

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

ORIGINAL

WALTER McSWEENEY, DEREK LINDELL,
WINSTON WILLIAMS, FORTUNE NEHMAD-
STARR, CHRISTOPHER TOMEO, DENNIS
DALY, and PETER DIAZ, all suing individually
and as members of HARBOUR POINTE AT
ARVERNE BY THE SEA HOMEOWNERS
ASSOCIATION II, INC., for the Benefit
and in the Right of HARBOUR POINTE AT
ARVERNE BY THE SEA HOMEOWNERS
ASSOCIATION II, INC.,

Plaintiff(s)

-against-

THE BOARD OF DIRECTORS OF HARBOUR
PONTE AT ARVERNE BY THE SEA HOME-
OWNERS ASSOCIATION II, INC., EDWIN
WILLIAMS, as President OF THE BOARD OF
DIRECTORS OF HARBOUR POINTE AT
ARVERNE BY THE SEA HOMEOWNERS
ASSOCIATION II, INC., GEORGE
BAYERSDORFER, as Vice President of
THE BOARD OF DIRECTORS OF HARBOUR
POINTE AT ARVERNE BY THE SEA HOME-
OWNERS ASSOCIATION II, INC., VICTORIA
PODGORSKI, as Secretary of THE BOARD OF
DIRECTORS OF HARBOUR POINTE AT
ARVERNE BY THE SEA HOMEOWNERS
ASSOCIATION II, INC., JOSEPH HAGGERTY,
as Treasurer of THE BOARD OF DIRECTORS
OF HARBOUR POINTE AT ARVERNE BY
THE SEA HOMEOWNERS ASSOCIATION
II, INC., and KATHERINE LOUIE, as
Communications Director of THE BOARD OF
DIRECTORS OF HARBOUR POINTE AT
ARVERNE BY THE SEAT HOMEOWNERS
ASSOCIATION II, INC.,

Defendant(s)

Index
Number 701927 2012

Motion
Date December 4, 2012

Motion
Cal. Number 4

Motion Seq. No. 1

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FILED
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The following papers numbered 1 to 11 read on this motion by the plaintiffs for a preliminary injunction, inter alia, prohibiting the defendants from spending funds belonging to Harbour Pointe at Arverne by the Sea Homeowners Association II, Inc. for the purpose of prosecuting claims relating to construction defects in individual homes, and on this cross motion by the defendants for an order pursuant to CPLR 602, consolidating, or combining for a joint trial, the instant action with *Harbour Pointe at Arverne by the Sea Home Owners Association, II, Inc. v. Benjamin- Beechwood LLC* (Index No. 5882/12) which is also pending in the New York State Supreme Court, County of Queens.

	Papers <u>Numbered</u>
Order to Show Cause – Affidavits– Exhibits	1-3
Notice of Cross Motion - Affidavits - Exhibits	4-6
Answering Affidavits - Exhibits.....	
Reply Affidavits.....	7-9
Memoranda of Law	10-11

Upon the foregoing papers it is ordered that the plaintiffs’ motion is denied. The defendants’ cross motion is also denied.

The complaint alleges the following: Harbour Pointe at Arverne By the Sea II is a residential home development located in Arverne, Queens County, New York which consists of 121 privately deeded homes and common elements. The plaintiffs are homeowners in the development and also members of the Arverne by the Sea Homeowners Association II, Inc. The maintenance and repair of each home is the exclusive responsibility of the homeowner, and each homeowner is also responsible for the payment of a pro-rata share of the expenses of the Association arising from the operation and maintenance of the common properties. In or about January, 2012, the Board of Directors of the Association decided to spend its funds to prosecute claims for construction defects in the homes of members of the Association. The defendant Board has hired an architectural and engineering firm and a law firm for the purpose of bringing suit against the developer of the project, already spending approximately \$25,000 of the Association’s funds. The Board has no authority to spend funds other than for the purpose of maintaining, repairing, and improving the common elements of the community.

The defendants make the following reply: Harbour Pointe at Arverne by the Sea II is a newly constructed development subject to Section 352-e of Article 23-A of the General Business Law. The development consists of common property owned by the Association, a corporation organized under the New York Not-for-Profit Corporation Law, and 121 homes

individually owned by the members of the Association. The developer-sponsor offered ownership interests to the public pursuant to an offering plan accepted for filing by the Office of the Attorney General of the State of New York on August 26, 2004. As time passed, construction defects manifested themselves in the common property and in the individual homes of the members which the developer has refused to remedy. Improperly laid foundations have cracked and shifted which in turn has caused interior walls and ceilings to crack. On or about March 13, 2012, the Board held a meeting of the Association to determine a course of action against the sponsor, and not one member objected to the Board's prosecution of claims against the sponsor. On March 18, 2012, the Board decided to hire a law firm to prosecute claims against the sponsor for defects in the common property and in the individual homes of members of the Association. On March 19, 2012, the law firm began an action against the sponsor, *Harbour Pointe at Arverne by the Sea Home Owners Association, II, Inc. v. Benjamin- Beechwood LLC* (Index No. 5882/12), which is also pending in the New York State Supreme Court, County of Queens.

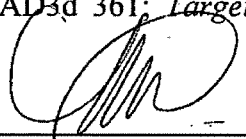
In order to obtain a preliminary injunction, the plaintiffs had to establish, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a weight of the equities in their favor. (See, *Aetna Insurance Co. v. Capasso*, 75 NY2d 860; *Felix v. Brand Service Group LLC*, -AD3d-, -NYS2d-, 2012 WL 6720783.; *Board of Managers of Britton Condominium v. C.H.P.Y. Realty Associates*, -AD3d-, -NYS2d-, 2012 WL 6602981.) The plaintiffs failed to carry this burden. In regard to the first requirement, the plaintiffs did not clearly show on this motion that the Board is without authority to bring suit against the developer for damages to individual homes. On the other hand, the Board has plausibly argued that the applicability of RPL § 339-dd should be extended to Homeowner's Associations. (See, *Scarsdale Manor Owners v Wolloch*, 106 AD2d 439, overruled on other grounds, *Board of Managers of Fairways at North Hills Condominiums v. Fairways at North Hills*, 150 AD2d 32.) There are difficult questions of law to be resolved in this case, a matter which casts doubt on the plaintiffs' likelihood of ultimate success on the merits. (See, 11A Fed. Prac. & Proc. Civ. § 2948.3 [2d ed.].) "[O]n application for preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." (*Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F2d 141, 143.) In regard to the second element, "[i]rreparable injury" means injury for which money damages are not satisfactory, and economic loss which is compensable in money does not constitute irreparable harm. (See, *DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635; *EdCia Corp. v McCormack*, 44 AD3d 991.) "Corporate directors and officers may be liable to the corporation in damages for amounts resulting from their breach of the duty of care, waste of corporate assets, and willful conversion or diversion of corporate assets." (4B N.Y.Prac., Com. Litig. in New York State Courts § 83:52 [3d ed.].) In the case at bar, the plaintiffs have asserted causes of action against members of the board and other individuals for damages resulting from the allegedly unauthorized expenditure of Homeowners Association II, Inc.'s funds. In regard

to the third requirement, the plaintiffs did not demonstrate that the alleged irreparable injury to be sustained by them is more burdensome than the harm that will be caused to the defendant Association and its members through imposition of the injunction. (See, *Reuschenberg v. Town of Huntington*, 16 AD3d 568; *Credit Index, L.L.C. v. Riskwise Intern. L.L.C.*, 282 AD2d 246; *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 AD2d 165; *Metropolitan Package Store Ass'n, Inc. v. Koch*, 80 AD2d 940; *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp.*, 70 AD2d 1021; 67A NY Jur2d, "Injunctions," § 31.) In the case at bar, no less than 38 members of the Association have sent letters to the Board seeking its help concerning construction defects in their homes. It would be very burdensome to these members if they had to prosecute their claims individually against the developer. The court is reluctant to leave the individual homeowners without an effective remedy, especially since some of the construction defects appear to be dangerous.

In regard to the cross motion, although there may be some common issues, consolidation is not warranted because the two actions arose out of different transactions and the respective plaintiffs make different claims. (See, *Village of Mamaroneck v. Mamaroneck Affordable Condominium Corp.*, 13 AD3d 361; *Target Graphics Inc. v. Deutsch*, 282 AD2d 601.)

Dated:

JAN 03 2013



J.S.C.
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