

**Skinner v Coward**

2008 NY Slip Op 30778(U)

March 13, 2008

Supreme Court, New York County

Docket Number: 0111940/2004

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 49

Index Number : 111940/2004

SKINNER, NORMAN

INDEX NO. \_\_\_\_\_

vs

COWARD, NICOLE J.

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

Sequence Number : 002

MOTION SEQ. NO. \_\_\_\_\_

AMEND CAPTION/PARTIES

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

is motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE . . . . .**

**FILED**

MAR 19 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 13, 2008

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  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: PART 49

-----X  
NORMAN SKINNER, individually and as a shareholder :  
of 409 Edgecombe Avenue, HDFC, on behalf of himself :  
and all other shareholders of 409 Edgecombe Avenue, :  
HDFC similarly situated, and in the right of :  
409 Edgecombe Avenue, HDFC, :  
Plaintiff, :

-against- : Index No. 111940/2004

NICOLE J. COWARD, DONNA LINDO, LOIS GIBBS- :  
RUSSELL, ELLA JOHNSON, and PATRICIA :  
WRIGHT, in their representative capacity as the :  
BOARD OF DIRECTORS OF 409 EDGECOMBE :  
AVENUE, HDFC, and ELIOT SPITZER as ATTORNEY :  
GENERAL OF THE STATE OF NEW YORK, :  
Defendants. :

**FILED**  
MAR 19 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**Herman Cahn, J.**

Currently before the Court are motion sequences 001 and 002, which are consolidated for disposition.

Plaintiff Norman Skinner moves for an order granting him leave to amend the Complaint, to add and join 409 Edgecombe Avenue, HDFC ("HDFC") and the Board of Directors of 409 Edgecombe Avenue, HDFC ("the Board") as defendants, CPLR §§ 1002(b), 1003, 3025(b). He also moves for preliminary injunctive relief from the individually named defendants, CPLR §§ 6301, 6311, including an order compelling an audit of HDFC's 2003-2005 financial statements.

Defendant Patricia Wright cross-moves to dismiss, CPLR §§ 3211(a)(7), 3212, 3016(b), and for sanctions and attorneys' fees, alleging that Plaintiff is engaging in frivolous litigation.

## BACKGROUND

This is a derivative action brought by a shareholder of a residential co-operative apartment building against individuals who had previously been members of the Board. HDFC is a non-profit, low-income housing cooperative corporation. Compl ¶ 5. It is the owner of 409 Edgecombe Avenue (“the building”), a 123-unit landmark building in the Sugar Hill section of Harlem, New York.

Plaintiff is a proprietary lessee and owner of 125 shares of HDFC stock, allocated to apartment 9A of the building. He was previously a member of the Board.

The individual defendants are no longer members of the Board. 9/8/06 Decision of the Court on the Record (“9/8/06 Decision”); Tessler Aff at ¶ 35. Plaintiff discontinued his claims against Nicole J. Coward, Donna Lindo, Lois Gibbs-Russell and Ella Johnson in their individual capacities and the Court dismissed these individual defendants. 9/8/06 Decision. At this time, only Wright remains as an individual defendant.

In his Complaint, Plaintiff raises concerns regarding the safety and management of the building. He contends, *inter alia*, and “upon information and belief,” that the electrical wiring in the building is the same wiring that was originally installed in 1917. Compl ¶ 46. He alleges that there are serious problems with the building’s heating system, elevators, window guards, facade, lead paint disclosure and abatement, and that the individual defendants have failed to apply for governmental benefits for which the cooperative might be eligible. *Id.* at ¶¶ 44-51. He also asserts that, “upon information and belief,” significant amounts of maintenance fees have been waived and “written off,” in violation of the HDFC bylaws. *Id.* at ¶¶ 74-75. Plaintiff alleges that the named defendants failed to take diligent steps to sell vacant apartments for many

years, thereby failing to collect the thousands of dollars in maintenance fees that would be generated if these apartments were occupied. *Id.* at ¶¶ 78-83. He further contends that the Board has refused to direct HDFC's accountants to complete audits of HDFC's 2003-2005 financial statements. Skinner Aff ¶ 4.

Plaintiff argues that HDFC and the Board, which he has moved to join as defendants, are entities from which he is entitled to relief arising out of the same transactions as are alleged in the Complaint.

Defendant Wright seeks to be dismissed from this action. She contends, *inter alia*, that she has not been a member of the Board since July 2005 and, as such, has not had the requisite control over HDFC to commit the malfeasance alleged by Plaintiff. She argues that since the claims against her are solely in her capacity as a Board member and Plaintiff has made no claim that she is personally liable in this action, Plaintiff cannot be granted relief against her. She also objects to Skinner's motion to amend the Complaint.

## **DISCUSSION**

### Dismissal of Wright as a Party Defendant

Section 3211(a)(7) of the Civil Practice Law and Rules specifies that a party may move to dismiss one or more of the claims against him on the ground that the pleadings fail to state a cause of action. In the instant action, Plaintiff concedes that

[n]aming the individual Board members was not intended to imply that any individual is guilty of individual wrongdoing. The caption and the complaint's allegations clearly and consistently state that all claims are against the Board members in their *representative capacity*, collectively, as 'The board of Directors of 409 Edgecombe Avenue, HDFC.'

Reply Br at ¶ 23 (emphasis in the original). As such, he has not pleaded claims against Wright as an individual, but only as a representative of the Board. Accordingly, Wright is dismissed from this action, and the complaint is dismissed as to her.

Wright also seeks sanctions against Plaintiff. Sanctions may be awarded for frivolous conduct in litigation if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

22 NYCRR § 130-1.1(c). Wright has not established a basis for sanctions. Although dismissed from this action, Plaintiff's inclusion of her as a defendant does not give rise to a claim for sanctions. As such, her cross motion for sanctions is denied.

#### Amending the Complaint

Inasmuch as Wright is dismissed from this action, her objections to Plaintiff's motion to amend the Complaint are not addressed.

The courts have long held that leave to amend a pleading is to be freely given, absent prejudice or surprise resulting directly from the delay. *Fahey v County of Ontario*, 44 NY2d 934, 935 (1978); *Board of Managers of the Alexandria Condo. v Broadway/72nd Assoc.*, 285 AD2d 422, 423 (1st Dep't 2001). "Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared" and a "party may amend his pleading . . . at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just." CPLR §§ 1003, 3025(b). Indeed, "[p]ersons against whom there is asserted any rights to relief jointly,

severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common questions of law or fact would arise.” CPLR § 1002(b).

In the instant action, Plaintiff’s claims against HDFC and the Board share underlying facts and alleged damages already pleaded in the Complaint. Additionally, the corporation on whose behalf the derivative plaintiff sues “is ordinarily an indispensable party in a derivative suit” and “should be joined as a defendant.” *Tobias v Tobias*, 192 AD2d 438, 440 (1st Dep’t 1993).

Accordingly, Plaintiff is granted leave to amend the Complaint to add HDFC as a party defendant, if it has not already been so named. Plaintiff is not given leave to amend the Complaint as to the individual defendants, whose dismissals are with prejudice. He is further instructed to update the caption of the action, consistent with the orders of the Court.

#### Injunctive Relief

Plaintiff seeks injunctive relief in a number of areas, including compelling the production of audited financial statements and the commencement of certain repair work. He sought to be granted this relief from “the Corporate Defendants,” as he jointly termed the individual defendants originally named in the Complaint. Compl ¶ 11. As all of these defendants have been dismissed from the action, in general, the Court feels that Plaintiff might better obtain the relief he seeks by applying to the government agency which, among other things, oversees the operation of the building.

The Court has considered the parties’ other contentions, and finds them unavailing.

Accordingly, it is

ORDERED that Wright's cross motion for dismissal is granted; and it is further

ORDERED that Wright's cross motion for sanctions against Plaintiff is denied; and it is further

ORDERED that Plaintiff's motion to amend the Complaint is granted, and he is directed to serve an amended complaint, if he be so advised, against HDFC and the Attorney General, only, within 30 days of service of this decision and order; and it is further

ORDERED that Plaintiff's motion for injunctive relief is denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: March 13, 2008

ENTER :



J.S.C.

**FILED**  
MAR 19 2008  
NEW YORK  
COUNTY CLERKS OFFICE