

**Espinal v 484 W. 165th St. Hous. Fund Dev. Corp.**

2007 NY Slip Op 33797(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0108307/2007

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA  
*Justice*

PART 61

*Genaro Espinal*

INDEX NO. 108307/07

*484 W. 165<sup>th</sup> Street*

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

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	
<del>_____</del>	<i>(see attached)</i>
<del>_____</del>	
<del>_____</del>	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

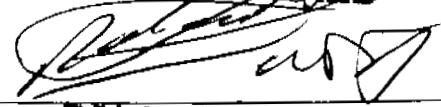
NOV 27 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

**SO ORDERED**



**ROLANDO T. ACOSTA**  
J.S.C.

Dated: 11/20/07

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 61

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GENARO ESPINAL and JULIO A. ARAUJO,

Plaintiffs,

- against -

484 WEST 165<sup>th</sup> STREET HOUSING  
 FUND DEVELOPMENT CORPORATION (“HDFC”),  
 and JOSE A. PEREZ, FEDERICO JIMENEZ,  
 MARIA JIMENEZ, as HDFC board members,

and

ANA TAPIA, JANINI LUGO, as individuals,

Defendants.

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**DECISION/ORDER**

Index No. 108307/07

Motions Seq. 1, 2, 3

Present:

**Rolando T. Acosta**  
**Supreme Court Justice**

Motions sequence 1, 2, and 3 are disposed of in this order. The following documents were considered in making this order.

<b>Papers</b>	<b>Numbered</b>
<b>Plaintiffs’ Affidavit of Compliance (motion seq. 1)</b>	<b>1</b>
<b>Plaintiffs’ Order to Show Cause</b>	<b>2</b>
<b>Plaintiffs’ Affidavit in Support</b>	<b>3 (Exhibits A-C)</b>
<b>Defendants’ Opposition &amp; Affirmation</b>	<b>4 (Exhibits A-H)</b>
<b>Defendants’ Notice of Motion &amp; Affirmation (motion seq. 2)</b>	<b>5</b>

**Affidavit in Support of Motion to Sever** 6 (Exhibits A-D)

**Plaintiffs' Affidavit in Opposition to Motion to Sever** 7 (Exhibits A-E)

**Defendants' Order to Show Cause to Dismiss (motion seq. 3)** 8 (Exhibits A-J)

**Plaintiffs' Affidavit in Opposition to Order to Show Cause to Dismiss** 9 (Exhibits A-D)

### Background

Plaintiffs, proceeding pro se, are suing two groups of defendants. Against the first group, defendants HDFC and the HDFC board members Jose A. Perez, Frederico Jimenez, and Maria Jimenez, plaintiffs interpose numerous causes of action, including breach of fiduciary duty alleging that defendants, in their capacities as board members have engaging in self-dealing and carried out transactions fraught with conflicts of interest. Plaintiffs also allege violations of the HDFC's bylaws, proprietary lease, and certificate of incorporation. Against the second group of defendants, Ana Tapia and Janini Lugo, proceeding pro se and in forma pauperis, plaintiffs allege tort claims sounding in slander, defamation, harassment, and intentional infliction of emotional distress and also violations of the real property law and applicable housing codes for breach of the covenant of quiet enjoyment.

At the outset, the Court expresses that because plaintiffs and defendants, Ana Tapia and Janini Lugo are pro se, they have been advised of the rule prohibiting *ex parte* communications with the Court and informed of the parties' obligation to submit copies of all documents to be considered by the Court to all parties in the action, or if represented by counsel, to the party's counsel.

### Motion Seq. 1: Plaintiffs' order to show cause for a temporary restraining order

Plaintiffs' seek, *inter alia*, a temporary restraining order ("TRO") against 484 West 165<sup>th</sup> Street Housing Development Fund Corporation ("HDFC")

enjoining HDFC and HDFC's board members from completing plumbing and structural work in connection with construction of a laundromat. Defendants oppose the application for a TRO based on the fact that the board passed a resolution to construct the laundromat claiming it was being built for shareholder convenience. Defendants also argue that HDFC's bylaws at Article VIII, § 2 vest in the board, and the board alone, the power to administer the affairs of the cooperative. Finally, defendants argue that under HDFC's bylaws, there is no requirement that shareholders be consulted for capital improvements, but that even so, a majority of shareholders approved the construction of the laundromat.

Notwithstanding plaintiffs' affirmations providing what they claim is "pound-foolish-and-penny-wise" spending by the board, such spending is beyond the Court's review as it is protected by the business judgment rule. Under the business judgment rule, "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, ... judicial review is not available." Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 538. Here, plaintiffs are not alleging that the HDFC board members acted in "bad faith" in deciding to construct a laundromat, but simply disagree with the board's decision to spend HDFC's money in the manner it is doing so. Therefore, because plaintiffs' have failed to demonstrate the likelihood of success on the merits as required for issuance of a temporary restraining order (see, W.T. Grant Co. v. Scroggi, 52 N.Y.2d 496 (1981)), the Court must deny plaintiffs' request for a temporary restraining order.

**Motion Sequence 2: Defendants' (HDFC, Jose A. Perez, Federico Jimenez, and Maria Jimenez) motion to sever**

Defendants, HDFC, Jose A. Perez, Federico Jimenez, and Maria Jimenez, through counsel, move to sever the actions against them and the second set of defendants, Ana Tapia and Janini Lugo. Defendants allege that severance is warranted because to keep the action together would create a confusion of defendants and claims. Plaintiffs oppose severance claiming that the same facts support their actions against both sets of defendants. In their opposition papers, plaintiffs allege that the non board member defendants, Ms. Tapia and Ms. Lugo, acted in concert with the full knowledge and blessings of the board to threaten, harass, intimidate, provoke, insult, slander, and defame plaintiffs. Plaintiffs have presented evidence that they previously hired counsel to send all defendants cease

and desist letters to stop the harassment against plaintiffs, and that one letter was sent to the HDFC board to put them on notice for failing to take action against defendants Tapia and Lugo. Plaintiffs also argue that as pro se litigants, it would be extremely onerous to sustain two separate actions.

The Court finds that because the underlying claims allege actions taken in concert between the two sets of defendants, severance is not appropriate. Furthermore, under the Court's broad power to fashion the sequence of the trial in a manner that can alleviate any confusion of defendants and claims, severance is not warranted in this case. See, C.P.L.R. § 4011 ("The court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting or proper decorum.") Therefore, the defendants' motion to sever is denied.

**Motion Sequence 3: Defendants' (Ana Tapia and Janini Lugo) motion to dismiss for lack of personal jurisdiction based on improper service**

Defendants move for dismissal of this action against them based on improper service. Defendants' claim they found out about the action against them from the HDFC board, but were never properly served. Plaintiffs oppose the motion arguing that defendants were properly served in accordance with C.P.L.R. § 2103. In fact, C.P.L.R. § 2103, does not cover the initiatory papers in a suit conferring jurisdiction, but with all other papers that are served and filed in a litigation after jurisdiction has been secured. See, Siegel, New York Practice, 4th Ed., p. 333. Therefore, in order for this Court to have personal jurisdiction over defendants, plaintiffs' method of service must comply with one of the statutorily created methods of service found in C.P.L.R. § 308.

As to defendant Lugo, plaintiffs offer an affidavit of service by Omar Atkins which describes that the method of service was personal service in accordance with C.P.L.R. § 308(1). As to defendant Janini, plaintiffs have also offered an affidavit of service to prove that defendant Janini was served by the so-called "nail and mail" method in C.P.L.R. § 308(4). The affidavit of service states that on August 28, 2007, at 12:30 P.M., after three other attempts, a true copy of the Amended Summons with Notice was affixed to her apartment door and that within 20 days of such affixing, a copy of the same was delivered to her at the same

address. Generally, a process server's affidavits of service constitute prima facie evidence of service. However, inasmuch as defendants Lugo and Tapia contest service, under oath, the Court is unable to determine the truth from the two competing sworn statements, and therefore, a traverse hearing is appropriate.

Accordingly, it is hereby

ORDERED that in motion sequence 1, plaintiffs' application for a temporary restraining order is denied; and it is further

ORDERED that in motion sequence 2, defendants' motion for severance of the actions against the HDFC board members and the individuals Ana Tapia and Janini Lugo is denied; and it is further

ORDERED that in motion sequence 2, defendants' request to amend the Notice of Appearance is granted; and it further

ORDERED that in motion sequence 2, the Notice of Appearance be amended to show that the law office of Barry Mallin & Associates only represents defendants HDFC, Jose A. Perez, Frederico Jimenez, and Maria Jimenez, but not defendants Ana Tapia and Janini Lugo; and it is further

ORDERED that motion sequence 3 be held in abeyance pending a traverse hearing to hear and report on the issue of whether the defendants, Maria Lugo and Ana Tapia, were served in accordance with the proper procedures set out in C.P.L.R. § 308.

This constitutes the Decision and Order of the Court.

Dated: November 20, 2007

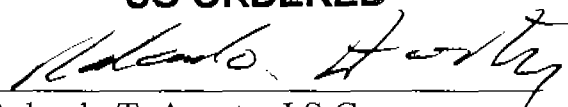
ENTER

**FILED**

NOV 27 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**SO ORDERED**

  
\_\_\_\_\_  
Rolando T. Acosta, J.S.C.  
**ROLANDO T. ACOSTA**  
J.S.C.

S

Genaro Espinal  
484 West 165<sup>th</sup> Street, Apt. 4-B  
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Plaintiff

Barry Mallin & Associates, PC  
132 Nassau Street, Ste. 522  
New York, N.Y. 10038  
Attorneys for Defendants  
HDFC, Jose A. Perez, Frederico Jimenez, Maria Jimenez

Ana Tapia  
484 West 165<sup>th</sup> Street, Apt. 3-A  
New York, N.Y. 10032  
Defendant

Janini Lugo  
484 West 165<sup>th</sup> Street, Apt. 1-B  
New York, N.Y. 10032  
Defendant