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

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Index Number : 100677/2009

MORTON, BARBARA

VS

303 WEST 122ND STREET H.D.F.C.

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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 decided in accordance with the memorandum decision and order dated July 7, 11

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 7, 11

HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

BARBARA MORTON,

Plaintiff,

- against -

303 WEST 122ND STREET H.D.F.C.;
EARL SCOTT, Individually and as President
of the Board of 303 West 122nd H.D.F.C.;
JUNE HOWARD, Individually and as a Member
of the Board of 303 West 122nd H.D.F.C.;
MERLE BERNARD, Individually and as
a Member of the Board of 303 West 122nd H.D.F.C.;
DESIREE JOYNER, Individually and as a Member
of the Board of 303 West 122nd H.D.F.C.;
MARTHA FREEMAN, Individually and as
a Member of the Board of 303 West 122nd H.D.F.C.;
MARGARET REYES-DAWSON, Individually and
as a Member of the Board of 303 West 122nd H.D.F.C.;
TERENCE MOORE, Individually and as a Member
of the Board of 303 West 122nd H.D.F.C.;
BARBARA FORBES, Individually and as
a Member of the Board of 303 West 122nd H.D.F.C.;
DEWITT KING, Individually and as a Member of
the Board of 303 West 122nd H.D.F.C.;
GISELLE CLARKE, Individually and as
a Member of the Board of 303 West 122nd H.D.F.C.;
STEPHEN CARBO, Individually and as a
Member of the Board of 303 West 122nd H.D.F.C.,

Defendants.

Index No.: 100677/09

DECISION/ORDER

SINGH, A., J.:

In this action, plaintiff Barbara Morton sues defendants, a residential

housing cooperative and members of the cooperative's Board of Directors, for alleged racial and disability discrimination, under federal, state and local laws, and for breach of fiduciary duty, arising out of defendants' denial of the applications of five prospective purchasers of plaintiff's cooperative apartment. Defendant 303 West 122nd Street H.D.F.C. now moves for summary judgment dismissing the complaint, and plaintiff cross-moves for partial summary judgment on the third cause of action for breach of fiduciary duty, and also seeks other relief (seq. # 002). By separate motion (seq. # 003), the individual defendants also move for summary judgment dismissing the complaint. The motions are consolidated for purposes of their disposition.

BACKGROUND

Defendant 303 West 122nd Street H.D.F.C. (Coop) is a cooperative housing corporation organized in 1985, under New York's Business Corporation Law and Private Housing Finance Law, for the exclusive purpose of providing housing to low-income persons. *See* Certificate of Incorporation, Ex. A to Byfield Aff. in Support of Individual Defendants' Motion for Summary Judgment (Byfield Aff.). The Coop owns the building located at 303 West 122nd St. in Manhattan, which has 42 units. Deposition of Martha Freeman (Freeman Dep.), at 17, 69. There are approximately 30 shareholders/proprietary lessees in the Coop. Reyes-Dawson

Aff. in Support of Defendant Coop's Motion for Summary Judgment (Reyes-Dawson Aff.), ¶ 15. The individual defendants are current or former members of the Coop's governing Board of Directors (Board).[1]

In 1991, plaintiff purchased shares in the Coop and obtained the proprietary lease to apartment 53, and, except for subletting it from 1999 to 2003, she has resided in the apartment with her family since that date. Morton Aff. in Opp. to Defendants' Motion and In Support of Plaintiff's Cross Motion (Morton Aff.), ¶ 2. In or around May 2007, plaintiff engaged the services of a real estate broker to help her sell her apartment. From May 2007 through September 2008, plaintiff received and accepted five offers from potential purchasers of her apartment. None of the prospective buyers was approved by the Board, however, and the apartment remains unsold.

In May 2007, plaintiff accepted an offer from Cynthia Perkins (Perkins), who is black. Perkins submitted an application to the Board, and was interviewed in August 2007. By letter dated September 18, 2007, the Board's screening committee notified Perkins that her application was "not acceptable." *See* Letter, Ex. 11 to Morton Aff. In October 2007, Morton requested that the Board

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[1]By stipulation dated April 14, 2010, the action was discontinued as against defendant Stephen Carbo. *See* Stipulation, Ex. 8A to Torna Aff. in Opp. to Defendants' Motion for Summary Judgment.

reconsider Perkins' application, but the Board declined. *See* Minutes, Ex. 12 to Morton Aff.; Letter dated Oct. 2, 2007, Ex. B2 to Afriye-Fullwood Aff. in Support of Defendant Coop's Motion for Summary Judgment (Afriye-Fullwood Aff.). Plaintiff alleges that, while Perkins' application was being considered, Board member June Howard (Howard) repeatedly commented that Perkins was "slow," and that defendants then denied Perkins' application because she was perceived as mentally disabled. According to defendant Giselle Clarke (Clarke), a Board member at the time that Perkins applied, who was present when the Board interviewed Perkins, the Board decided that Perkins did not meet the established criteria for acceptance of a purchaser, based on her expressed financial constraints and incomplete application, and because, after mail sent to her by the Board was returned as undeliverable, questions arose about the veracity of information provided. Clarke Aff. in Support of Defendant Coop's Motion for Summary Judgment, ¶¶ 17, 19. Board member Freeman also testified that the Board denied Perkins' application because her application was incomplete, and she did not provide all information requested. Freeman Dep., at 127, 130.

In November 2007, plaintiff accepted an offer from May Le (Le), who is Asian-American. After submitting an application, Le was interviewed by the Board's screening committee on January 23, 2008. Morton Aff., ¶ 17. Notes from

the interview of Le indicate that the screening committee recommended approval of her. *See* Notes, Ex. 13 to Morton Aff. By letter dated February 15, 2008, the Board requested additional documents from Le. *See* Letter, Ex. B6 to Afriye-Fullwood Aff. in Support. That letter was returned as undeliverable, although Le later explained that she did not receive it because she had moved. The Board subsequently rejected Le's application to purchase plaintiff's apartment. *See* March 1, 2008 letter, Ex. B9 to Afriye-Fullwood Aff. in Support. Clarke attested that she attended the interview of Le, and that the Board denied May Le's application "due to its overall incompleteness, failure to provide a missing tax return, discrepancies in her marital status conveyed during the interview as compared to her tax return, mis-communication about her address, and revolving credit issues." Clarke Aff., ¶ 20.

Shortly after Le's application was denied, plaintiff's broker requested that the Board interview another prospective purchaser, Mary Ann Alheidt, who is white, but Alheidt withdrew her application, apparently before any action was taken by the Board. *See* Morton Aff., ¶ 19. In June 2008, applications to purchase plaintiff's apartment were submitted by Karen Baird and Brendan Alfieri, who also are white. *Id.*, ¶ 21. The Board interviewed Baird on August 7, 2008, and requested additional information from her (*see* Letter, Ex. B11 to Afriye-Fullwood

Aff. in Support), but, in part because of the Board's delay in deciding on her application, Baird withdrew her offer before the Board voted. *See* Letter dated Sept. 10, 2008, and accompanying e-mails, Ex. H to Byfield Aff. in Support; Reyes-Dawson Aff., ¶ 27. Alfieri was interviewed by the Board and was rejected in October 2008. Morton Aff., ¶ 22; Letter dated Oct. 11, 2008, Ex. A17 to Afriye-Fullwood Aff. Reyes-Dawson attested that the "only problem" with Alfieri was that he had to sell his apartment before purchasing plaintiff's, and the Board wanted someone who was ready to move, because it believed that time was of the essence to plaintiff. Reyes-Dawson Dep., Ex. A7 to Afriye-Fullwood Aff., at 93-94; Reyes-Dawson Aff., ¶¶ 28-29.

Thus, of the five prospective purchasers of plaintiff's apartment, three were formally rejected by the Board (Perkins, Le, and Alfieri), and two withdrew their applications before the Board considered or decided upon their applications (Alheidt, Baird). Of the three applicants who were rejected by the Board, one was black (Perkins), one was Asian (Le), and one was white (Alfieri). Baird and Alheidt, who withdrew their offers, were white. Plaintiff, who is black (*see* Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at 8), contends that the Board rejected the potential buyers, and delayed in providing applications and in considering them, because the applicants were not

black, or, in the case of Perkins, because she was perceived to be mentally disabled. Plaintiff further claims that defendants acted in bad faith, and in breach of their fiduciary duty, by delaying in providing and deciding upon applications, by rejecting qualified candidates to prevent plaintiff from selling her apartment, and by mismanaging the building's finances, among other things.

The complaint asserts four causes of action: The first cause of action alleges that the Coop and individual Board members improperly considered the "race, ethnic background and disability status of each of Barbara Morton's prospective purchasers" (Complaint, ¶ 47), in violation of New York Civil Rights Law §§ 19-A and 19-B, New York Executive Law § 296, New York City Administrative Code § 8-107 and 8-502, the Federal Fair Housing Act § 804 (f) (i), 42 USC § 3604 (f) (i), and Federal Civil Rights Laws § 42 USC 1983 et seq. Complaint, ¶ 48.

The second cause of action alleges that the Coop acted in bad faith, and breached its covenant of good faith and fair dealing, in denying approval to qualified prospective purchasers. *Id.*, ¶¶ 56-57.

The third cause of action alleges that the Board and the individual Board members breached their fiduciary duty to plaintiff "by allowing the financial situation of the Corporation to deteriorate by failing to make any attempt to sell

nine units in the Building that have been empty for approximately 10 years" (*id.*, ¶ 62); by defaulting on tax payments to the City due in 2008 (*id.*, ¶ 63); by placing unreasonable restrictions on shareholders' access to the Corporation's books and records (*id.*, ¶ 66); by failing and refusing to provide shareholders with the Coop's annual statement of income and disbursements for fiscal year 2008 (*id.*, ¶ 67); and by malfeasance and neglect in the management and disposition of the Coop's assets (*id.*, ¶¶ 64-65, 68).

The fourth cause of action alleges that the Coop breached its fiduciary duty to plaintiff by "enacting an exorbitant flip tax of 10% ... directly aimed at Ms. Morton's attempts to sell her apartment" (*id.*, ¶ 71); by allowing extended sublets by Board members and their families (*id.*, ¶¶ 72-74); by permitting Scott to be a Board member without being a shareholder (*id.*, ¶ 76); by permitting Reyes-Dawson to be a shareholder without using her apartment as a primary residence (*id.*, ¶ 77); by allowing Clark to employ unlicensed subcontractors to perform work in her apartment (*id.*, ¶ 77); and by urging Perkins to purchase an apartment from the Coop instead of from plaintiff (*id.*, ¶ 80).

Defendants seek summary judgment dismissing all four causes of action, on the grounds that plaintiff has no standing to sue for discrimination in this case, and that the actions of defendants were protected from judicial review by the business

judgment rule. In her cross motion, plaintiff seeks partial summary judgment on the third cause of action, to the extent that it is based on defendants' failure to maintain adequate books and records. *See* Plaintiff's Notice of Cross Motion for Partial Summary Judgment.

DISCUSSION

The standards for summary judgment are well settled. The moving party must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. *See* CPLR 3212 (b); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such showing has been made, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562. In reviewing a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). However, "mere conclusions, expressions of hope or

unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman,* 49 NY2d at 562.

At the start, defendants move for dismissal on the grounds that plaintiff lacks standing to assert a claim for discrimination under the New York State Human Rights Law (Executive Law § 296) (NYSHRL), and the federal statutes, because the alleged discrimination was not directed at her. Executive Law § 296 (5) (a) (2) provides that it is unlawful to discriminate against "any person because of race, ... national origin, ... [or] disability ... in the terms, conditions or privileges of the sale of any ... housing." Defendants do not dispute that plaintiff has standing under the New York City Human Rights Law (Administrative Code of the City of New York [Admin. Code] § 8-107) (NYCHRL) and Civil Rights Law §§ 19-a and 19-b.[2]

Contrary to defendants' argument, courts have found that the NYSHRL, like the NYCHRL, permits "claims by persons who were not themselves members of

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[2]Admin. Code § 8-107 (20) explicitly grants standing to sue to those who have been discriminated against by virtue of their association with a person in a protected category. Civil Rights Law § 19-a prohibits a housing cooperative corporation from withholding its consent to the sale of shares or other ownership interests in such corporation because of the race, creed, national origin, or sex of the purchaser. Section 19-b permits "any person aggrieved" by a violation of § 19-a to bring an action in court.

the protected class but who were personally affected, albeit indirectly, by virtue of the alleged discrimination." *Axelrod v 400 Owners Corp.*, 189 Misc 2d 461, 465 (Sup Ct, NY County 2001); *see Matter of Mill River Club, Inc. v New York State Div. of Human Rights*, 59 AD3d 549, 553-554 (2d Dept 2009) (plaintiff had standing to sue country club for discriminatory admissions policy although he was not denied membership); *Bernstein v 1995 Assoc.*, 185 AD2d 160, 163 (1st Dept 1992) (doctor had claim against landlord for discrimination against his patients); *Dunn v Fishbein*, 123 AD2d 659, 660 (2d Dept 1986) (white roommate had standing to sue for discrimination when allegedly denied apartment because his roommate was black); *see also Hispanic Aids Forum v Estate of Bruno*, 16 Misc 3d 960, 965-966 (Sup Ct, NY County 2007); *but see Faiola v Jac Towers Apts., Inc.*, 147 Misc 2d 630631-632 (Sup Ct, Queens County 1990) (finding plaintiff apartment seller not "aggrieved" under NYSHRL for denial of approval of prospective purchasers, but claim allowed under Civil Rights Law § 19-a). Defendants also submit no authority that, and do not even address whether, the federal statutes should be viewed differently.[3] Accordingly, the branch of

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[3]Under the Fair Housing Act, which makes it unlawful "to refuse to sell ... a dwelling to any person because of race ... (42 USC § 3604 [a]), or to otherwise discriminate in the terms, conditions, or privileges of sale of a dwelling (*id.* § 3604 [b]), any "aggrieved person" may bring a civil action for a discriminatory housing practice. 42 USC § 3613 (a) (1) (A). The

defendants' motions seeking dismissal of the complaint on standing grounds is denied.

Next, defendants move for dismissal of the complaint on the ground that the Board's decisions with respect to the prospective purchasers fall within the protections of the business judgment rule. "The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings." *40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 (2003). The rule has been long recognized in New York, and has been applied in the context of residential cooperative corporations. *Id.*; *see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 (1990).

Pursuant to 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, courts will not substitute their judgment for the board's." *Matter of Levandusky*, 75 NY2d at 538; *see Pullman*, 100 NY2d at 153; *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 7-8 (1st Dept 2006). In adopting this rule, the Court of

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Fair Housing Act defines "aggrieved person" as any person, including a corporation, who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 USC § 3602 (i).

Appeals found that it best balances the sometimes competing interests in "protect[ing] individual residents from abusive exercise" of a board's broad powers, and protecting the collective "interest of the entire community of residents in an environment managed by the board for the common benefit." *Matter of Levandusky*, 75 NY2d at 537; *see Pullman*, 100 NY2d at 153-154. It also serves to protect a cooperative's business decisions from "undue court involvement and judicial second-guessing." *Matter of Levandusky*, 75 NY2d at 540; *see Pullman*, 100 NY2d at 154.

Thus, when reviewing a cooperative board's decision to disapprove a sale of shares, for example, the court will not engage in an "independent assessment of the reasonableness of the decision" (*Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002]), and will not "evaluate the merits or wisdom of the board's decision." *Matter of Levandusky*, 75 NY2d at 539; *see Del Puerto v Port Royal Owner's Corp.*, 14 Misc 3d 1214(A), *8 (Sup Ct, Kings County 2007), *affd* 54 AD3d 977 (2d Dept 2008). "[W]ithout a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though 'the results show that what [the directors] did was unwise or inexpedient.'" *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 36 (1st Dept 1999) (citation omitted).

Notwithstanding this deferential standard, the business judgment rule is not an "insuperable barrier" (*Barbour*, 296 AD2d at 224), and judicial review of a cooperative board's actions may be obtained when a shareholder/proprietary lessee demonstrates a breach of a board's fiduciary duty, through evidence of "fraud, self-dealing, unlawful discrimination, bad faith or other misconduct by the Board." *Fishman v Charles H. Greenthal Mgt. Corp.*, 2010 NY Slip Op 30115(U), *6 (Sup Ct, NY County 2010), *affd* 82 AD3d 425 (1st Dept 2011); *see Pullman*, 100 NY2d at 155; *see Del Puerto*, 54 AD3d at 978; *Pelton*, 38 AD3d at 9; *Jones*, 263 AD2d at 36; *Ash v Board of Mgrs. of 155 Condominium*, 23 Misc 3d 1103(A), * 7 (Sup Ct, NY County 2008). The rule also "permits review of improper decisions, ... when the challenger demonstrates that the board's action . . . deliberately singles out individuals for harmful treatment." *Matter of Levandusky*, 75 NY2d at 540; *see Barbour*, 296 AD2d at 224.

However, even when a shareholder alleges that she was subjected to unequal treatment, "individual directors and officers may not be subject to liability absent the allegation that they committed separate tortious acts." *Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324, 326 (1st Dept 1998); *see Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 442 (1st Dept 2009); *Hill v Murphy*, 63 AD3d 680, 681 (2d Dept 2009); *16 E. 96th Apt. Corp. v Neubohn*, 50 AD3d 397, 397 (1st Dept 2008);

Pelton, 38 AD3d at 10; *Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 155 (1st Dept 1999). Further, as to the cooperative corporation itself, "'a corporation does not owe fiduciary duties to its members or shareholders.'" *Peacock*, 67 AD3d at 443 (citation omitted).

In this case, defendants have made a prima facie showing, through deposition testimony, affidavits of members of the Board, and documents, including Board meeting minutes, that they acted within the scope of their authority and for non-discriminatory reasons when they denied the applications of the prospective purchasers of plaintiff's apartment. Evidence submitted also shows that the Board did not vote on two of the prospective purchasers because the applicants withdrew their offers. In opposition, plaintiff chiefly relies on hearsay evidence, consisting of remarks allegedly made by a few Board members, to show that the Board's decisions about the prospective purchasers's applications were the result of unlawful discrimination.

With respect to Perkins, plaintiff contends that Board member Howard repeatedly called Perkins "slow," and that Board meeting minutes show that plaintiff complained about this and asserted that this was a reason to re-interview

Perkins. *See* Morton Aff., ¶¶ 12, 13; Board minutes, Ex. 12 to Morton Aff.[4] The minutes of the Board meeting reflect that Howard acknowledged that she once stated that Perkins was slow. *See* Board minutes, Ex. 12 to Morton Aff. Plaintiff argues that this evidence is sufficient to raise an issue of fact as to whether perceived mental disability was the basis for the denial of Perkins' application.

With respect to the other prospective buyers, plaintiff contends that remarks by two Board members indicated to her that the Board would not approve non-black applicants. Morton Aff., ¶ 27. Plaintiff attests that, sometime after Le's application was denied, Reyes-Dawson told plaintiff that she needed to send an applicant "of color," the "right kind" of color. Morton Aff., ¶ 28. Plaintiff further attests that, at some unspecified time, Board member Dewitt King (King) told her that he wanted "color," and questioned her about finding people of color. *Id.*, ¶ 29.

Under some circumstances, hearsay and other inadmissable evidence may be considered in opposition to a summary judgment motion, when other, admissible evidence is also submitted. *See Zimbler v Resnick 72nd St. Assoc.*, 79 AD3d 620, 621 (1st Dept 2010); *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99,

[4]Although plaintiff attests that these minutes were from a May 5, 2008 meeting (Morton Aff., ¶ 12), it appears that the meeting was actually held on October 1, 2007. See Board minutes, Ex. 12 to Morton Aff.

100(1st Dept 1999). That is, "evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination." *Matter of New York City Asbestos Litig.*, 7 AD3d 285, 285 (1st Dept 2004); *see Acevedo v York Intl. Corp.*, 31 AD3d 255, 258 (1st Dept 2006). When it is the only evidence submitted, however, it is insufficient to defeat summary judgment. *See Stock v Otis Elev. Co.*, 52 AD3d 816, 816-817 (2d Dept 2008); *Arnold v New York City Hous. Auth., 296 AD2d 355, 356 (1st Dept 2002); Narvaez v NYRAC*, 290 AD2d 400, 400-401 (1st Dept 2002); *Hitter v Rubin*, 208 AD2d 480, 481 (1st Dept 1994); *Oparaji v New York Mtge. Co.*, 24 Misc 3d 1230(A) (Sup Ct, Bronx County 2007).

Here, in the absence of any other evidence purporting to establish that the Board acted out of bias against non-black applicants, the hearsay statements appear to be the sole basis for the court to deny summary judgment to defendants, and are insufficient to raise a triable issue of fact as to whether the Board impermissibly considered the race, national origin, or disability of prospective purchasers. Further, plaintiff submits no evidence that the non-black applicants were treated any differently than the black applicant, who also was rejected, or that the Board has not approved sales to other, non-black applicants. *See Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459 (1st Dept 2010). As to the disability

discrimination claim, even assuming that Howard commented that Perkins was "slow," this ambiguous, isolated comment is insufficient to show bias toward mentally disabled applicants, and plaintiff's speculation that it does fails to raise an issue as to whether the Board considered her to be disabled. *See id.*

Plaintiff's claims against the defendant Board members in their individual capacity also cannot survive. Plaintiff presents no evidence, or even alleges, that the individual defendants acted in other than their capacity as members of the Coop's Board. In the absence of evidence of bad faith or independent tortious conduct, the breach of fiduciary claim against them should be dismissed. *See id.* at 461; *Pelton*, 38 AD3d at 10; *Brasseur v Speranza*, 21 AD3d 297, 298 (1st Dept 2005). To the extent that plaintiff seeks leave to amend the complaint to add specific independent tortious acts, the amended complaint, even if it were allowable, alleges the same acts which were addressed above, and found meritless.

Similarly, plaintiff does not show that the decisions of the Board in managing the building and addressing the needs of its residents, including implementing and enforcing sublet policies, addressing whether and when to sell empty apartments, imposing a flip tax, and otherwise managing the Coop's finances, were not made "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach v Bennett*,

47 NY2d 619, 629 (1979); *see Jones*, 263 AD2d at 36.

While plaintiff claims, for example, that Board members and their families were unfairly permitted to sublet their apartments for extended periods, she does not dispute that she sublet her apartment for almost four years, without any objection from the Board. There is also no evidence that the decision to impose the flip tax on unit sales was done for any purpose other than to financially benefit the Coop and falls within the business judgment rule.

Plaintiff's additional allegations about individual Board members, including that defendant Scott was permitted to be a Board member without being a shareholder, that Reyes-Dawson was permitted to be a shareholder without using her apartment as a primary residence, and that Clark was allowed to employ unlicensed subcontractors to perform work in her apartment, are refuted by defendants' evidence, and, in any event, fail to demonstrate bad faith or self-dealing. *See* Reyes-Dawson Aff. ¶¶ 31-34; Clarke Aff., ¶¶.

Nor has plaintiff submitted evidence to support her claim that the Board has restricted access to its books and records. To the extent that plaintiff, relying on the affidavit of an accountant who reviewed the Coop's financial records, seeks summary judgment on her claim that the Board breached its fiduciary duty by failing to keep adequate books and records, defendants correctly note that this

claim introduces a new theory of liability not alleged in the complaint. Although courts have the discretion to award summary judgment "on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Rubenstein v Rosenthal*, 140 AD2d 156, 158 [1st Dept 1988]; *see Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984]), plaintiff's submissions are insufficient to support the claim that the Board breached its fiduciary duty in its maintenance of financial records, and defendants have demonstrated that they would be prejudiced at this late stage in the proceedings.

There is no real dispute here that the Coop, as a low-income housing cooperative, has struggled to keep up with its financial obligations. Nonetheless, even if plaintiff disagreed with the Board's decisions about the Coop's finances, and even if some decisions could be considered "unwise and inexpedient," the record provides an insufficient basis for the Court to interfere with defendants' business decisions.

In view of the above, the branch of plaintiff's cross motion which seeks to disqualify counsel for the defendant Board members, on the basis of an alleged conflict of interest, is denied as moot, and in the absence of any proof that attorney Byfield is, as plaintiff argues, representing both the Coop and the individual

defendant Board members in this action.

Accordingly, it is

ORDERED that the motion of defendant 303 West 122nd Street H.D.F.C. (seq. # 002) is granted and the complaint is dismissed as against it, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant Board members Earl Scott, June Howard, Merle Bernard, Desiree Joyner, Martha Freeman, Margarette Reyes-Dawson, Terrence Moore, Barbara Forbes, DeWitt King, and Giselle Clarke (seq. # 003) is granted and the complaint is dismissed as against them, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER:

July 7, 2011

HON. ANIL SINGH, J.S.C.