Board of Mgrs. of the 257 W. 17th St. Condominiums v 257 Assoc. Borrower LLC
2018 NY Slip Op 33057(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 160585/2013
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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THE BOARD OF MANAGERS OF THE 257 WEST 17TH ST. CONDOMINIUMS,

Plaintiff,

- v -

257 ASSOCIATES BORROWER LLC and BBP FITNESS LLC D/B/A BRICK NEW YORK,

Defendants.

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INDEX NO. 160585/2013

MOTION DATE 11/15/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 134, 138, 139, 140, 141, 142, 143, 144

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Motion by Plaintiff Board of Managers of the 257 West 17th St. Condominiums (the "Condo") for an order:

(1) granting the Condo a preliminary and/or permanent injunction, pursuant to CPLR 6301 and 6311, enjoining Defendants, 257 257 Associates Borrower LLC, and BBP Fitness LLC d/b/a Brick New York, their agents, officers, employees, licensees, assignees and/or tenants from operating a gym in the commercial premises located at 257 West 17th Street, New York, New York (the "Premises") without the legally required Physical Culture Establishment Permit required by Section 73-36 of the New York City Zoning Resolution;

(2) granting the Condo summary judgment, pursuant to CPLR 3212, on its First Cause of Action against both Defendants which seeks preliminary and permanent injunctions barring the operation of a gym in the Premises without a Physical Culture Establishment Permit; and

(3) granting the Condo summary judgment, pursuant to CPLR §3212, on its Third Cause of Action, which seeks an award of attorney's fees in an amount to be determined by the Court against Defendant, 257 Associates Borrower LLC.

BACKGROUND

The instant action arose out a dispute between Plaintiff Board of Managers of the 257 West 17th St. Condominiums ("the Condo")—the elected board of managers of a condominium located at 257 West 17th Street, New York, New York ("the Building")—and Defendant BBP Fitness LLC d/b/a Brick New York ("the Gym") over the latter's use and operation of a gymnasium on the ground and cellar floors of the Building.[1] This dispute between the parties goes back to at least 2013, and has involved a motion for a preliminary injunction, two contempt motions, and now this motion for a permanent injunction. The crux of the Condo's complaint with the Gym is that individuals in the Premises will regularly drop weights onto the floor as part their "CrossFit" exercise routine, and that the noise and vibrations from the dropping of weights will reverberate up through the Building's walls and infrastructure disturbing the Condo's residents.

In January of 2015, a prior court sitting issued a preliminary injunction and enjoined the Gym and "all other persons acting under the jurisdiction, supervision, and/or direction of defendant", during the pendency of the litigation, from:

> "(a) dropping and/or throwing weights and/or weighted materials on the floors, walls, and/or ceilings of the commercial unit (Unit Cl) at the building (the premises) or engaging in any other activity in the premises which will cause a violation of New York City's Noise Code; [and] (b) operating a gym in the premises without the required physical culture establishment permit . . . ."

(Preliminary Injunction Decision at 12-13.) The prior court explained its decision as follows:

> "Here, the affidavits, submitted by the owners and/or occupants of the building, in support of the motion, detail the daily assault on the quiet enjoyment of their apartments, including sleep deprivation, inability to concentrate/work, stress, inability to use the apartment . . . . Additionally, it is undisputed that Brick is currently operating illegally. This evidence, coupled

[1] The Gym leases the Premises from Defendant 257 Associates Borrower LLC. Counsel for Defendant 257 Associates Borrower LLC has been present for all oral argument on this motion and in the courtroom for two prior contempt motions. Defendant 257 Associates Borrower LLC has not submitted any papers in opposition to this motion, but counsel orally stated that it was opposed to the Court awarding the Condo attorney fees, although counsel noted that the Gym has agreed to pay any attorney fee award *this* Court issues as against Defendant 257 Associates Borrower LLC, pursuant to the provisions of the lease.

with the expert testimony provided by both plaintiff's and defendant's acoustical engineers that the noise levels violate applicable code provisions, demonstrates a likelihood of success on the merits of plaintiff's nuisance claim. Plaintiffs have also demonstrated that the lack of quiet enjoyment is causing irreparable injury.

Finally, plaintiffs have also established the third element necessary for injunctive relief. The balance of the equities tips in favor of the condominium and its residents. Plaintiffs, and residents of the condominium, have a right to enjoy their apartments in relative peace. Defendants have clearly failed to cure the noise problems in the building, and have had ample time to make the necessary renovations to abate the vibrations and noise."

(Preliminary Injunction Decision at 11-12.)

At the same time that the parties were litigating the instant case before the prior court, the Gym was pursuing its application before the Board of Standards and Appeals (BSA) for a zoning permit to operate a physical cultural establishment (PCE) in the Building. On November 19, 2015, the BSA issued a written resolution (the "2015 Resolution") granting the Gym a one-year permit to operate a PCE at the subject premises, subject to numerous restrictions being placed on the activities allowed on the premises. (Ginsberg Affirm., Ex. D [2015 Stipulation] [2015 Resolution annexed thereto].)[2]

Among other things, the Resolution mandated:

1. "All weight lifting stations within the PCE must utilize Rogue pads placed on top of sound absorbing weight platforms, as indicated on BSA-approved plans";
2. "Under no circumstances are PCE staff or customers permitted to use barbells with a weight in excess of 135 lb. in the cellar-level of the PCE premises"; and
3. "'Overhead Drops' of weights or weighted objects is not permitted in Classroom 3("Downtown") or elsewhere within the PCE premises".

(2015 Resolution at 3-4.)

[2] The BSA's 2015 Resolution was annexed to and "incorporated" into the parties' so-ordered stipulation of December 7, 2015 (the "2015 Stipulation"); and Defendant agreed "to abide by the terms of the Resolution" in the 2015 Stipulation. (2015 Stipulation ¶¶ 2, 15.) However, because the 2015 Resolution and the 2015 Stipulation are numbered and paginated differently, the Court refers to each separately.

The BSA further noted that it had "held an unprecedented number of public hearings on this application, and worked with acoustical engineers [from both sides], to determine whether and to what extent the PCE can operate at the subject site without constituting an unreasonable nuisance to the residential occupants of the subject building;" and that based on "sound and vibration attenuation measures implemented at the subject premises" the BSA "directed" the Gym to adhere to the "strict" requirements of the Resolution, which the BSA stated that it made "a condition of its approval of the subject application[.]" (2015 Resolution at 2.)

The 2015 Resolution further noted that the instant litigation was pending, that an "Interim Temporary Order" had been issued requiring the Gym to use its best efforts to prevent the dropping of weights between 7:30 a.m. and 8:30 p.m., but that, notwithstanding said order, members of the Condo "maintain that the PCE continues to be a nuisance." (Id. at 2.) In addition, the BSA stated that it had "taken the unusual step of limiting the term of the subject approval to one year, commencing on November 20, 2015," so that it could thereafter "evaluate . . . whether and to what extent the PCE adhered to the Operational Plan and whether and to what extent the Operational Plan adequately mitigated the noise and vibration complained of by the Opposition." (Id.)

Thereafter, the parties agreed to a stipulation that was so-ordered by the prior court on December 7, 2015 (the "2015 Stipulation") which annexed and incorporated the 2015 Resolution. Pursuant to the 2015 Stipulation, the parties agreed that the aforesaid preliminary injunction granted by the prior court was to "be lifted in its entirety, thereby permitting Brick to operate its gym at the Premises known as 257 West 17th Street (Unit C1) (basement and first floor level), subject to the conditions contained in the Resolution as well as the terms and conditions of this Agreement." (2015 Stipulation ¶ 1.)

Pursuant to the 2015 Stipulation, the parties agreed that if the Condo had evidence that the Gym "failed to comply with the Resolution," it could move the Court "for such relief as may be just and proper, which shall include, but not be limited to, contempt penalties against [the Gym]." (Id. ¶ 11.) Per the 2015 Stipulation, the Court kept "continuing jurisdiction over the enforcement of this Agreement." (Id.) In addition, the 2015 Stipulation further stated that "[n]othing contained herein shall constitute a waiver and/or limitation of remedies by either party for any future conduct of the parties." (Id. ¶ 11.)

Thereafter in 2017, the Condo brought its first motion for contempt. During the contempt hearing, the Court heard testimony from a private investigator who stated that she went to the Gym's premises and witnessed numerous violations of the aforesaid three prohibitions from the 2015 Resolution. In addition, during this first contempt hearing, four residents of the Condo—from three different apartments—testified concerning the noise and vibrations they experienced in their apartment emanating from the Gym below. The resident witnesses testified that the noises and vibrations prevented them from sleeping, interfered with their children's ability to do their homework after school, and limited their ability to work in their home offices. The resident witnesses further testified that that the constant noise and vibrations and threat of such caused them to experience a general sense of anxiety.

After this testimony, the parties agreed to dispose of this first contempt motion by signing an additional so-ordered stipulation (the "2017 Stipulation") which supplemented the 2015 Stipulation. Pursuant to the 2017 Stipulation, the Gym agreed to take additional measures to prevent weights from being dropped in violation of the 2015 Stipulation—namely, to impose certain disciplinary measures on members and employees who dropped weights in violation of the 2015 Stipulation.[3]

In August and September of this year, the Court heard the Condo's second motion for contempt. During this second contempt hearing, the Court viewed video evidence of individuals dropping weights in violation of the 2015 Resolution. In sum and substance, the video showed numerous individuals dropping weights without the required Rogue pads to cushion and absorb the impact—often during classes without any attempt by instructors to enforce the requirement that Rogue pads be used. The Court again heard testimony from two residents from two apartments concerning how the vibrations emanating from the Gym negatively affected their lives and ability to use and enjoy their apartments.[4] On September 18, 2018, this Court found the Gym in criminal and civil contempt for its violations of the 2015 and 2017 Stipulations.

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[3] The 2017 Resolution also required the Gym to install video recording equipment throughout the Gym "to ensure that all areas of the 1st floor and basement levels of the Premises … are clearly and continuously visible on recordings." (2017 Stipulation ¶ 3.)

[4] One witness described the anxiety produced by the noise and vibrations as "waiting for the other foot to drop" in the sense that "[w]hen you're lying in bed, you feel thuds or vibrations or things of that nature every few seconds or every few minutes, you condition your body to wait for the next one." (2017 Contempt Hearing Tr. at 50:06-21.)

On the same day this Court held the Gym in contempt, the BSA issued a written resolution denying the Gym's request to extend its permit to operate a PCE. On September 20, 2018, the Condo brought the instant motion by order to show cause.

On the instant motion, the Condo moves for summary judgment on the first cause of action of its complaint which seeks preliminary and permanent injunctions barring the operation of a gym in the Premises without a Physical Culture Establishment ("PCE") permit, and for summary judgment on its third cause of action which seeks an award of attorney's fees in an amount to be determined by the Court against Defendant 257 Associates Borrower LLC.

Prior to hearing argument on the merits of the instant motion, this Court granted a temporary restraining order (TRO) enjoining the Gym from operating a PCE without a permit from the BSA during the pendency of this motion after hearing oral argument. Among other arguments, the Gym argued that the action had been settled pursuant to the previous 2015 Stipulation and that the Condo was required to purchase a new index number and commence a new action to seek the requested injunctive relief. The Condo argued that its cause of action seeking a permanent injunction was never settled. (September 20, 2018 Hearing at 19:15-22.) Based upon the arguments, the Court permitted the instant motion to go forward and entered the aforesaid TRO. (Id. at 21:05-08.)[5]

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence

[5] The Court further notes that the 2015 Stipulation did not state that the action was discontinued and stated that "[n]othing contained herein shall constitute a waiver and/or limitation of remedies by either party for any future conduct of the parties." (Id. ¶ 11.)

of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

I. Plaintiff Is Entitled to a Permanent Injunction Enjoining Defendants 257 Associates Borrower LLC and the Gym from Operating a Gym Without a Physical Cultural Establishment ("PCE") Permit.

"A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 [2d Dept 2009].) "Injunctive relief is to be invoked only to give protection for the future[,] to prevent repeated violations, threatened or probable, of the plaintiffs' property rights." (Id. [internal quotation marks and emendation omitted].) To be entitled to a permanent injunction, "a party must show that there was a violation of a right or threatened violation, that there is no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor." (*Islamic Mission of Am., Inc. v Mukbil Omar Ali*, 152 AD3d 573, 575 [2d Dept 2017].)

The Condo presents a copy of the condominium's by-laws which provides that "[a]ll present and future Owners, tenants, subtenants and occupants of Units" are subject to said by-laws and must so comply with them. (Affirm in Supp., Ex. E [Declaration] art. 15.) Article VI, Section 11 of the By-Laws, captioned "Restrictions on Use of Units", states:

> "No . . . unlawful use shall be made of the Property, or any part thereof, and all valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof shall be observed."

On September 18, 2018, the Board of Standards and Appeals ("BSA") filed a resolution denying the Gym's application to extend the term of the special permit which it previously granted the Gym, pursuant to Zoning Resolution § 73-36 and 73-06. In its denial, the BSA stated:

> "[I]n light of the evidence presented, uncontroverted by the subject PCE's owner, trainer-employee and representative that the subject PCE has failed to comply with the 2015 Resolution and, in so doing, elicited numerous complaints from residents of the building regarding its adverse effects—specifically noise and vibrations in their residential units resulting from the

> dropping of excessive weights from significant heights in the subject PCE space—the Board finds, pursuant to ZR § 73-03(f), that the subject PCE has been in substantial violation of the conditions and safeguards described [by] the Board in the 2015 Resolution[.]"

On September 20, 2018, this Court issued a TRO on this motion enjoining the Gym from its operation pending the determination of this motion. During oral argument over the TRO, this Court noted that it had previously held the Gym in contempt, earlier in the week, for failing to abide by the BSA's 2015 Resolution, which the Gym had agreed to do in a so-ordered stipulation.

Prior to finding the Gym in contempt, this Court had reviewed video evidence showing numerous individuals dropping weights directly onto the Gym's floor without using Rogue pads—actions that were prohibited by the 2015 Resolution. In finding the Gym in contempt, the Court noted that the Gym had signed a so-ordered stipulation in late 2017 in which the Gym agreed to take significant measures to enforce compliance with the 2015 Resolution among the Gym's members and employees. Notwithstanding the Gym's promise, the video evidence showed that individuals in the gym were still regularly dropping weights directly onto the Gym floor without Rogue pads often during classes and without any instructors attempting enforce the use of Rogue pads. (September 17, 2018 Tr. at 47:14-53:17.) The Court further noted that it had heard testimony from two residents who it found to have credibly described how the aforesaid dropping of weights inside the gym caused them to experience noises and vibrations in their apartments that negatively affected their quality of life. (Id.) As such, this Court issued an order dated September 18, 2018, holding the Gym in civil and criminal contempt for violating the provisions of the BSA's 2015 Resolution.

The Gym now argues that this Court should deny the Condo's request for relief because:

(1) it is in the process of applying to the BSA for a new special permit to operate a PCE; and
(2) a report, dated July 23, 2015 (the "Eremos Report"), conducted by a neutral third-party acoustics and vibration analysis consultant found that weight drops of 225 pounds in the basement of the Gym resulted in "no audible sound or perceptible vibration" in the apartments of the residents who testified during the contempt hearing.

(Memo in Opp. at 3-4.) The Gym argues that, based on the above two points, the Condo cannot establish the violation of a continuing right without a remedy at law,[6] the Condo is not being irreparably harmed, and the equities balance in the Gym's favor. The Court will discuss each of above two points in turn.

As a general matter, "a board of managers of a condominium is statutorily empowered to enforce its by-laws, rules and regulations" and may seek injunctive relief to do so. (*Bd. of Managers of Ocean Terrace Towne House Condominium v Lent*, 148 AD2d 408, 409 [2d Dept 1989].) Here, the Condo is seeking a permanent injunction preventing a PCE from being operated on its premises in violation of the New York City's zoning ordinances—as making use of a unit in violation of the zoning ordinances amounts to a violation of its by-laws. The Gym argues, in sum and substance, that there is no violation of the zoning ordinance because—after the BSA denied the Gym's application to extend the duration of its special permit to operate a PCE—the Gym applied for a new application. The Gym argues that gyms are generally allowed to operate while they wait for their application to be reviewed by the BSA. The Court however rejected this argument at the TRO oral arguments. As the Court explained there, to allow the Gym to operate a PCE after having its special permit denied—on the grounds that it was awaiting approval of their new application—would effectively render the BSA's denial meaningless. (September 20, 2018 Hearing Tr. at 69:07-24.)

With regard to the Eremos Report, the Gym has consistently referred to this report to argue, in sum and substance, that there are no noises and vibrations being experienced by the Condo's residents. Indeed, on this motion and in prior motions, the Gym appears to have taken the position that, based on the Eremos Report, any weight drops in the Premises could not have caused the noises and vibrations complained of by the residents, and as such, the Gym need not comply with the BSA's 2015 Resolution.

However, as the Court explained when it held the Gym in contempt, the Eremos Report was considered by the BSA when it issued its 2015 Resolution, and the BSA—using its own expertise—decided that the restrictions placed by the 2015 Resolution were appropriate. (September 17 Hearing Tr. at 23:14-25:23.) It was not for the Court to second guess the BSA's expertise when this Court held the Gym in contempt in September, and it is now not for this Court to second guess the

[6] The Court notes that, on its papers, the Gym also argued that the Condo could not establish a likelihood of success on the merits because Plaintiff did not withdraw the branch of its motion seeking a preliminary injunction until the oral argument on this motion.

BSA's decision to deny the Gym a PCE special permit, based on the Gym having "failed to comply with the 2015 Resolution." (2018 BSA Denial.)

Moreover, during the hearing for the permit extension before the BSA Board in July this year, one of the Gym's principals admitted that "we violated the letter of these conditions ... [but] [w]e don't believe we violated the spirit. ... We don't believe we caused any harm to these people ... because we have more evidence that will back that up." (BSA Hearing Tr. at 34:08-35:11.) The Gym through this principal argued to the BSA Board that the Eremos Report established, in sum and substance, that the complaints from residents were not being made "in good faith." (Id. at 42:04-44:16.) At least one board member rejected the Gym's argument that the Eremos Report provided a basis for the Gym avoid strict compliance with the 2015 Resolution. As that Board Member explained, "[t]he Board saw [the Eremos Report], reviewed it, and nevertheless, put in a condition that prohibited the dropping of weights above a certain weight on each floor. I don't see why we're defending this." (BSA Hearing Tr. at 53:11-55:02; *see also* id. at 28:25-30:23.)

To be clear, this Court, over the course of two contempt motions—one which was settled and one which resulted in the Gym being held in contempt—has heard lengthy testimony from the Condo's residents in which they credibly testified as to the loss of sleep, the inability to fully use their apartments and the general anxiety they experienced from the noise and vibrations caused by individuals dropping weights in the Gym.

Since that time the BSA has declined to extend the Gym's special permit to operate a PCE at the Premises because of the Gym's violations of the 2015 Resolution and the aforesaid resulting harmful effects to the Condo's residents. As such, the Gym's contention that the "only harm being suffered by [the Condo] is the technical non-compliance with the By-Laws" is misguided. The Condo is exercising its statutory authority to enforce its by-laws in order to protect its residents from continuing to suffer the irreparable harm caused by the noise and vibrations emanating from the Gym, which the BSA has determined these residents need not endure any longer. To allow the Gym to operate without a permit would be to allow the ongoing violation of the Condo's right to enforce its by-laws and to force the Condo's residents to suffer the irreparable harm of the noise and vibrations produced from the Gym's illegal operation.

The Court further finds that the equities balance strongly in favor of the Condo as the Gym has openly flouted its compliance with the BSA's 2015 Resolution, essentially on its belief that the 2015 Resolution was overly restrictive

and that there was no basis for the residents to complain. In addition, notwithstanding this position, the Gym agreed in December 2017 to take additional measures to ensure that its members and employees would not drop weights in violation of the 2015 Resolution. However, based on the video evidence of individuals regularly dropping weights in full view of trainers without any admonishment or intervention and the testimony of residents that they are still regularly experiencing the adverse effects of weights being dropped, the Court finds that the Gym had no intention of complying with the 2015 and 2017 Stipulations when the Court gave the Gym this "second chance" back in December of 2017.

As such, this Court finds:

1) that the Condo has established that its right to have its by-laws complied with is being violated, and that the violation of this right will continue absent this Court issuing the requested injunctive relief;
2) that the effect of this violation of the by-laws is that the Condo's residents are being irreparably harmed by the continuous noise and vibrations emanating from the Gym currently operating without a PCE special permit (i.e. in violation of the Zoning Resolution); and
3) that the equities weigh strongly in favor of granting a permanent injunction enjoining the Gym and Defendant 257 Associates Borrower LLC (the condominium unit owner) from operating a PCE without a special permit.

Accordingly, the Condo's motion for a permanent injunction is granted.

II. The Branch of the Condo's Motion for Attorney Fees is Granted

The Condo seeks an award of attorney fees against Defendant 257 Associates Borrower LLC, the owner of the commercial unit that the Gym is currently leasing, based on the following provision of the bylaws:

> "The violation of any rule or regulation adopted by the Board of Managers, or the breach of any By-Law contained herein, or the breach of any provision of the Declaration, shall give the Board of Managers the right, in addition to any other right set forth in these By-Laws: . . . (b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach; and (c) in any event charge the Unit Owner with the cost of reasonable legal and other fees and costs incurred in enjoining,

abating or remedying such violation."

(By-Laws, Article VI, Section 9.)

Here, the Condo Board of Managers has successfully sought an order from this Court enjoining the aforesaid breach of its by-laws, based on the operation of a PCE on its premises without a special permit in violation of the Zoning Resolution. As such, the Condo is entitled to its reasonable attorney fees pursuant to the above provision, as against Defendant 257 Associates Borrower LLC, as it has prevailed on the central claims advanced and received "substantial relief in consequence thereof." (*Bd. of Managers of 55 Walker St. Condominium v Walker St., LLC*, 6 AD3d 279, 280 [1st Dept 2004].)

In addition, it bears noting that Defendant 257 Associates Borrower LLC has not filed any papers in opposition to this branch of Plaintiff's motion for reasonable attorney fees. Although counsel for Defendant 257 Associates Borrower LLC stated at oral argument that it opposed an award of attorney fees and costs during oral argument, said counsel and counsel for the Gym also stated that the Gym would cover any fee award against Defendant 257 Associates Borrower LLC.

Accordingly, the branch of the Condo's motion for an award of reasonable attorney fees pursuant to the by-laws is granted, and the issue of the amount of the reasonable attorney fees is referred to the Special Referee's Part to hear and report on said issue.

CONLCLUSION

Accordingly, it is hereby

ORDERED that the branch of Plaintiff Board of Managers of 257 West 17th Str. Condominiums' motion that seeks summary judgment in plaintiff's favor on the first and third causes of action of the complaint is granted, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ADJUDGED, DECLARED, and ORDERED that Defendants 257 Associate Borrower LLC, and BBP Fitness LLC d/b/a BRICK New York, their agents, officers, employees, licensees, assignees and/or tenants are hereby enjoined from operating a gym in the commercial premises located at 257 West 17th Street, New York, New York (the "Premises") without the legally required Physical Culture Establishment Permit required by Section 73-36 of the New York City Zoning Resolution; and it is further

DECLARED that Plaintiff is entitled to reasonable attorney fees incurred in the making of this motion from Defendant 257 Associate Borrower LLC pursuant to Article VI, Section 9 of the By-Laws and the stipulation of November 12, 2018 (NYSCEF Document No. 1434) as the prevailing party; and it is further

ORDERED that the portion of Plaintiffs' action seeking recovery of reasonable attorney fees is severed and continued, and the issue of the amount of Plaintiff's reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for Plaintiff shall, within 30 days from the filing of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the instant motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly, with costs and disbursements to Plaintiffs as taxed by the Clerk; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon the defendants and upon the Clerk of the Court within twenty (30) days of the filing of this order.

The foregoing constitutes the decision and order of this Court.

11/29/2018
DATE

ROBERT D. KALISH, J.S.C.
HON. ROBERT D. KALISH

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