

**Franklin v Cordero**

2011 NY Slip Op 30057(U)

January 6, 2011

Supreme Court, New York County

Docket Number: 60158/2007

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA  
Justice

PART 19

Index Number : 601584/2007  
FRANKLIN, KEN LAMONTE,  
VS.  
CORDERO, ORANGY  
SEQUENCE NUMBER : 005  
DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
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

~~motion and cross-motion are~~ decided in accordance with accompanying memorandum decision.

**FILED**  
JAN 11 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/5/11

Saliann Scarpulla  
**SALIANN SCARPULLA** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
KEN LAMONTE FRANKLIN, individually and  
derivatively on behalf of 167-169 Allen Street,  
H.D.F.C.,

Plaintiff,

- against-

Index No.:60158/2007  
Submission Date: 9/29/10

ORANGY CORDERO, individually, and on the  
Board of Officers of 167-169 Allen Street,  
H.D.F.C., Inc.,

Defendant.

**DECISION AND ORDER**

For Plaintiff:  
Seyfarth Shaw LLP  
620 Eighth Avenue  
New York, NY 10018

For Defendant:  
Rose & Rose  
291 Broadway, Suite 1202  
New York, NY 10007

Papers considered in review of this motion to dismiss:

- Notice of Motion . . . . . 1
- Aff in Support . . . . . 2
- Aff in Opp. . . . . 3
- Reply Aff. . . . . 4

**FILED**  
JAN 11 2011  
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this shareholder derivative action for a declaratory judgment and to turn over books and records, defendant Orangy Cordero, individually, and behalf of the Board of Officers of 167-169 Allen Street, H.D.F.C., Inc. ("Cordero") moves to dismiss this action pursuant to

CPLR §3211(a)(5) as time barred, and CPLR §3211(a)(7) for failure to state a cause of action.

Plaintiff Ken Lamonte Franklin, individually and derivatively on behalf of 167-169 Allen Street, H.D.F.C., (“Franklin”), commenced this action with the filing of a summons and complaint on or around May 10, 2007. Franklin moved, by order to show cause, to remove and consolidate a summary nonpayment proceeding in Housing Court with this action. By decision and order dated May 29, 2007, this Court (Edmead, J.) denied Franklin’s motion and directed Franklin to serve and file an amended complaint by June 19, 2007.<sup>1</sup>

Pursuant to a stipulation between the parties, Franklin subsequently filed and served an amended complaint. Cordero then moved to dismiss the amended complaint. After a hearing on the record March 27, 2009, the Court (Lehner, J.), denied the motion to dismiss with leave to renew. The Court rejected Cordero’s claim that the action should be dismissed for Franklin’s failure to make a pre-litigation demand, stating from the bench “Let’s assume it’s futile.” At oral argument on the motion, Cordero’s position was that Franklin was not a shareholder in good standing due to a failure to pay maintenance payments (or “rent”), and that because he was not in good standing, he was not allowed access to the books and records, or to participate in shareholder meetings or elections. In opposition, Franklin argued that he submitted checks as payment of the rent, but that Cordero and the Board had refused

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<sup>1</sup> As a result of the Housing Court action, Franklin paid all back rent sought, and the H.D.F.C. obtained a judgment for the legal fees. The H.D.F.C. has since appealed whether it was entitled to a possessory judgment for the outstanding legal fees.

to cash his payments. Cordero's counsel was not able to counter these assertions at the oral argument. The Court held that

The motion to dismiss at this stage is denied. I can't find out whether the checks have been paid. The plaintiff says he's paid the checks and they are not being cashed. The defendant doesn't seem to know that. I think you ought to find out all the facts, and this is without prejudice to renew upon bylaw provisions that would take away his voting rights for not paying a judgment, without prejudice for frictional claim show that, showing any bylaw provisions that says he's no longer in good standing but merely showing a judgment for legal fees would not deprive a person of shareholder rights. At this stage the motion is denied with leave to renew.

Subsequently, Franklin served and filed a second amended complaint, dated September 18, 2009, adding the Board of Officers ("Board") as defendants. Cordero now moves to dismiss the second amended complaint as being barred by the statute of limitations and for failure to state a cause of action. Specifically, Cordero argues that the complaint should be dismissed because (1) it fails to name a proper party; (2) while it purports to be a shareholder derivative action, it is an action to vindicate Franklin's personal rights; (3) Franklin lacks standing to bring this action as he is not a shareholder in good standing; (4) the action is barred because Franklin failed to make a pre-litigation demand, pursuant to Business Corporation Law ("BCL") §626; and (5) the action is barred by the six (6) year statute of limitations.

Franklin counters that Cordero's prior motion to dismiss was premised on many of the grounds raised here, namely (1) failure to make a pre-litigation demand; (2) that the action is time barred by a six (6) year statute of limitations; and (3) that the action is in furtherance

of Franklin's individual rights, and is not actually a derivative action. As Franklin argues, these grounds were fully briefed before the Court on the prior motion to dismiss, and the Court denied the motion. Accordingly, Franklin argues, the defendants should not be allowed to re-litigate these same arguments in this motion. As to Cordero's new arguments – that Franklin has failed to name a proper party, and that Franklin is not a shareholder in good standing – Franklin argues that the claims lack merit. Franklin further asserts that “following denial of defendants’ prior motion to dismiss, the Court directed that the ‘Board of Officers’ be added as a party, which was the sole purpose for filing an amended complaint, an amendment to which defendants consented.” (Emphasis in original.)

In reply, Cordero again asserts that the motion should be dismissed for lack of pre-litigation demand; that this action does not seek derivative, but rather personal relief; and that Franklin lacks standing to bring this action as he is not a shareholder in good standing.

### **Discussion**

On a defendant's motion to dismiss pursuant to CPLR § 3211(a), the test “is not whether the plaintiff has artfully drafted the complaint, but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep't 1998).

On a motion to dismiss pursuant to CPLR §3211(a)(7), the Court must accept as true all allegations in the complaint, “accord plaintiff[] the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 303 (2001). However, “bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference.” *Ruffino v. NYCTA*, 55 A.D.3d 817 (2d Dep’t 2008) (internal citations omitted).

“A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) (*see* CPLR 3211(c)). . . . Yet affidavits submitted by a defendant ‘will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action.’” *Sokol v. Leader*, 74 A.D.3d 1180, 1181-82 (2d Dep’t 2010) (quoting *Lawrence v. Miller*, 11 N.Y.3d 588, 595 (2008)). “Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied ‘unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.’” *Sokol*, 74 A.D.3d at 1182 (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)).

Here, the Court will not revisit any of the grounds raised which were also before Judge Lehner when he denied the motion to dismiss the amended complaint. As Cordero did not make a motion to renew or reargue, and the time to do so has long since passed, the Court cannot revisit these aspects of the motion to dismiss.

Cordero moves to dismiss for failure to name a proper party as a defendant. Cordero argues that the “Board of Officers of 167-169 Allen Street HDFC Inc.” does not exist. The affidavit submitted by Cordero in support of this motion states “I [Angie Cordero] am the defendant sued herein as ‘Orangy Cordero’ and I am the President of 167-169 Allen Street HDFC, as well as the managing agent for the premises 167-169 Allen Street.”<sup>2</sup> Cordero also submits copies of Shareholder Meeting Minutes which discuss elections to the “Board of Directors.”

“[U]nder CPLR 305(c), an amendment to correct a misnomer will be permitted ‘where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue.’” *Matter of Board of Mgrs. of Oyster Point Condominium v. Nyce*, 2010 NY Slip Op 9509, at 2 (2d Dep’t Dec. 21, 2010) (quoting *Creative Cabinet Corp. of Am. v. Future Vision’s Computer Store*, 140 A.D.2d 483, 484-485 (2d Dep’t 1988)). Here, it is clear which defendants Franklin was intending to sue, and Cordero’s argument that the proper parties have not been named amounts to complaining about a misnomer.

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<sup>2</sup> Cordero purports to submit a copy of the By-Laws for the H.D.F.C, at Exhibit F. However, the exhibit appears to be a form by-laws; name and location of the Corporation are blank. As such, it will not be considered on this motion.

Moreover, Cordero argues that it is error that she is the only individual board member named. Taking the allegations of the complaint as true, as the Court must on a CPLR 3211 motion, Franklin has been excluded from shareholder meetings and from reviewing the books and records of the corporation, thereby preventing him from learning the names of the other individual board members and/or officers. Accordingly, leave is granted for Franklin to file and serve a Third Amended Complaint, naming Angie Cordero individually and as President and managing agent of 167-169 Allen Street HDFC, the Board of Directors of 167-169 Allen Street HDFC, and John Does 1-10, the individual members of the Board of Directors of 167-169 Allen Street HDFC.

Cordero next moves to dismiss the complaint because Franklin does not have standing, as he is not a shareholder in good standing. This argument arose before Justice Lehner on the prior motion to dismiss, and Justice Lehner explicitly directed the defendant to determine whether Franklin has been submitting checks as payment for his rent which the HDFC was refusing to cash, and whether pursuant to the HDFC's by-laws, an outstanding judgment for legal fees alone would render Franklin no longer in good standing. These were the reasons stated on the record for denying the motion to dismiss with leave to renew.

Cordero fails to address either of these points on this motion. Instead, Cordero argues that Franklin is not a shareholder in good standing because of outstanding rent, but does not address whether the checks have been received and not cashed. Moreover, there is nothing in the purported by-laws, proprietary lease, or meeting minutes which indicate whether an

outstanding judgment regarding legal fees would affect Franklin's status as a shareholder. Therefore, the affidavits and supporting documents submitted by Cordero fail to conclusively establish that Franklin does not state a cause of action. The submitted documents are insufficient to show "that a material fact as claimed by the pleader to be one" – that Franklin is a shareholder in good standing – "is not a fact at all." Accordingly, Cordero does not establish that, affording the allegations of the second amended complaint every favorable inference, Franklin fails to state a cause of action.

In accordance with the foregoing, it is

ORDERED that the motion to dismiss by defendant Orangy Cordero, individually, and behalf of the Board of Officers of 167-169 Allen Street, H.D.F.C., Inc. is denied; and it is further

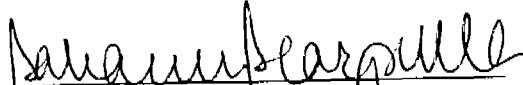
ORDERED that plaintiff Ken Lamonte Franklin individually and derivatively on behalf of 167-169 Allen Street, H.D.F.C., is to file and serve a Third Amended Complaint, correcting the name to the defendants to "Angie Cordero individually and as President and managing agent of 167-169 Allen Street HDFC, the Board of Directors of 167-169 Allen Street HDFC, and John Does 1-10, the individual members of the Board of Directors of 167-169 Allen Street HDFC" within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that answer(s) to the Third Amended Complaint shall be filed and served within thirty (30) days of receipt.

This constitutes the decision and order of the Court.

Dated: New York, New York  
January 6, 2011

ENTER:

  
Hon. Saliann Scarpulla, J.S.C.

**FILED**  
JAN 11 2011  
NEW YORK  
COUNTY CLERK'S OFFICE