

**Ash v Ansbro**

2009 NY Slip Op 31693(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 116716/08

Judge: Walter B. Tolub

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

PART 15

Index Number : 116716/2008  
**ASH, ALLAN A.**  
 VS.  
**ANSBRO, JOHN**  
 SEQUENCE NUMBER : 001  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_  
 MOTION DATE 5.15.07  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

on this 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 is *denied* in accordance with the accompanying memorandum of decision.

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

**FILED**  
 JUL 30 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 7/29/09

WALTER B. TOLUB c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----x  
ALLAN ASH, individually and derivatively  
on behalf of THE 155 CONDOMINIUM,

Plaintiffs,

Index No.: 116716/08

-against-

JOHN ANSBRO, JOHN SCELFO, ADELE RIEKIN,  
JUAN LEON, KEVIN GALLIGAN, each  
individually and as members of the 155  
Condominium, and THE BOARD OF MANAGERS  
OF THE 155 CONDOMINIUM,

Defendants.

DECISION

**FILED**  
JUL 30 2009

COUNTY CLERK OF NEW YORK  
RECEIVED

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

**BACKGROUND**

Defendants move, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), to dismiss plaintiff's complaint in its entirety.

Plaintiff is the owner of 5% of one of the units in the subject condominium. The owner of the other 95% of that unit is deceased. Plaintiff instituted the present action against certain members of the condominium board and the condominium board of managers, alleging six causes of action seeking: (1) seeking a declaration that defendants may not be indemnified for any settlement, judgment or costs in litigation because of their "bad faith," an apportionment of damages on the subsequent causes of action appearing in the complaint, and plaintiff's legal fees; (2) damages from defendants John Ansbro, John Scelfo, Adele

Rifkin and the Board of Managers for what plaintiff would have been awarded in an earlier action that he lost had defendants not lost condominium records; (3) recovery of plaintiff's legal fees in the prior action that he lost; (4) an accounting and re-allocation of costs imposed by the Board of Managers related to terrace repairs; (5) damages resulting from the Board of Managers' failure to enforce rules regarding window air conditioners and washer-dryers in individual units; and (6) requesting a recall vote for Board of Managers members Adele Rifkin, Juan Leon and John Scelfo, and barring them from ever again serving on the board.

#### **DISCUSSION**

CPLR 3211 (a), "Motion to dismiss cause of action", states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

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(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

\*\*\*

(7) the pleading fails to state a cause of action . . . .

Under CPLR 3211 (a) (1), a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenberg Thalman & Co., Inc. v*

*Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1<sup>st</sup> Dept 2000),

The court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 (1994)). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 (1<sup>st</sup> Dept 1999).

Defendants' motion to dismiss is granted, based on plaintiff's lack of standing to maintain the instant action.

Under New York law, a claim for damages to a tenancy-in-common must be brought by all of the co-owners. *Caprer v Nussbaum*, 36 AD3d 176 (2d Dept 2006). Although plaintiff initially alleged that he is the unit owner of unit 17B in the subject premises, defendants have documented that he is, in fact, the owner of only 5% of that unit, a fact which plaintiff does not deny.

In his sur-reply, permitted to be filed by this court, plaintiff indicates that he and his son are the co-executors of the estate of the deceased owner of the other 95% of the unit in question, and indicates a willingness to include the estate of the deceased co-owner as a co-plaintiff in the action. The sur-

reply includes an affidavit of plaintiff's son to the same effect. However, what is missing from plaintiff's papers are a certified copy of the deceased co-owner's will, and documentation from the Surrogate's Court, in legally admissible form, evidencing that plaintiff and his son have been appointed as executors of that estate. Conclusory assertions, unsupported by documentary evidence, are insufficient to defeat a motion to dismiss. See *Andejo Corp. v South Street Seaport Limited Partnership*, 40 AD3d 407 (1<sup>st</sup> Dept 2007). Furthermore, plaintiff has failed either to move to have, or make a formal request that, the caption be amended to add the estate of the deceased co-owner as a plaintiff, or to add the estate as a party.

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/29/09

ENTER:

W  
 Walter B. Tolub, J.S.C.

**FILED**  
 JUL 30 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK