

**Fraiman v Barbanel**

2007 NY Slip Op 30245(U)

March 14, 2007

Supreme Court, New York County

Docket Number: 0101430

Judge: Walter B. Tolub

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**  
Justice

PART 15

*Sandra Scrimas*

INDEX NO.

101430/06

MOTION DATE

2/9/2007

MOTION SEQ. NO.

006

MOTION CAL. NO.

\_\_\_\_\_

*Dany Barbanel*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence 007, 008, & 009 & is decided in accordance with the accompanying memorandum decision

**FILED**

MAR 19 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/14/07

4  
J.S.C.

Check one:  FINAL DISPOSITION

**WALTER B. TOLUB**  
 NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
SAUNDRA FRAIMAN, SAUL FRAIMAN and  
JOANNE PELLO

Plaintiff,

Index No. 101430/06  
Mtn Seq. 006, 007,  
008, 009

-against-

GARY BARBANEL, individually, and as  
president of 425 E. 50 OWNERS CORP.,  
ELIZABETH MASON, individually, and as  
Treasurer of 425 E. 50 OWNERS CORP.,  
SHARLA BAILEY KIDDER, individually, and  
as secretary of 425 E. 50 OWNERS CORP.,  
and 425 E. 50 OWNERS CORP.,

Defendants.

**FILED**

MAR 19 2007

COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
WALTER B. TOLUB, J.:

Motion sequences 006, 007, 008, and 009 are consolidated and resolved in the following memorandum decision. Motion sequence 007 is permitted to be withdrawn, having been substituted as the amended motion to reargue in motion sequence 009.

Litigation and Factual History

Plaintiffs Sandra and Saul Fraiman (the "Fraiman plaintiffs") and Joanne Pello ("Ms. Pello") are residential shareholders of defendant 425 E. 50 Owners Corp. (defendant "Cooperative" or "Corporation"), the owner of a seven unit residential building in Manhattan ("the building"). The Fraiman plaintiffs own 250 shares of stock issued by the defendant Cooperative. Ms. Pello owns 220 shares of stock issued by the defendant Cooperative. Collectively, plaintiffs hold 470 of the

issued 1100 shares (42.72%)<sup>1</sup> of the defendant Cooperative's stock. In terms of voting rights, the total number of votes allocated to all of the Corporation's shareholders is 3300. Of this number, the Fraiman plaintiffs hold 750 votes, and Ms. Pello holds 660 votes. (Order to Show Cause, Motion Sequence 005, Exhibit F). Plaintiffs combined allocations represent 40.9% of the total available number of Corporation votes.

On April 1, 2005, Ms. Pello was elected as the Treasurer to the Cooperative's Board of Directors ("the Board"). On October 21, 2005, the Board, faced with numerous building repairs, issued a Special Assessment in the amount of \$30,000 (the "First Special Assessment").<sup>2</sup>

On October 17, 2005, three days prior to the Board's issuance of the First Special Assessment, plaintiffs' counsel sent a letter addressed to the "Occupants and Board of Directors" of the Cooperative (Order to Show Cause, Motion Sequence 004, Exhibit B). The letter charged that the building's premises had been neglected and not managed in accordance with New York State Law, and indicated a willingness to commence "appropriate

---

<sup>1</sup> 22.72% of the stock is issued to the Fraiman plaintiffs. Ms. Pello holds the remaining 20%.

<sup>2</sup> As noted in this court's October, 2006 decision, by virtue of the amount of shares owned, the Fraiman plaintiffs were assessed \$6,818.18 and plaintiff Pello was assessed \$6,000.00 of the \$30,000 assessment (Affirmation In Opposition, Motion sequence 005, Exhibit D).

litigation" if plaintiffs did not obtain the relief demanded in their letter (Id.). Plaintiffs' demands included, but was not limited to, the immediate scheduling of an annual meeting and elections, reallocation of the corporation's shares, refinancing of the existing mortgage, solicitation of repair estimates, immediate building repairs, and removal of the insurance coverage for two greenhouses from the building's insurance policy (Id.).

On October 25, 2005, four days after the issuance of the first special assessment and roughly a week after plaintiffs indicated their willingness to sue the Corporation, the Commissioner of the Department of Buildings for the City of New York ("Department of Buildings"), citing "hazardous defects"<sup>3</sup> issued Violation No. 34499531X (Order to Show Cause, Motion Sequence 004, Exhibit D).<sup>4</sup> This violation was dismissed by Administrative Law Judge Ethan V. Finneran on February 9, 2006 who determined that the cited conditions were not hazardous, the building was adequately maintained, and "did not require any more immediate repairs than those undertaken by Respondent" (Id. Exhibit E).

---

<sup>3</sup>The handwritten text on the issued violation reads: "Failure to maintain exterior building wall - hazardous defects noted: at cellar level front facade breezeway, steel structural beams supporting main entrance walkway sidewalk are rusted and exploding with Q-deck. Rusted and [remainder unreadable]".

<sup>4</sup>The court notes that in its October, 2006 decision the decision incorrectly stated that Ms. Pello filed the violation.

On October 31, 2005, citing cause, the Board removed Ms. Pello from her position as Treasurer (Affirmation In Opposition, Motion sequence 005, Exhibit D). On November 7, 2005, Ms. Pello was removed as a Director of the Board (Affidavit of Gary Barbanel, Motion Sequence 003, Exhibit N). Defendant Elizabeth Mason was subsequently appointed as Treasurer (Affirmation In Opposition, Motion sequence 005, Exhibit D) and elected as director to the Board on November 10, 2005 to complete Pello's term (Affirmation in Opposition, Motion Sequence 003, Exhibit N). On November 30, 2005, defendants announced a maintenance increase of four percent (4%) to become effective on January 1, 2006 ("the maintenance increase").

On January 25, 2006, plaintiffs commenced this action against the Corporation<sup>5</sup> and Board of Directors members Gary Barbanel (President and Director of defendant Corporation), Sharla Bailey Kidder (Secretary and Director of the Corporation) and Elizabeth Mason (Treasurer and Director of the Corporation). Immediately thereafter, plaintiffs moved for, and this court temporarily granted, a stay of the implementation of the First

---

<sup>5</sup> The court notes that although plaintiffs repeatedly assert in their papers that this litigation is commenced by the named individuals and on behalf of the corporation, the corporation is not named in the action's caption. The third paragraph of plaintiff's complaint however, asserts that the action is brought derivatively "in the right and for the benefit of 425 E. 50 Owners Corp. and representatively on their own behalf and all other shareholders" (Complaint p. 2).

Special Assessment and Maintenance Increase (Order to Show Cause, Motion Sequence 008, Exhibit A). In April, 2006, plaintiffs again moved by order to show cause seeking the same relief, which this court temporarily granted (Id., Exhibit C). While the April, 2006 Order to Show Cause was pending, the Board, again citing capital expenditures, building repairs and other cooperative expenses, issued a Second Special Assessment in the amount of \$30,000 ("the Second Special Assessment").

By decision dated October 6, 2006, this court decided motion sequences 003, 004, and 005 wherein it was determined that (1) this court had no jurisdiction over defendant Sharla Bailey Kidder and therefore, the action as to Ms. Kidder was dismissed; (2) dismissal of the first, third, seventh and eighth causes of action were warranted; and (3) partial dismissal of the second cause of action was warranted. The court also lifted the stay imposed upon plaintiffs' responsibility to pay the special assessment, and directed the holding of a special meeting for an election of Directors and Officers to the extent that they had not already occurred. The instant motions followed.

Motion Sequences 006, 007 and 008

By motion sequence 006, plaintiffs move for an order directing defendants to produce (1) access to or copies of the books and records, list of shareholders and minutes of the meetings of the shareholders and directors for the last seven (7)

years of defendant 425 East 50 Owner's Corp.; (2) a list of estimates or contracts for repairs and improvements to be performed at 425 East 50<sup>th</sup> Street, New York, New York; (3) copies of Corporate Resolutions which permitted defendants Gary Barbanel and Elizabeth Mason to obtain space upon the common roof area for their personal greenhouses; and (4) proof that the aforementioned greenhouses are covered by independent insurance and not by the Corporation's insurance policy.

By motion sequence 008, defendants move to reargue this Court's decision dated October 6, 2006 covering motion sequences 003, 005, and 005, and upon re-argument, issuing an order (1) clarifying the Court's decision so as to specifically lift the stay imposed on Plaintiffs' responsibility to pay the second special assessment adopted by the Board on or about April 20, 2006; (2) directing that plaintiffs pay their share of the second special assessment by a date certain; and (3) resettling the October 6, 2006 order to require plaintiffs to pay their share of the 4% maintenance increase effective January 1, 2006.

By motion sequence 009, plaintiffs seek to renew and reargue this court's October 6, 2006 decision pursuant to CPLR 2221(d) and (e), and upon re-argument, seek an order granting the relief sought in the respective original motion sequences.

Motion Sequences 008

Defendant's motion to reargue is denied. Not only is

defendants' motion rendered moot,<sup>6</sup> but the reason that this court did not address the Second Assessment in its October decision is because defendants Order to Show Cause, which was quite specific as to the relief sought, did not include a provision seeking other general relief (see, CPLR 2214[a]; HCE Associates, etc. v. 3000 Watermill Lane Realty Corp., 173 AD2d 774 [2<sup>nd</sup> Dept. 1991]). As pointedly noted by the Court of Appeals, "if litigants do not make clear what relief they would like, the court can hardly be faulted for not granting it" (Schultz v. Barrows, 94 NY2d 624, 629 [2000]). This court therefore finds no need to amend its prior decision on this issue.

Motion Sequence 009<sup>7</sup>

Motion Sequence 009 seeks to renew and/or reargue several specific components of this court's October 6, 2006 decision. These include (1) renewal of the dismissal of the action as to Sharla Bailey Kidder; (2) renewal and re-argument of the dismissal of plaintiff's first cause of action; (3) renewal and re-argument of the dismissal of the third, and eighth causes of

---

<sup>6</sup>On March 7, 2007, defendants' counsel, by facsimile letter, indicated to the Court that plaintiffs have complied with their financial obligations concerning payment of the Second Special Assessment (see, facsimile letter from Richard P. Marin, Esq. to Hon. Walter B. Tolub, March 7, 2007).

<sup>7</sup>The court notes that plaintiff correctly points out that this court inadvertently mislabeled the motion sequences in part of its October 2006 decision. Motion sequence 003 was mislabeled as motion sequence 005. Sequence 004 was mislabeled as sequence 003, and Sequence 005 was mislabeled as sequence 004.

action; (4) renewal and re-argument of the portion of the seventh cause of action addressed to the removal of Ms. Pello as a Corporate Director; (5) renewal and re-argument of the portions of the second causes of action that were dismissed and (6) re-argument of the portion of this court's order directing the payment of the First Special Assessment and maintenance increase. As the bulk of plaintiffs' motion concerns re-argument of large portions of the complaint in this action, these issues are addressed first.

First, Second and Third Causes of Action

The portion of plaintiffs' motion seeking renewal and/or re-argument of the first, second and third causes of action are granted, and upon reconsideration, these causes of action are again dismissed.

Success on a motion to renew and reargue a court's prior decision is predicated on either the presentation of either "new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221(e)), or a showing that in arriving at its earlier decision, the court either overlooked or misapprehended the facts or the law or somehow mistakenly arrived at its conclusion (CPLR 2221 (d)(2); Foley v. Roche, 68 AD2d 558, 567 [1<sup>st</sup> Dept 1979]; Schneider v. Solowey, 141 AD2d 813 [2<sup>nd</sup> Dept 1988]; Pahl

Equipment Corp. v. Kassis, 182 AD2d 22,27 [1<sup>st</sup> Dept 1992]).

Contrary to plaintiffs' assertions, the presentation of engineering reports, photographs, and claims of new violations, some of which appear to be completely unsupported, do not change this court's position that judicial inquiry into the issues raised in the first cause of action is either prohibited under the principles of res judicata and collateral estoppel, or barred by the Business Judgment Rule.

Plaintiffs' first cause of action claims that the alleged lack of repair and maintenance in the building lead to the issuance of Notice of Violation #34499531X from the Building Department (Complaint ¶15). However, since these claims were addressed and subsequently dismissed by an Administrative Law Judge, all further claims arising out of or in connection with the issuance of this particular violation are barred under both res judicata and collateral estoppel (see, Palm Mgmt Corp. v. Goldstein, 29 AD3d 801 [2<sup>nd</sup> Dept. 2006]; Hernandez v. Selsky, 5 AD3d 882 [3<sup>rd</sup> Dept 2004]; Jeffreys v. Griffin, 1 NY3d 34 [2004]).

Moreover, absent evidence demonstrating discrimination, self-dealing or board member misconduct, judicial inquiry into claims of corporate mismanagement predicated upon: the hiring of unlicensed contractors, failure to hire professional business

management,<sup>8</sup> failure to make repairs demanded by plaintiffs (first cause of action); failure to refinance the building's existing mortgage (third cause of action); failure to maintain a proper reserve fund, failure to professionally ascertain the useful life of the corporations' major capital items, and the failure to prepare a corporate capital budget<sup>9</sup> are all prohibited by the business judgment rule (see, Konrad v. 136<sup>th</sup> East 64<sup>th</sup> Street Corp., et al, 246 A.D.2d 324, 325 [1<sup>st</sup> Dept. 1998]; Jones v. Surrey Cooperative Apartments, 263 A.D.2d 33,36 [1<sup>st</sup> Dept. 1999]; (Matter of Levandusky v. One Fifth Avenue Apt. Corp., 75 N.Y.2d 530 [1990])). As such, the dismissal of the first three causes of action of plaintiffs' complaint, stands.

#### Seventh and Eighth Causes of Action

Renewal and re-argument of the portion of the seventh cause of action addressing the removal of Ms. Pello as Corporate Director is also denied. Plaintiffs' seventh cause of action challenged solely the removal of Ms. Pello as Corporate Director in November of 2005. Therefore, the arguments by plaintiffs advanced with respect to Ms. Pello's removal as a Corporate Director in 2006 are irrelevant on a motion to renew (see, CPLR 2221(e) (2), (e) (3); Mangine v. Keller, 182 AD2d 476 [1<sup>st</sup> Dept

---

<sup>8</sup>The reappearance of this same claim in the sixth cause of action is dismissed as duplicative.

<sup>9</sup>The reappearance of this same claim in the sixth cause of action is dismissed as duplicative.

1992]; Martin v. Triborough Bridge and Tunnel Authority, 180 AD2d 596 [1<sup>st</sup> Dept 1992]. See generally, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial, [James Publishing 2006] §16:331) and are equally irrelevant on a motion to reargue (Foley, 68 AD2d 558; Schneider, 141 AD2d 813; Pahl Equipment Corp., 182 AD2d 22,27).<sup>10</sup>

Renewal of this court's decision to dismiss the eighth cause of action, which challenges the appointment of defendant Elizabeth Mason as a Director of the corporation, is granted. Upon renewal and re-argument, the cause of action is reinstated. This reinstatement is predicated solely upon the argument that defendants failed to comply with the notice requirements contained within the Corporation's By-laws, and to some extent, BCL § 605.<sup>11</sup>

Balance of Plaintiffs' motion to Renew and Reargue

The portion of plaintiffs' motion seeking to renew this court's decision to dismiss the action as to Ms. Kidder (motion sequence 003), is granted. The papers indicate that Ms. Kidder was served by substitute service and an answer was interposed on

---

<sup>10</sup>The court notes that with respect to the 2006 removal from office, Ms. Pello may very well be able to sustain a claim for improper removal based on the simple fact that the requisite notice provisions of the Corporation's bylaws as well as the BCL appear to have not been complied with.

<sup>11</sup>The court further notes that BCL §§ 703, 717, 716 and 717 are, upon further review, inapplicable with respect to the eighth cause of action.

May 16 2006 (Order to Show Cause, Motion Sequence 009, Exhibit D). However, notwithstanding the fact that Ms. Kidder was properly served, and in fact, answered the complaint, individual liability as to directors and officers will not attach absent a showing that they committed separate tortious acts (DeCastro v. Bhokari, 201 A.D.2d 382, 383 [1<sup>st</sup> Dept. 1994]; Murtha v. Yonkers Child Care Association, 45 N.Y.2d 913, 915 [1978])). Since there has been no demonstration that Ms. Kidder has committed a separate tortious act, the action in its entirety as against Ms. Kidder both individually and as a member of the Board, remains dismissed. The court further clarifies that dismissal of the action in its entirety, for the same reasons, extends to defendants Mason and Barbanel both in their individual capacities and as members of the Board.

The balance of plaintiffs' motion to renew and/or reargue is denied. Contrary to the arguments advanced by plaintiffs, the dismissal of many of plaintiffs' claims as barred by the business judgment rule does not conflict with the determination that defendant's violation of specific sections of the New York City Administrative Code and the Business Corporation Laws<sup>12</sup> may ultimately give rise to a claim of breach of fiduciary duty.

---

<sup>12</sup> See, Second (claimed violation of New York City Administrative Code), Fifth and Sixth Causes of action (claimed violations of BCL § 624).

Motion Sequence 006

By motion sequence 006, plaintiffs move for an order directing defendants to produce (1) access to or copies of the books and records, list of shareholders and minutes of the meetings of the shareholders and directors for the last seven (7) years for defendant 425 East 50 Owner's Corp.; (2) a list of estimates or contracts for repairs and improvements to be performed at 425 East 50<sup>th</sup> Street, New York, New York; (3) copies of Corporate Resolutions which permitted defendants Gary Barbanel and Elizabeth Mason to obtain space upon the common roof area for their personal greenhouses; and (4) proof that the aforementioned greenhouses are covered by independent insurance and not by the Corporation's insurance policy.

The motion is granted to the extent that defendants are directed to produce a list of estimates and/or contracts for repairs and improvements to be performed at 425 East 50<sup>th</sup> Street within 20 days. Defendants are further directed to allow plaintiffs to inspect the books and records, shareholder lists and Board minutes for the Shareholder and Director Meetings of defendant 425 East 50 Owner's Corp. within 20 days.

The portion of the motion which seeks discovery with respect to a claim against the corporation for breach of fiduciary duty

based on the construction of two private rooftop greenhouses<sup>13</sup> in 1988 and 1992 is denied as barred by the statute of limitations (CPLR 213).

Accordingly, it is

ORDERED that motion sequence 006 is granted to the extent that defendants are to produce a list of estimates and/or contracts for repairs and improvements to be performed at 425 East 50<sup>th</sup> Street within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants are to allow plaintiffs to inspect the books and records, shareholder lists and Board minutes for the Shareholder and Director Meetings, of defendant 425 East 50 Owner's Corp. within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that motion sequence 007 is permitted to be withdrawn; and it is further

ORDERED that motion sequence 008 is denied; and it is

---

<sup>13</sup> Contrary to plaintiffs' allegations, when Ms. Mason purchased her unit in 1999, it already contained the glass enclosed room which plaintiffs claim is a greenhouse (Affirmation In Opposition, Exhibit E). Mr. Barbanel built his greenhouse in 1988 after obtaining Board Permission (Id., Exhibit D).

further

ORDERED motion sequence 009 to renew and/or reargue this Court's October 6, 2005 decision is granted, and upon renewal and/or re-argument, the motion is denied with respect to the first, second, third and seventh causes of action. The motion is further denied with respect to the portion of the motion seeking to renew and reargue the order directing plaintiffs to pay the First Special Assessment and maintenance charges; and it is further

ORDERED that motion sequence 009 to renew and/or reargue this Court's October 6, 2005 decision is granted, and upon renewal and/or re-argument, the court reinstates the cause of action against defendant Sharla Bailey Kidder, and subsequently dismisses the action as against defendant Kidder both individually and as a member of the Board; and it is further

ORDERED that for the reasons set forth in this decision, the action is dismissed as against defendants Gary Barbanel and Elizabeth Mason, both individually and as members of the Board; and it is further

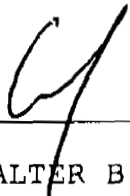
ORDERED that motion sequence 009 to renew and/or reargue

this Court's October 6, 2005 decision is granted, and upon renewal and/or re-argument, eighth cause of action challenging the appointment of defendant Elizabeth Mason as a Director of the corporation on November 10, 2005, is granted.

Counsel for the parties are directed to appear for the scheduled Preliminary Conference in this matter in IA Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on April 20, 2006.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/14/07

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
MAR 19 2007  
COUNTY CLERK'S OFFICE  
NEW YORK