d 160, 162) and is a permissive method for members to initiate a challenge based on a corporation's failure to comply with statutory requirements, none of the authorities cited by defendants stand for the proposition that the use of Article 78 is mandatory.

Second, defendants assert that "the failure to file an amended Certificate of Incorporation is a mere technicality, which will have no effect where a board's decision is based upon a vote approving the action." Defendants' Memo #2 at 7-8. Defendants refer this Court to *Matter of American Fibre Chair Seat Corp.*, 265 N.Y. 416 (1934), in which the Court of Appeals held that the failure of a corporation's president and secretary to file an amended Certificate of Incorporation did not preclude members of the corporation from exercising certain voting rights. In that case, the members of the corporation voted unanimously to adopt new bylaws and a resolution for amendment of the Certificate of Incorporation to permit cumulative voting. *Id.* at

419. "The president and secretary of the corporation were directed to execute and file the proper certificates as provided by law to carry out and effectuate the purpose of the resolution." *Id.*

Defendants' reliance on this case is misplaced. The Court of Appeals held the failure to file an amended COI to be harmless in a situation in which a resolution was adopted by unanimous vote following lawful procedure and the corporation operated under the terms of the resolution and new bylaws for more than a decade without incident. *Id.* In the case at bar, there has been no unanimous vote, nor has there been any attempt to follow the procedures required to duly adopt new bylaws or a resolution directing the officers of the LOA to file an amended COI. The members of the LOA did not continue to conduct business pursuant to the proposed amendment for a period of years without disharmony. *American Fibre* does not stand for the proposition that, in the absence of any attempt to follow proper procedure, failure to file an amended Certificate of Incorporation "is a mere technicality, which will have no effect...." (*see* Defendants' Memo #2 at 7-8).

In addition, defendants argue that judicial approval of the LOA's purported amendment to its Certificate of Incorporation was not required. Defendants refer this Court to *Nathan Littauer Hosp. Assn. v. Spitzer*, 287 A.D.2d 202 (3d Dept. 2001), in which the Court determined that an amendment to a hospital's Certificate of Incorporation that affected the hospital's ability "to provide abortion related services and potentially... contraception services and counseling," did not require judicial approval. *Littauer* is hardly analogous to the case at bar. The hospital's Certificate of Incorporation contained no explicit language stating that the purpose of the corporation was, *inter alia*, to provide abortion and contraception services, and the court found that the restated Certificate of Incorporation, which repeated verbatim the original purpose statement, showed "no change to Littauer's overall business purpose." *Id.* at 205.

Defendant LOA's Certificate of Incorporation, on the other hand, does contain explicit language referring to "maintenance of the... water supply." Defendants' Memo #1 at 8. Defendants' assertion that "the elimination of abortion services at a hospital is much more significant that [sic] an alteration in a COI regarding well water service," Defendants' Memo #2 at 9, is not only unsupported; it is an attempt to draw a comparison where none exists. Furthermore, defendants' argument that the "technicality" by which defendants were required to seek judicial approval "will be eliminated when the new version of the statute becomes effective" (*see* Defendants' Memo #2 at 9) is irrelevant. All of the actions complained of took place before the effective date of the amendment to which defendants refer, and defendants have made no efforts to comply in any event even with the new, arguably less restrictive statutory requirements.

Defendants argue also that "the Board's conduct is protected by the business judgment rule." Defendants' Memo #1 at 10. "Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 537-38 (1990) (citation and internal quotation marks omitted). "So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." *Id.* at 538.

This argument is unavailing in connection with this cause of action. Defendants have provided no authority to support the proposition that a Board's decision to ignore the requirements of Not-For-Profit Corporation Law §§ 803 and 804(a)(ii) is protected by the

business judgment rule and thus not subject to judicial review. In fact, the business judgment rule is expressly reserved for the protection of lawful actions. *See Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979) ("That doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the *lawful* and legitimate furtherance of corporate purposes." (emphasis added)). Defendants may not rely on the business judgment rule for protection of their failure to comply with the requirements of the Not-For-Profit Corporation Law.

Plaintiff having pleaded facts sufficient to make out a cause of action arising from defendants' *ultra vires* actions, and defendants having failed to sufficiently refute such a claim, defendants' motion to dismiss this cause of action is denied at this time.

Cause of Action Four: Unlawful Taking / Nuisance

Plaintiffs' fourth cause of action, as originally stated in the complaint, alleges that defendants' offer to plaintiffs of "$2,000 in consideration of abandonment of their rights to the community well" constitutes a concession by defendants that their plan to abandon the community well constitutes "an illegal and improper taking." Complaint at ¶ 94. Defendants respond that plaintiffs' claim for improper taking must fail in the absence of state action and/or a legally cognizable property right. Defendants' Memo #1 at 12. Plaintiffs counter that "[t]his argument merely exalts form over substance and is without merit," arguing that this cause of action is actually "in the nature of a claim for nuisance." Plaintiffs' Opposition Memo at 13.

Defendants argue in reply that this claim is "meritless" because plaintiffs neither pled nuisance in the first instance nor amended their pleadings. Defendants' Memo #2 at 10. This argument is unavailing. "[T]he fundamental criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one." *Juric v. Bergstrasser*, 44 A.D.3d

1186, 1187 (3d Dept. 2007) (citation omitted) (internal quotation marks omitted). "'[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion... will fail' regardless of whether the plaintiff will ultimately prevail on the merits." *Bovino v. Village of Wappingers Falls*, 215 A.D.2d 619, 620 (citation omitted). Thus, if factual allegations can be discerned from the Complaint that would make out a cause of action for nuisance, plaintiffs' failure to expressly plead nuisance would not be fatal to their claim. Nevertheless, because plaintiffs have failed to make a prima facie showing on each of the elements of a nuisance claim, this cause of action must be dismissed.

The elements of a nuisance claim, as argued by plaintiffs, are interference that is (1) substantial, (2) intentional, (3) unreasonable, (4) with a person's property right to use and enjoy land, (5) caused by the conduct of another. Plaintiffs' Opposition Memo at 13. Defendants' argument that plaintiffs have no ownership interest in the well system itself, *see* Defendants' Memo #2 at 11, is inapposite. This Court has already ruled that the LOA's governing documents, as presently written, provide plaintiffs a right to water service. Order of May 6 at 8. Defendants' intended conduct would constitute substantial, intentional interference with plaintiffs' ability to use their land. However, because plaintiffs cannot show that such conduct on the part of defendants would be unreasonable, as a matter of law, plaintiffs have failed to state a claim for nuisance.

Significantly, there is documentary evidence before this Court that establishes that defendants made the decision to discontinue well service only after two overwhelming votes of the members of the LOA in favor of doing so. In fact, had defendants complied with legal procedure, said votes would have been sufficient to authorize an amendment to the LOA's

Certificate of Incorporation pursuant to Not-For-Profit Corporation Law § 802(a)(1).[4] In light of the statutory recognition of the importance of member voting (*see, e.g.*, Not-For-Profit Corporation Law § 613), this Court cannot find that defendants' attempt to act on the express will of the majority of the members of the LOA can support a claim of unreasonable interference.

For the foregoing reasons, plaintiffs have not asserted a prima facie cause of action for nuisance, and defendants' motion to dismiss this cause of action is granted for failure to state a cause of action.

Fifth Cause of Action: Breach of Fiduciary Duty

Plaintiffs' fifth cause of action alleges that "the [L]OA Board of Directors and/or the individual defendants have breached, violated, and repudiated their fiduciary duties or threatened to breach, violate, and repudiate their fiduciary duties...." Complaint at ¶ 101. Plaintiffs base this cause of action on the allegation that "for many years, the [L]OA Board, including the individual defendants, failed to budget sufficient funds to effectuate necessary and/or advisable maintenance and repairs to the community water supply system... as a pretext for abandoning the community well in favor of their own private wells, thereby enabling the individual defendants to benefit from abandonment of the community well at the expense of the minority members, including Plaintiffs." Complaint at ¶¶102-110. In addition, plaintiffs allege that defendants have purported "to have the Constitution of the [L]OA amended... without due process..." and have charged "seasonal members... for full-year lighting when the community was contemplated to be a seasonal community and when the benefit of full-year lighting is realized only by the full-year residents." Complaint at ¶¶ 113-14.

[4] N-PCL § 802(a)(1) provides that "Amendment or change of the certificate of incorporation shall be authorized... If there are members entitled to vote thereon, by majority vote of such members...."

Because they have not adequately alleged self-interest on the part of defendant directors, plaintiffs have failed to articulate a cognizable claim for breach of fiduciary duty. "Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Marx v. Akers*, 88 N.Y.2d 189, 202 (1996). Rather than showing directors who engaged in self-dealing to receive a financial benefit different from that available to the members of the LOA generally, the documentary evidence before this Court shows that the Board took measures to inform itself of the desire of a majority of its members before taking any action. Defendants' motion to dismiss the fifth cause of action is therefore granted.

Sixth Cause of Action: Derivative Action

Plaintiffs' sixth cause of action is in the nature of a shareholders or members derivative suit. It alleges that the defendants' decision to abandon the community well "is an illegal *ultra vires* act... motivated by an intention and desire of the [L]OA Board members, and/or a segment of the members in sympathy and/or cahoots[5] with those [L]OA Board members, to neglect and avoid the expense of the community well... and to receive a personal benefit and financial savings at the expense of the minority members...." Complaint at ¶¶ 119-20. Plaintiffs make similar allegations of defendants' self-interest with regard to the Board's decision to "assume year-round expenses such as lighting, garbage removal, and snow removal...." Complaint at ¶ 121. In addition, plaintiffs allege that they "have demanded that the [L]OA Board of Directors refrain from taking the action taken or threatened herein" and that "[a]ny further demand... would be futile, since the [L]OA Board is a defendant herein, since the individual defendants named herein constitute the current and/or former [L]OA Board of Directors, and since the

[5] This may be the first use of the word "cahoots" in motion practice before this Court.

[L]OA Board and the individual defendants cannot be expected to vote to prosecute an action against themselves." Complaint at ¶¶123-24.

Not-for-Profit Corporation Law § 623(a) provides that "[a]n action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members...." Plaintiffs, as members of defendant LOA, have met and pled this requirement. However, plaintiffs are also required to "set forth with particularity the efforts... to secure the initiation of such action by the board or the reason for not making such effort." N-PCL § 623(c). It is requirement that is fatal to plaintiffs' claim.

The only allegation of demand contained in plaintiffs' complaint states "Plaintiffs have demanded that the [L]OA Board of Directors refrain from taking the action threatened or taken herein." Complaint at ¶ 123. Such general pleading fails to satisfy the requirement of particularity regarding the efforts of plaintiffs "to secure the initiation of such action." Plaintiffs' allegation that "further demand... would be futile," *see* Complaint at ¶ 124, is similarly inadequate. In order to meet this requirement, plaintiffs must adequately allege that defendants, due to their own self-interest, which must be different from that of the members generally, were incapable of making an impartial decision. *See Marx, supra*, at 202; *see also Malkinzon v. Kordonsky*, 56 A.D.3d 734, 735 (2d Dept. 2008). In fact, the documents submitted by plaintiffs show the contrary: that defendants acted only after becoming informed that the interest of the members generally would be served by abandoning the community well.

Because plaintiff has failed to adequately plead the requirements of demand and/or futility pursuant to Not-For-Profit Corporation Law § 623(c), defendants' motion to dismiss this cause of action is granted.

Seventh Cause of Action: Accounting

Plaintiffs' seventh cause of action is for an accounting. Complaint at ¶ 126. Not-For-Profit Corporation Law § 720 allows an action to compel a director or officer to account for his conduct in two cases: neglect, failure to perform, or violation of duty "in the management and disposition of corporate assets," and "acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties." Plaintiffs' allegations relevant to this cause of action are that defendants "failed to budget sufficient funds to effectuate necessary, and/or advisable maintenance and repairs to the community water supply system," and that defendants have charged "seasonal members... for full-year lighting... when the benefit of full-year lighting is realized only by the full-year residents." Complaint at ¶ 102, 114.

Defendants argue that the Board's decisions in these matters are protected by the business judgment rule. Defendants' Memo #1 at 18. Plaintiffs counter that defendants' business judgment defense improperly relies on an affidavit not properly before this Court. Plaintiffs' Opposition Memo at 18. This argument is misplaced. Because officers of a not-for-profit corporation are protected by the business judgment rule, plaintiffs must make a showing that defendants failed to act in good faith in executing their duties. *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 71 (2008). As has been explored more fully in this Court's discussion of plaintiffs' fifth and sixth causes of action, plaintiffs have made no such showing, and documentary evidence is to the contrary. Accordingly, defendants' motion to dismiss this cause of action is granted.

Eighth Cause of Action: Injunctive Relief

Plaintiffs' eighth cause of action, for injunctive relief, has been partially addressed by Order of this Court dated May 6, 2014, pursuant to which plaintiffs were granted a preliminary injunction by which defendants were restrained, enjoined and prohibited from taking any action to discontinue, or failing to take any action necessary to continue the community water service for the pendency of this action, conditioned on the plaintiffs' posting of a bond in the amount of $7,500,[6] to be renewed annually, as may be necessary, for the pendency of this litigation. The preliminary injunction shall continue, pending further order of this Court.

Granting or denial of a permanent injunction is premature.

On the basis of the foregoing, it is thus ORDERED that:

1. Defendants' motion to dismiss plaintiffs' first cause of action is granted.
2. Defendants' motion to dismiss plaintiffs' second cause of action is denied.
3. Defendants' motion to dismiss plaintiffs' third cause of action is denied.
4. Defendants' motion to dismiss plaintiffs' fourth cause of action is granted.
5. Defendants' motion to dismiss plaintiffs' fifth cause of action is granted.
6. Defendants' motion to dismiss plaintiffs' sixth cause of action is granted.
7. Defendants' motion to dismiss plaintiffs' seventh cause of action is granted.
8. With respect to plaintiffs' eighth cause of action, the Order of this Court dated May 6, 2014, by which plaintiffs were granted a preliminary injunction restraining, enjoining, and prohibiting defendants from interrupting the community water service, conditioned on plaintiffs posting a bond to be renewed annually, as may be necessary, for the pendency of this action, shall remain in effect.

[6] This Court is aware of a further motion pending to modify the bonded amount.

9. Granting or denial of a permanent injunction is premature.

This decision shall constitute the Order of the Court.

Dated: July 29, 2014
Goshen, New York

ENTER:

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