

<b>Simon v 160 W. End Ave. Corp.</b>
2003 NY Slip Op 30262(U)
July 9, 2003
Supreme Court, New York County
Docket Number: Index No. 101868/03
Judge: Carol R. Edmead
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STATE COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

X

BARBARA A. SIMON, individually and as Executor of  
the Estate of JEAN C. WHITE and as a Shareholder of  
160 West End Avenue Corporation and  
SKIPPO PORTEOUS,

Index No. 101868/03

Plaintiffs,

**DECISION/ORDER**

-against-

On Submission

160 WEST END AVENUE CORPORATION, GERALD  
ROSS and INSIGNIA MANAGEMENT,

Defendants.

X

**HON. CAROL EDMEAD, J.S.C.**

MEMORANDUM DECISION

Defendants 160 West End Avenue Owners Corporation, s/h/a 160 West End Avenue Corporation (“West End”), Gerald Ross (“Ross”) and Insignia Residential Group, s/h/a Insignia Management (“Insignia”) submit this pre-amended answer motion to dismiss the Amended Complaint. Defendants argue that, among other things, all of plaintiffs’ causes of action are, in essence, claims for defamation, and are time barred, insufficiently specific, and based on actions protected by the business judgment rule? Defendants submit that in any event, the non-defamation causes of action are insufficiently pled. Defendants further argue that the Amended Complaint is

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<sup>1</sup> Plaintiffs are Barbara A. Simon, individually, as Executor (sic) of the Estate of Jean C. White and as a shareholder of 160 West End Avenue Corporation and her ex-husband Skipp Porteous. Ms. Simon and Mr. Porteous are both beneficiaries of a will of Ms. White, which also named Ms. Simon as Executrix (hereinafter “Will”). Defendant West End is a residential cooperative, defendant Mr. Ross is an officer of that Cooperative Board, and Insignia is its managing agent.

<sup>2</sup> In light of the Court’s determination below, the Court does not reach the business judgment rule defense.

barred under the theory of *res judicata*. According to defendants, West End's previous holdover proceeding against Ms. Simon also involved Ms. White's attempts to assign her apartment shares to non-family members. Defendants argue that the Civil Court already rejected Ms. Simon's claims of entitlement to occupy or assign the subject apartment. Defendants also submit that Ms. Simon was provided a full and fair opportunity to raise the instant claims in the Civil Court proceeding, and is therefore precluded from raising them herein.

In opposition, plaintiffs argue that the false statements upon which they base their defamatory claims occurred within one year prior to the commencement of this action, are sufficiently specific, and are not privileged. Plaintiffs also argue that the remaining causes of action, to wit: breach of fiduciary duty and intentional infliction of emotional distress, may be independently maintained. Furthermore, plaintiffs contend that the holdover proceeding in Civil Court does not have *res judicata* effect on the damage claims herein, as that Court is one of limited jurisdiction and the instant causes of action are unrelated to the holdover proceeding.

In reply, defendants reiterate the arguments in support of dismissing the Complaint, and point out, among other things, plaintiffs' failure to address the cases in support of dismissal.

### The Complaint<sup>3</sup>

Jean C. White owned shares and a proprietary lease of an apartment located at 160 West End Avenue, in New York County ("the apartment"). In June 1999, Ms. White applied for an *inter vivos* transfer of the apartment to plaintiffs, Ms. Simon and Mr. Porteous, as joint tenants with right of survivorship.

Mr. Ross, a director of West End, advised Ms. White that her transfer was legally and

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<sup>3</sup> This action was commenced in February 2003.

morally improper. Based on information supplied by Insignia, Mr. Ross made false accusations “to the building staff, to the Board of Directors and to others including, but not limited to, the [Departmental] Disciplinary Committee [of the Supreme Court, Appellate Division]” that “the Plaintiffs were acting illegally and unethically in their dealings with” Ms. White and “were attempting to improperly influence the elderly to turn over property to them.” In the letter to the Disciplinary Committee, dated September 29, 1999, defendants Mr. Ross and Insignia claimed that Ms. Simon, an attorney, improperly represented clients including Ms. White, preyed on the elderly, and attempted to obtain advantages from defendant West End by false representations. Mr. Ross also complained that Mr. Porteous, an investigator, conspired with Ms. Simon in preying on the elderly.<sup>4</sup> Based on Mr. Ross’ accusations, West End refused to consider Ms. White’s application. In March 2000, the Disciplinary Committee dismissed Mr. Ross’ complaint.

In June 2000, Ms. White died, and her will naming Ms. Simon as Executrix bequeathed the apartment to Ms. Simon and Mr. Porteous. Ms. Simon and Mr. Porteous subsequently applied for a transfer of the apartment pursuant to the will, but their application was rejected, based on the false information supplied by Mr. Ross.

Mr. Porteous then, after applied for a transfer to himself, but withdrew his application four months later.

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<sup>4</sup> In their opposition papers, plaintiffs acknowledge that the alleged false statements in the 1999 complaint letter are time barred (Aff. in Opp. at ¶7, S), but assert that they were re-communicated to the Board in connection with Ms. Simon’s transfer application in “Spring of 2002.” The complaint, however, does not contain any allegation that the letter was republished in “Spring of 2002.”

In September 2001, the Estate: through Ms. Simon, applied for a transfer to herself individually, but was also denied as a result of a false accusation made by “defendants” that she was “not a good neighbor,” as well as the allegations in the complaint letter.<sup>6</sup> “Upon information and belief, [West End] did not act in good faith or within the business judgment rule but used its secret proceedings to defame the innocent . . . .” Ms. Simon was also denied access to the list of shareholders necessary to appeal the Board’s decision.

On July 21, 2002, Mr. Ross told a tenant cooperator that he had a “lot of information about” Ms. Simon, and that Ms. Simon acted “improperly” in that “she was the lawyer for the lady who left the apartment and she wound up getting the apartment.” Mr. Ross also told the tenant that Ms. Simon “acted improperly and unethically as a lawyer.” In September 2002, Mr. Ross told another tenant that he had a “lot of information” about Ms. Simon, that she was “manipulative” and that there were “bad reports” about her from her present building.<sup>7</sup>

Based on the above, plaintiffs seek, against West End, Mr. Ross, or Insignia separately or collectively (1) money damages arising from West End’s and Mr. Ross’ breach of fiduciary duty, resulting when West End used confidential information to falsely attack a member and a prospective transferee and interfered with an agreement between the shareholder and a proposed transferee; (2)

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A fair reading of the complaint indicates that this September 2001 application was made by Ms. Simon on behalf of the Estate (see complaint, ¶¶ 28 and 36).

After the Board denied Ms. Simon’s transfer application, it commenced an action for possession against Ms. Simon as Executrix. The Civil Court (Schachner, J.) determined that an executrix had a right to occupy the subject apartment, but that Ms. Simon in her individual capacity did not, as she did not have approval from the Board. The Civil Court granted West End a money judgment and full judgment of possession.

<sup>7</sup> The original complaint did not contain these additional allegations of false statements made in July and September 2002.

(as a result of the false statements by West End resulting in denials of plaintiffs' applications to take title) an order directing West End to transfer shares pursuant to the will; (3) to enjoin West End from creating a second class of shareholders in violation of the Internal Revenue Code ("IRC"), Certificate of Incorporation, and Bylaws; (4) an injunction on behalf of the Estate requiring West End to provide the shareholder list in order for the Estate to appeal the Board's denials; (5) money damages, based on defendants' tortious interference with Ms. White's agreement to convey the property to Ms. Simon and Mr. Porteous; (6) money damages for defamation of Ms. Simon; (7) money damages for defamation of Mr. Porteous; and (8) money damages for "vicious and malicious" actions in breach of obligations to plaintiffs

### Analysis

#### First Cause of Action

Plaintiffs' first cause of action for breach of fiduciary duty against West End and Mr. Ross arises from West End's alleged improper reliance on false statements and its failure to act in 1999 on Ms. White's application, West End's alleged improper reliance and denial of Ms. Simon's and Mr. Porteous' transfer applications some time prior to September 2001, West End's failure to act on Mr. Porteous' subsequent transfer application, and West End's improper reliance upon and making of defamatory statements to deny the Estate's transfer application in September 2001. Plaintiffs' breach of fiduciary duty claim against Mr. Ross is based on his alleged false accusations.

Cooperative corporations and their boards of directors owe a fiduciary duty to their shareholder-tenants and have a duty to act in an appropriate and reasonable manner (*Chemical Bank v 635 Park Ave. Corp.*, 155 Misc 2d 433, 588 NYS2d 257 [Sup Ct New York County 1992]; see also *Stowe v 19 East 88<sup>th</sup> Street, Inc.*, 257 AD2d 355, 683 NYS2d 60 [1<sup>st</sup> Dept 1999]). It is

undisputed that Ms. Simon, in her individual capacity,<sup>8</sup> and Mr. Porteous were not shareholders of the subject apartment in 1999 when Ms. White applied for the transfer, or in the period prior to September 2001. Thus West End and Mr. Ross did not owe a fiduciary duty to them during this time.

Nor can this cause of action be maintained against West End for breach of its fiduciary duty to *its shareholder Ms. White* in 1999, when it relied upon the alleged false statements and failed to act on Ms. White's transfer application or in 2001, when it relied on alleged false statements to deny the Estate's transfer application. In evaluating a motion to dismiss, the court must liberally construe the complaint in plaintiff's favor and assume that the allegations of the complaint are true (see CPLR §3026; see *Barrows v Iwzansky*, 111 AD2d 105 [1<sup>st</sup> Dept 1985]).

Assuming as the plaintiffs' claims that West End relied on false statements and delayed acting on Ms. White's application in 1999 and denied the Estate's application in September 2001, such claims fail to make out a claim of breach of fiduciary duty. Plaintiffs argue that "the evidence will show that the Board singled out Ms. White and the Plaintiffs because of the way they sought to transfer the property which singled out Plaintiffs because Barbara A. Simon was a lawyer and a friend of the shareholder." Although pleading unequal treatment of shareholders is sufficient to allege a breach of fiduciary duty (*Aronson v Crane*, 145 AD2d 455 [2<sup>nd</sup> Dept. 1988]), the allegation that West End subjected Ms. White or her Estate to disparate or unequal treatment because the prospective transferee is a lawyer and friend is insufficient. There are no allegations that this type of treatment by the Board toward Ms. White or to her Estate differed from the treatment other

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<sup>8</sup> In opposition to defendants' contention that plaintiffs are not shareholders, plaintiffs' retort that "In fact, Plaintiff, as Executor of the Estate of a shareholder, is a shareholder" (Aff. In Opp. ¶2).

similarly situated shareholders received. The complaint is devoid of any allegations describing what the uniform treatment of shareholders was, or that West End's acts constituted a departure from any such uniform treatment.

The Court notes that cooperative boards have the absolute right for any reason or no reason to withhold its approval of an applicant, or to require reasonable financial documentation, provided the boards does not act in bad faith or engage in illegal discriminatory practices (*see Simpson v Berkley Owner's Corp.*, 213 AD2d 207 [1<sup>st</sup> Dept 1995]; *Application of Folic*, 139 AD2d 456, 457-458 [1<sup>st</sup> Dept 1988]; *Rossi v Simms*, 119 AD2d 137 [1<sup>st</sup> Dept 1986] [absent illegal discrimination, the cooperative corporation has the right to withhold their approval of an applicant's purchase for any reason or no reason]). The proprietary lease regarding the subject apartment permitted West End to reject Ms. White's transfer application in 1999 or in 2001 for any reason (*see Lease, Section 16 O*): "There shall be no limitation, except as above specifically provided, on the right of Directors or lessees to grant or withhold consent, for any reason not proscribed by law or for no reason, to an assignment"). The allegations in the complaint are insufficient to rise to the level of bad faith, in that the facts, as pleaded, do not denote misconduct amounting to bad faith (*see Schwartz v Rosenthal*, 10 Misc 2d 85 [Sup Ct New York County 1958] *citing*, *Steinberg v Carey*, 285 AD 1131 [1<sup>st</sup> Dept 1955]). Further, there are no allegations of illegal discriminatory practices, other than the alleged disparate treatment discussed above.

Also, plaintiffs' breach of fiduciary duty claim against West End for its alleged defamatory statements made in connection with the Estate's transfer application in September 2001 sounds in defamation. Since these alleged false accusations occurred outside the one-year statute of limitations, they are time barred (*see In the Matter of Entertainment Partners Group, Inc. v Gail*

*Davis et al.*, 198 AD2d 63 [1<sup>st</sup> Dept 1993] [plaintiff “may not circumvent the one-year statute of limitations applicable to defamation claims by denominating the action as one for intentional interference with economic relations, prima facie tort, or injurious reputation, if, in fact the claim seeks redress for injury to reputation”]).

Additionally, plaintiff’s claims against Mr. Ross for breach of fiduciary duty to Ms. White for his alleged false statements to the Board and to Ms. White in 1999, and to the Board in 2000 and 2001 are not actionable. individual directors cannot be held liable for breach of fiduciary duty absent an allegation of a separate tortious act (*see Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154 [1<sup>st</sup> Dept 1999]; *Konrud v 136 East 64<sup>th</sup> Street Corp.*, 246 AD2d 324 [1<sup>st</sup> Dept 1998]). Here, Mr. Ross’ advice to Ms. White that her 1999 application was legally and morally improper, and his “accusations,” including those in the 1999 complaint letter, to the Board also sound in defamation (*see Morrison v National Broadcasting Co., et al.*, 19 NY2d 453, *supra*). Also, the alleged statements by Mr. Ross in 2000 through September 2001 to the Board, including statements that Ms. Simon was “not a good neighbor,” also sound in defamation. Therefore, notwithstanding the label applied by plaintiffs to their first cause of action, the claims against Mr. Ross, in essence, are ones for defamation.<sup>9</sup> Since the alleged false accusations occurred outside the one-year statute of limitation, they are time barred (*see In the Matter of Entertainment Partners Group, Znc. v Gail Davis et al.*, 198 AD2d 63 [1<sup>st</sup> Dept 1993]).

In light of this determination, the Court does not reach the merits of the business judgment rule or common interest privilege claims.

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<sup>9</sup> The complaint is also devoid of any allegation that Mr. Ross participated in any fraudulent acts, or acted in an discriminatory or self dealing manner.

### Second Cause of Action

Plaintiffs' second cause of action against West End for an order directing the transfer of shares pursuant to the will is also dismissed. The crux of plaintiffs' second cause of action is that West End improperly relied on false information supplied by defendants Mr. Ross and Insignia to deny the conveyance of the apartment *inter vivos* or through the Will, and to "cover" the Board's improprieties. This cause of action essentially mirrors the first cause of action, and is dismissed for the reasons set forth above.

### Third Cause of Action

Plaintiffs' third cause of action for an "order enjoining defendant from establishing a second class of shareholders" is dismissed. This claim on behalf of the Estate is based on West End's wrongful refusal to permit the Executrix from occupying the premises in violation of the IRC, the Certificate of Incorporation, and the Bylaws. However, this claim was raised in the Civil Court proceeding. In this regard, Ms. Simon claimed that by denying an executrix's right to occupancy, West End effectively created a second inferior class of shareholder in violation of (1) BCL §501's requirement that there exist only one class of shareholders and (2) IRC §216's condition precedent to certain tax benefits that there exist a single class of stock. The Civil Court effectively rejected Ms. Simon's contention when it granted West End a full judgment of possession. Since the merits of this cause of action were raised and litigated, and determined, it is barred by *res judicata* (see *Tsabbar v Delena*, 300 AD2d 196 [1<sup>st</sup> Dept 2002]; *Marinelli Assoc. v Helmsley-Noyes Co., Inc.* 265 AD2d 1 [1<sup>st</sup> Dept 2000]).

### Fourth Cause of Action

Pursuant to BCL §607, a "list of shareholders . . . shall be produced at any meeting of

shareholders *upon the request thereat or prior thereto* of any shareholder” (emphasis added). The plaintiffs failed to allege that the request for the shareholder list was made during a shareholder meeting, or requested prior thereto. Plaintiffs’ mere allegation that they were denied access to the list is fatally vague (*see* CPLR §3013 [“Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action”]). Therefore, the fourth cause of action for an injunction directing West End to produce the shareholder list is dismissed.

#### Fifth Cause of Action

Plaintiffs’ fifth cause of action against all defendants for tortious interference with contract is based on alleged false accusations made by defendants which interfered with the agreement between Ms. White and plaintiffs regarding the *inter vivos* conveyance of the shares. As to West End, this allegation is conclusory at best. Further, the discussion *supra* page 7 applies. This claim must also fail as to Mr. Ross and Insignia, as it sounds in defamation, and is predicated on events which occurred outside the statute of limitations (*see* CPLR §215[3]; *Morrison v National Broadcasting Co., et al.*, 119 NY2d 453 and *In the Matter of Entertainment Partners Group, Ztc. v Gail Davis et al.*, 198 AD2d 63, *discussion supra*).

#### Sixth, Seventh, and Eighth Causes of Action

Ms. Simon’s sixth cause of action for defamation is dismissed for lack of specificity. CPLR 3016 (a) requires that in a defamation action, “the particular words complained of ... be set forth in the complaint.” The complaint also must allege the time, place and manner of the false statement and specify to whom it was made (*Arsenault v Forquer*, 197 AD2d 554 [2<sup>nd</sup> Dept 1993]; *Vardi v*

*Mutual Life Ins. Co.*, 136 AD2d 453 [1<sup>st</sup> Dept 19881). Further, plaintiff must allege special damages, unless the statements are slanderous *per se* (*Liberman v Gelstein*, 80 NY2d 429 [1992]). The statements by Mr. Ross on July 21, 2002 that Ms. Simon acted “unethically” as the “lawyer for the lady who left the apartment and wound up getting the apartment,” is slanderous *per se*, as they relate to her profession. Therefore, plaintiff need not plead special damages resulting from these statements (*see Liberman v Gelstein*, 80 NY2d 429, *supra* [statements that tend to injure another in his or her trade, business or profession is an exception to the requirement of special damages be alleged]). However, these statements are not actionable, as they, along with the other statements made on September 20, 2002, were made to a “Tenant Cooperator.” As the complaint fails to identify to whom or where the statements were made, it is facially insufficient. The Court notes that in opposition to instant motion, plaintiffs also claim that the complaint letter was republished to the Board which resulted in the denial of Ms. Simon’s application “at an undetermined time” in Spring 2002. However, the Amended Complaint contains no such allegation, which nonetheless, is insufficiently specific.<sup>10</sup>

To the extent the seventh cause of action by Mr. Porteous for defamation rests on the alleged republications of the complaint letter in connection with his transfer applications some time prior to September 2001, such claims are time-barred (*see* CPLR §215[3]). Furthermore, the statements

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<sup>10</sup> The Court notes that this cause of action cannot be dismissed on the ground that the statements were protected under the common interest privilege, which extends to communications made by one person to another upon a subject in which both have an interest” (*Stillman v Ford*, 22 NY2d 48 [1968]). The privilege may be defeated if the defendant spoke with actual malice (with knowledge that the statement was false or reckless disregard of whether it was false or not) or with common law malice (ill will or spite) (*Liberman v Gelstein*, 80 NY2d 429, 438 *supra*). The complaint alleges that the alleged false statements were “known to be false” or made “after Mr. Ross learned that the allegations were false.”

by Mr. Ross made within the statute of limitations period did not pertain to Mr. Porteous. Therefore, Mr. Porteous has no claim for defamation.

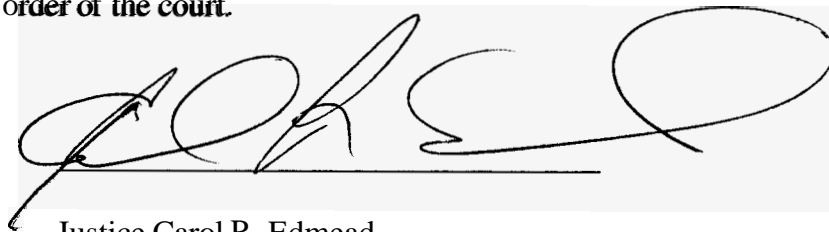
Ms. Simon's eighth cause of action for intentional infliction of emotional distress must also fail, as none of the alleged 2002 false accusations are so "outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society" (*Howell v New York Post Co.*, 81 NY2d 115 [1993]).

Furthermore, since Mr. Porteous' eighth cause of action for intentional infliction of emotional distress is based on the pre-2001 statements, and the alleged statements in 2002 do not include him, such claim must also fail (CPLR §215[3]; *Spinale v Guest*, 270 AD2d 3 [1<sup>st</sup> Dept 2000] [holding that intentional infliction of emotional distress claim is time-barred absent an allegation that defendants did anything in the one-year period prior to the commencement of the action]).

Based on the foregoing, defendants' motion to dismiss the Complaint in its entirety is granted.

This constitutes the decision and order of the court.

Dated: July 9, 2003

A handwritten signature in black ink, appearing to read "Carol R. Edmead", is written over a light gray rectangular background. The signature is fluid and cursive, with a large loop at the end.

Justice Carol R. Edmead