

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT: _____
Justice

PART 54

Index Number : 650111/2012
AKASA HOLDINGS, LLC,
vs.
SWEET, DAVID J.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 10/4/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 9-12
Answering Affidavits — Exhibits _____ No(s). 16-26, 30-39
Replying Affidavits _____ No(s). 27-28

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 11/29/12

SHIRLEY WERNER KORNREICH
J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE
[X] Cross-Motion denied

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

AKASA HOLDINGS, LLC,

Plaintiff,

Index No.: 650111/2012

**DECISION, ORDER &
JUDGMENT**

-against-

DAVID J. SWEET, as trustee for THE 55 CROSBY
STREET REVOCABLE TRUST, JANE SACHS,
GENE THOMPSON, and PATRICIA P. THOMPSON,

Defendants.

-and-

55 CROSBY ASSOCIATES, INC.,

Nominal Defendant.

-----X

SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition.

Plaintiff Akasa Holdings, LLC (Akasa) moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the counterclaim of defendants David J. Sweet, as Trustee for The 55 Crosby Street Irrevocable Trust (the Camuto Trust), Jane Sachs, Gene Thompson (Mr. Thompson), and Patricia Thompson (collectively with Mr. Thompson, the Thompsons) (collectively, the Individual Defendants) and the counterclaims of nominal defendant 55 Crosby Associates, Inc. (the Co-Op). Motion Seq. No. 001. The Individual Defendants cross-move for summary judgment pursuant to CPLR 3212. Akasa also moves for summary judgment pursuant to CPLR

3212. Motion Seq. No. 002. As discussed *infra*, part I, this Court has already granted a portion of the Individual Defendants' cross-motion and denied a portion of Akasa's motion for summary judgment. The remaining portions of plaintiff's motions are granted and the balance of the Individual Defendants' cross-motion is denied for the reasons that follow.

I. Factual Background & Procedural History

This action arises from a dispute between the shareholders of the Co-Op, which owns a building located at 55 Crosby Street, New York, NY (the Building). On January 13, 2012, Akasa, which owns 60 of the Co-Op's 118 shares (approximately 51%), commenced this action against the Individual Defendants, the other shareholders. The Co-Op is named as a nominal defendant and is represented by separate counsel. The complaint seeks declaratory and injunctive relief against the Individual Defendants on two subjects: (1) Akasa's right to use portions of the Building that it alleges are "designated public areas"; and (2) the proper procedure for determining the size of the Co-Op's board of directors (the Board). At oral arguments held on August 9, 2012, this Court disposed of the first subject regarding Akasa's claim that areas used by Individual Defendants are "public areas," by ruling in the Individual Defendants' favor and denying Akasa's request for injunctive relief. *See* Transcript, p. 54-55. Thus, the Court now will only consider the parties' motions as they apply to the second subject. Additionally, the Individual Defendants asserted a counterclaim against Akasa and a cross-claim against the Co-Op for the indemnification of legal fees incurred in this action. The Co-Op also asserted counterclaims against Akasa for indemnification of its legal fees.

The material facts are not in dispute. However, as Akasa's motion relating to the counterclaims is a motion to dismiss, the Court's decision as to that motion relies exclusively on

the pleadings and documentary evidence. The Court relies on the record in deciding the rest of the motions, all of which are for summary judgment.

The Co-Op is a New York corporation. The Building consists of four units and a basement located on five floors. Akasa, a New York limited liability company, whose members are Tony Krantz and Kristin Dornig Krantz, owns one unit that includes two floors and the basement. Akasa purchased its interest in the Co-Op from non-parties Walter Chatam and Mary Chatam (collectively, the Chatams) in March 2011. Sweet is the trustee for the Camuto Trust, a New York trust that exists for the benefit of non-party Andrea Camuto (Ms. Camuto). The Camuto Trust owns 23 shares of the Co-Op and one unit, which Ms. Camuto lives in. Sachs owns 17 shares of the Co-Op and one unit that she lives in. The Thompsons are joint owners of 18 shares of the Co-Op and one unit, which Mr. Thompson lives in. The rules and regulations of the Co-Op are set forth in its by-laws (the By-Laws). The Co-Op, Akasa, and the Individual Defendants are all parties to proprietary leases. Akasa and the Individual Defendants are also parties to a shareholder agreement (the Shareholder Agreement).

Article III, Section 1 of the By-Laws provides that the number of Directors of the Co-Op “shall be three, or such other number, no more than seven nor less than three, as may be from time to time provided herein ” and can only be changed “by resolution of the shareholders from time to time at any annual or special meeting.” Section 5.1.3 of the Shareholder Agreement provides that the shareholders “agree to cause the nomination for election and to vote their Shares for the election of each Shareholder . . . as a director of the [Co-Op], as long as each of them is a Shareholder of the [Co-Op].”

Article VII, Section 1 of the By-Laws provides that:

[T]he [Co-Op] shall indemnify any person made a party to an action by or in the right of the [Co-Op] to procure a judgment in its favor . . . [and] the [Co-Op] shall also indemnify any person made . . . a party to an action . . . by reason of the fact that he . . . was a director or officer of the [Co-Op] or served in any capacity against judgment.

Until 2009, each unit-owner nominated one director to the Board. In 2009, there were four unit-owners: Sachs, the Thompsons, the Camuto Trust, and the Chatams. However, at the shareholders' annual meeting on June 4, 2009, the shareholders voted 78 to 40 to elect a five member Board, consisting of Sachs, Ms. Camuto, Mr. Thompson, Walter Chatam, and Mary Chatam. Thus, for the first time, a unit owner – the Chatams – was represented by more than one person on the Board. At the next shareholders' meeting, held on March 17, 2010, Sachs proposed that a meeting be called for the election of the Board because the Chatams would be leaving the Co-Op due to the pending sale to Akasa. However, it was decided that no changes to the Board should be made until the sale to Akasa was complete. On October 10, 2011, the shareholders elected a four person Board: Sachs, Ms. Camuto, Mr. Thompson, and Tony Krantz, one of the members of Akasa. Akasa objected and contended that the proper size of the Board should be five directors, not four. There have been no further Board elections, and to date, the Board still consists of the four members voted on at the October 10, 2011 meeting.

II. Motions for Summary Judgement

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing

papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

CPLR 3001 states that “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” *See also* 43 N.Y. Jur2d Declaratory Judgments §§ 4, 22. “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.” *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 (1st Dept 2009) (quoting *James v Alderton Dock Yards*, 256 NY 298, 305 (1931)). Although a court may address and resolve questions of fact in the context of an action for a declaratory judgment (Siegel, NY Prac § 436, at 739 (5th ed) (citing *Rockland Power & Light Co. v City of New York*, 289 NY 45 (1942))), “the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of

fact.” *Thome*, 70 AD3d at 100; *see also QBE Ins. Corp. v ADJO Constr. Corp.*, 32 Misc3d 1231[A], NY Slip Op 51508 [U], at *3 (Sup Ct, Nassau County 2011).

A permanent injunction is a “drastic remedy” that is only awarded to a party that has “actually succeed[ed] on the merits of the case, rather than merely demonstrate[d] that success is likely in a future proceeding.” *Ferolito v Vultaggio*, 36 Misc3d 1227(A), at *1 (Sup Ct, NY County 2012) (quoting *Sybron Corp. v Wetzel*, 46 NY2d 197, 204 (1978); *Weizmann Inst. of Science v Neschis*, 229 FSupp2d 234, 258 (SDNY 2002)). The moving party also must establish “(1) irreparable injury absent the granting of injunctive relief, and (2) a balancing of the equities in the movant’s favor.” *Id.*

The contracts governing the Co-Op are clear and, therefore, Akasa is entitled to summary judgment, a declaratory judgment, and a permanent injunction dictating how the number of Board members is to be determined and how such Board members are to be elected. The Individual Defendants, and Mr. Thompson in particular, are adamant that the Co-Op has always operated in accordance with their interpretation of the By-Laws and the Shareholder Agreement. *See* Affidavit of Gene Thompson dated June 7, 2012, ¶ 10 (“That is all we do now, and that is all we have ever done”). However, the By-Laws and the Shareholder Agreement, read together, clearly set forth the following procedure for determining the size of the Board and electing directors: (1) pursuant to Article III, Section 1 of the By-Laws, the shareholders are to vote on a number, between 3 and 7, of directors to serve on the Board; (2) pursuant to § 5.1.3 of the Shareholder Agreement, the shareholders are to nominate candidates to serve as directors on the

Board; and (3) pursuant to § 5.1.3 of the Shareholder Agreement, the shareholders are to vote on each of the nominees.¹

It should be noted that the Individual Defendants' reliance on § 15 of the Shareholder Agreement, which requires that the Shareholder Agreement may only be modified with unanimous consent, is inapposite because changing the number of directors on the Board does not constitute a modification of the Shareholder Agreement. Rather, as clearly set forth in § 5.1.3, such a change can be made by a majority vote.

Finally, the Court will not weigh in on the validity of the votes that took place at the 2009 and 2011 Board elections because there are questions of fact that preclude summary judgment, such as whether, pursuant to § 1 of the Shareholder Agreement, proper notice was given that a vote would be held on a change of the number directors. The resolution of this question has no bearing on the remedies sought by the parties, since (1) no monetary damages are sought due to any alleged violation of the Shareholder Agreement; and (2) a ruling on this issue has no bearing on the future composition of the Board because the Board will be established in accordance with the procedures set forth herein.

Therefore, the court grants summary judgment to Akasa. A declaratory judgment and a permanent injunction are issued *infra*.

III. Motion to Dismiss

¹ Assuming the parties wish to vote in accordance with their apparent allegiances, at the next shareholders' meeting, Akasa will be able to establish a five member Board because they control 51% of the shares. Akasa will then be able to nominate and ensure the election of both Tony Krantz and Kristin Dornig Krantz. The Individual Defendants, if they wish, will then be able to fill the remaining three spots on the Board with Sachs, Ms. Camuto, and Mr. Thompson.

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 NY3d 491 (2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citing *McGill v Parker*, 179 AD2d 98, 105 (1992)); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.* (citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250 (citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law [citation omitted].” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The counterclaims and cross-claim for indemnification are dismissed because Article VII, Section 1 of the By-Laws only provides for indemnification for claims brought (1) for the benefit of the Co-Op; or (2) against an individual related to his actions as a director or officer of the Co-Op. Neither of these scenarios apply to this case. First, neither Akasa’s claims nor the relief granted herein are for the benefit of the Co-Op or the Individual Defendants; they are for

the benefit of Akasa. Second, the Individual Defendants have been sued by virtue of their status as shareholders, since as discussed *supra*, part II, the dispute as to the proper procedure for the election of Board members is between the parties in their capacity as shareholders, not Board members or officers. Moreover, no wrongdoing has been alleged in this action (including in the previously dismissed claims related to the alleged “designated public areas”) that arises from actions taken by the Board or an individual in their capacity as a director or officer. Hence, the Court dismisses the counterclaims and cross-claim for indemnification. Accordingly, it is

ORDERED that the motion by plaintiff Akasa Holdings, LLC to dismiss the counterclaims of defendants David J. Sweet, as Trustee for The 55 Crosby Street Irrevocable Trust, Jane Sachs, Gene Thompson, and Patricia Thompson and nominal defendant 55 Crosby Associates, Inc. is granted, the cross-claim of said defendants against said nominal defendant is dismissed as moot, and the Clerk is directed to enter judgment dismissing said counterclaims and cross-claim with prejudice; and it is further

ORDERED that the cross-motion for summary judgment by defendants David J. Sweet, as Trustee for The 55 Crosby Street Irrevocable Trust, Jane Sachs, Gene Thompson, and Patricia Thompson against plaintiff Akasa Holdings, LLC is denied, except as to the portion of said cross-motion that was granted at oral arguments (held on August 9, 2012), dismissing plaintiff’s third cause of action seeking a permanent injunction regarding the use of cooperative space; and it is further

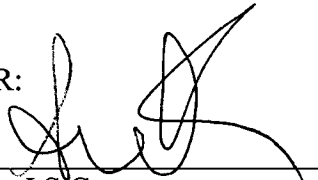
ORDERED that the motion for summary judgment by plaintiff Akasa Holdings, LLC against defendants David J. Sweet, as Trustee for The 55 Crosby Street Irrevocable Trust, Jane Sachs, Gene Thompson, and Patricia Thompson is granted; and it is further

ORDERED and ADJUDGED that plaintiff Akasa Holdings, LLC, defendants David J. Sweet, as Trustee for The 55 Crosby Street Irrevocable Trust, Jane Sachs, Gene Thompson, and Patricia Thompson, and nominal defendant 55 Crosby Associates, Inc. are to abide by the following procedure to determine the size of the board of directors of said nominal defendant (the Board) and to elect directors to the Board: (1) the shareholders of said nominal defendant (the Shareholders) are to vote on a number, between 3 and 7, of directors to serve on the Board; (2) the Shareholders are to nominate candidates to serve as directors on the Board; and (3) the Shareholders are to vote on each of the nominees. Said plaintiff and defendants are enjoined from deviating from these procedures unless the By-Laws of said nominal defendant and/or the shareholder agreement between the Shareholders are duly amended to permit an alternative procedure; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: November 29, 2012

ENTER:



J.S.C.