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

PRESENT: HON. PAUL G. FEINMAN Justice PART 12

Index Number : 650129/2011
POMERANCE, BRENDA
vs.
MCGRATH, BRIAN S
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 650129/11E
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

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 and cross motions are decided in accordance with the annexed decision and order.

PC 3/21/2011 2:15 PM

Dated: 12/27/2011

J.S.C.

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

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
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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BRENDA POMERANCE, on behalf of herself and in the right of 310 WEST 52 STREET CONDOMINIUM ASSOCIATION,

Plaintiff,

-against-

BRIAN SCOTT MCGRATH, BOARD OF MANAGERS OF THE 310 WEST 52 STREET CONDOMINIUM ASSOCIATION, CARL CHERNOFF, BONNIE GOLDNER, ALEXANDER MOSHINSKY, JOHN GATES, CHARLES HSU, MICHAEL NUTT, RACHEL OPPEN a/k/a RACHEL MATUSZAK, JOHN DOES and JANE DOES, being past and present members of Board of Managers,

Defendants.

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Index Number 650129/2011E
Mot. Seq. No. 001

DECISION AND ORDER

For the Plaintiff:
David J. Aronstam, Esq.
40 Exchange Place, Ste. 2010
New York, NY 10005
(212) 949-6210

For the Defendants:
Kagan, Lubric, Lewis, Gold & Colbert, LLP
By: Joseph G. Colbert, Esq.
200 Madison Ave.
New York, NY 10016

Papers considered in review of this e-filed motion to dismiss:

Papers	**E-Filing Document Numbers**
Notice of Motion	5
Affirmation in Support of Motion	7
Memorandum of Law In Support	9
Exhibits A-B	10
Memorandum of Law in Opposition	13
Exhibits 1-7	15
Notice of Cross Motion	16
Memorandum of Law In Reply	18, replaced with 23
Affirmation and Affidavits in Further Support	19, 20, 21
Exhibits	19-1, 20-1, 21-1
Transcript of Proceedings of Oral Argument	24

PAUL G. FEINMAN, J.:

The motion and cross motion are consolidated for purposes of decision.

This is an action brought by an owner of an apartment unit in a condominium on West

52nd Street ("the Link Condominium"), against the condominium's Board of Managers and many of the Board's current and past individual members. The complaint is brought by plaintiff individually and on behalf of the condominium association. Plaintiff, a former member of the Board, alleges that the Board and its current and past members have mismanaged finances and breached their fiduciary duties as well as the New York State Condominium Act and the Link Condominium By-laws (Doc. 10, Mot. ex. A [Ver. Compl. ¶ 1]).

Defendants move to dismiss the complaint in its entirety on the ground that plaintiff lacks legal capacity to sue (CPLR 3211 [a] [3]), and that the complaint fails to state a cause of action (CPLR [a] [7]). Plaintiff cross-moves to amend the complaint pursuant to CPLR 3025 (b) should the complaint be found insufficient; to convert the cross motion to a motion for summary judgment on the first cause of action; to lift the automatic stay and direct defendants to respond to discovery demands; for an order permitting her to examine the books and records of the Link condominium pursuant to BCL § 624; and for attorney's fees based on defendants' bad faith. For the reasons which follow, the motion is granted in part and otherwise denied, and the cross motion is granted in part and otherwise denied.

ALLEGATIONS OF FACT

According to the verified complaint, the condominium association was formed in June 2005 with an offering plan filed with New York State by the-then sponsor, El Ad 52 LLC (Doc. 10, Mot. ex. A, Ver. Compl ¶ 10). El Ad 52 LLC then undertook construction of the building and by early 2007, unit owners began occupying their apartments (*id.*). Various construction-related problems were discovered and eventually a group of unit owners formed by defendant McGrath, hired a law firm to resolve the issues with the sponsor (Doc. 10, Mot. ex. A, Ver.

Compl ¶¶ 24-29).

The sponsor controlled the Board of Managers of the association until December 2007, at which time the first annual election was held and, according to the By-laws, the unit owners acquired four seats on the Board, with the remaining three seats reserved for the sponsor (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 11, 39). Defendants McGrath, Goldner, Chernoff, and Moshinsky ran as a slate and won (Doc. 10, Mot. ex. A, Ver. Compl ¶ 42). Plaintiff, an engineer and an attorney, took an active interest early on in the building's management, in engineering issues, and in the expenditures by the condominium (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 66, 194). She raised concerns about the presence of Goldner on the Board because he allegedly no longer lived in the condominium, and about a possible conflict of interest caused by the Board's retention of the same law firm previously retained by McGrath and his group to represent the owners in the issues with the sponsor (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 25-27, 50-58). Because of her concerns, she began examining expense invoices and legal invoices and was told by the managing agent in about October 2008 that McGrath was overspending the budget due to excessive legal expenses (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 83-86, 89).

The complaint alleges that McGrath in particular refused to work cooperatively with the with the Link's sponsor, and instead resorted to costly litigation which has not been in the best interest of the condominium or the unit owners (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 59, 63, 79, 93). For instance, the Board commenced an action in Supreme Court against the sponsor in April 2008 seeking unpaid common charges and late fees, among other claims (Doc. 10, Mot. ex. A,

Ver. Compl ¶ 80).[1] At the time of the second annual meeting, the Board's law firm notified the sponsor that, despite the clear terms of the By-laws, the sponsor was not entitled to three seats on the new Board; this resulted in a declaratory action commenced in late 2008 by the sponsor seeking to clarify its rights to appoint three members to the Board (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 110, 118).[2] In January 2010 the Association commenced another suit against the sponsor alleging breach of contract, fraud, and other claims (Doc. 10, Mot. ex. A, Ver. Compl ¶ 180).[3] In sum, this complaint alleges that since 2007, the members of the Board, "hand-picked" and under the control of defendant McGrath, wasted "hundreds of thousands of dollars" in "unnecessary legal proceedings" against the sponsor to address "unsatisfactory building elements" (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 2, 4-5, 9). According to the complaint, the audited financial report dated February 22, 2010, continues to show overspending on legal fees in particular, and projects future ongoing litigation costs against the sponsor (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 182-183, 186-187).

Plaintiff and other unit owners ran for Board positions prior to the second annual meeting, while McGrath and his followers campaigned for reelection (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 90-91). Pomerance sought to bring the attention of the unit owners to the amount of legal fees billed to the association (Doc. 10, Mot. ex. A, Ver. Compl. ¶ 94). Shortly before the

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[1] *The Board of Managers of 310 W. 52nd St. Condominium v El-Ad 52 LLC, et al.*, Supreme Court, New York County, index No. 105762/2008.

[2] *El-Ad 52 LLC v The Board of Managers of 310 W. 52nd St. Condominium, et al.*, Supreme Court, New York County, index No. 603677/2008. The matter was resolved in petitioner's favor by Decision, Order, and Judgment dated June 16, 2009.

[3] *Residential Board of Managers of 310 West 52nd Street Condomium v El-Al 52 LLC,* Supreme Court, New York County, index. 600174/2010.

election, the then-Board issued a report dated December 11, 2008 which, in part, set forth various goals (most of which allegedly remain unmet), advised that no increase in common charges was needed and stated that there was an operating surplus of $27,850 (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 102-103). This "surplus," according to the complaint, purposely and deceptively excluded the approximate $100,000 in legal expenses incurred in 2008 (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 102 -104). The McGrath slate was allegedly reelected primarily based on the positive contents of this report (Doc. 10, Mot. ex. A, Ver. Compl 107). As was the sponsor's right, it then appointed plaintiff and another unit owner running in opposition to the McGrath slate, to serve on the Board for the 2008-2009 term (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 3, 123).

According to the complaint, plaintiff as a new Board member immediately asked for the Engineering Report, unredacted law firm invoices, and the monthly financial summaries for 2008 (Doc. 10, Mot. ex. A, Ver. Compl ¶ 136). Her request was denied by a letter from the Board's law firm dated December 23, 2008, which stated her request was a "disrupt[ion of] the affairs of the Association"; the letter also stated she was "tainted by conflict of interest" and had an adverse interest to the condominium association (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 136-137). Allegedly McGrath also told plaintiff that she could not be trusted to act in the best interest of the condominium because she had been appointed to the Board by the sponsor; this belief is disputed by plaintiff (Doc. 10, Mot. ex. A, Ver. Compl ¶ 127).

The new Board allegedly stymied her attempts to serve and to fulfill her fiduciary duties as a Board member. Her offers to serve as Chief Compliance Officer were ignored, as were her concerns about the amount of legal fees expended and the continuing litigation by the Board against the sponsor (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 128, 131). She was refused access to

documents although she asked for them at most of the Board meetings she attended in 2009 (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 3, 123, 140-144).

Pomerance served on the Board from December 17, 2008 until September 24, 2009 (Doc. 10, Mot. ex. A, Ver. Compl. ¶ 14). She was dismissed when the sponsor allowed McGrath to appoint two unit owners to seats allotted by the By-laws to the sponsor, and he chose defendants Oppen and Nutt; this allegedly was an instance of McGrath putting his self-interest in creating a hand-picked Board ahead of the interest of the condominium (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 175-176). There was no election held for the Board at the 2009 or the 2010 annual meetings, due to a lack of quorum (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 178, 207). In addition, although as of December 2009, the sponsor no longer had representation on the Board, having sold the last of the residential units, McGrath left the seat vacant rather than appoint someone new (Doc. 10, Mot. ex. A, Ver. Compl ¶ 179). This is all evidence, according to the complaint, that the "governance process for the Link is broken," because only about one-third of the units are primary residences but the By-laws require 50 percent of unit ownership to achieve a quorum (Doc. 10, Mot. ex. A, Ver. Compl ¶ 208).

On December 30, 2010, the Link unit owners received notice of a more than 50 percent increase in common charges and the imposition of a special assessment. According to the complaint, this increase will take place after McGrath has sold his unit (Doc. 10, Mot. ex. A, Ver. Compl ¶ 6). The complaint alleges that the Link's common charges are one-third higher than common charges at buildings of comparable vintage and construction having "far more amenities" (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 203- 205).

Other allegations in the 61-page complaint include the claim that the Board employed the

law firm of the husband of defendant Goldner during the time she was on the Board, without disclosing this to the unit owners (Doc. 10, Mot. ex. A, Ver. Compl ¶ 161), and that the decision to upgrade the elevators was made without putting the matter to a vote by the unit owners, required under the By-laws, given that the expenditure was more than $10,000 (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 108-109). The complaint sets forth many other instances of alleged malfeasance. Finally, the complaint states that it asserts both derivative and individual claims, and that with "regard to making a demand upon the Board to authorize the Link to bring suit against themselves, in such circumstances the demand would be fruitless. The derivative claims assert that the Board has mismanaged the finances of the Link, engaged in waste of assets and other breaches of fiduciary duty." (Doc. 10, Mot. ex. A, Ver. Compl. ¶ 221).

The verified complaint contains five causes of action. The first cause of action seeks a declaration that the Board must permit plaintiff Pomerance to inspect the "detailed, accurate records" of the receipts and expenditures from the operation of the property, which are to be kept by the Board of managers and made available for examination by the unit owners at convenient hours of weekdays (RPL § 339-w; By-law, Art. XI, Section 1)" (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 223 - 227). The second cause of action seeks a declaration that as a member of the Board from 2008-2009, Pomerance is entitled to be permitted to inspect those records which a member of the Board is entitled to inspect during his or her tenure and which were denied to her, in bad faith, during her tenure (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 228-232). The third cause of action seeks a declaration that the actions and resolutions of the Board in 2010, in particular the imposition of a special assessment, are null and void because the Board was entirely composed of members whose one-year terms had previously expired (Doc. 10, Mot. ex. A, Ver.

Compl ¶¶ 233-239). The fourth cause of action alleges willful breach of fiduciary duty and actions in bad faith in the Board's mismanagement, waste of finances, and engagement in "wasteful litigation" against the sponsor, and that these acts are not protected by the business judgment rule (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 240-246). Pomerance individually seeks punitive damages of at least $6,000,000 (Doc. 10, Mot. ex. A, Ver. Compl ¶ 247). The fifth cause of action alleges fraudulent misrepresentation by McGrath, Chernoff, Goldner, and Moshinsky, specifically as concerns statements knowingly made during the 2008 election campaign as to the Link's financials (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 250-259).

LEGAL ANALYSIS

Defendants move pre-answer to dismiss the complaint as against all defendants on the grounds that plaintiff lacks legal capacity to sue, and that the complaint fails to state a cause of action. Plaintiff cross-moves seeking various relief, as discussed below. First addressed is the defendants' pre-answer motion to dismiss.

Defendants' Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and the submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs. et al.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). The court is "not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." (*P.T. Bank Cent. Asia v*

ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003]). If from the four corners of the pleadings, "factual allegations are discerned which taken together manifest any cause of action cognizable at law," a defendant's motion to dismiss will be denied (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], citation omitted).

CPLR 3211 (a) (3) allows for dismissal of a cause of action on the ground that the party asserting it does not have legal capacity to sue. First, defendants argue that the complaint is premature as plaintiff has not satisfied the necessary prerequisite to bringing derivative causes of action set forth in the Business Corporation Law, namely that she had made a demand on the Board to bring an action and the Board refused. It is required that where an action is brought derivatively by shareholders in the right of the corporation to procure a judgment in its favor,

> "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."

(BCL § 626 [c]). Defendants argue that the complaint is silent about any efforts taken by Pomerance to persuade the Board to commence such an action, or the reasons why such an action is futile. As noted above, the complaint alleges, at paragraph 221, that the totality of what has been alleged shows that a demand on the Board would have been futile. Plaintiff points to *Marx v Akers*, 88 NY2d 189 (1996), which addresses the three situations of futility, any of which must be alleged "with particularity" (*Marx*, at 200). The first situation is where a majority of the board of directors is either self-interested in the transactions at issue, or "controlled" by a self-interested director, losing its independence (*id.*). The second situation described by *Marx* is when the members of the board of directors did not fully inform themselves as to the transaction at issue to

the extent reasonably appropriate under the circumstances (*id.*).[4] Here, the complaint alleges that the members of the Board simply would not investigate the various issues brought up by Pomerance including possible conflicts of interest of the Board, her right as a Board member to various documents and issues raised at meetings, and her claims of wasteful spending (Doc. 13 Memo of Law in Opp. pp 13-16). Even if the complaint does not explain the self-interest of McGrath in controlling the Board, it sufficiently alleges several situations where plaintiff tried to bring the Board's attention to specific problems but was ignored, and it sufficiently alleges the futility in her making a demand on the Board to bring a litigation. The complaint, therefore, should not be dismissed on this ground.

Second, defendants argue that the complaint improperly intermingles individual and derivative claims, and therefore should be dismissed as plaintiff has not brought a proper complaint (*see Abrams v Donati*, 66 NY2d 951 [1985]). However, it has been held that a shareholder may bring both derivative and individual claims in the same complaint as long as the complaint "has not confused individual and derivative claims within each cause of action" (*Wallace v Perret*, 28 Misc 3d 1023, 1030 [Sup Ct, Kings County 2010], citing *Baliotti v Walkes*, 134 AD2d 554 [2d Dept 1987]). This argument by defendants will be addressed as to each cause of action, discussed below.

CPLR 3211 (a) (7) allows for dismissal of a cause of action when the pleading fails to allege a viable cause of action. Defendants contend that decisions and actions taken by the Board are beyond the scope of judicial review, pursuant to the business judgment rule which applies to

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[4]The third situation posited by *Marx* is where the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors. This need not be addressed by the court.

the acts of boards of directors of cooperative and condominium corporations (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009]). The business judgment rule provides that the courts will "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]). "So 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." (*Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 538 [1990]).

1. First cause of action

The first cause of action is brought in Pomerance's name and alleges that she has been denied her right as a unit owner, codified in Real Property Law § 339-w, and memorialized in the By-laws, Art. VII, § 4, to examine the "detailed, accurate records" kept by the manager or board of managers in chronological order, "of the receipts and expenditures arising from the operation of the property"; these "records and the vouchers authorizing the payments shall be available for examination . . . at convenient hours of weekdays." Plaintiff seeks a declaration that she is entitled to such an examination. The complaint alleges that while she has been allowed access to some records (Doc. 10 Mot. ex. A, Ver. Compl. ¶¶ 83, 86), she is entitled to see other records which have been denied to her. In particular, she was once denied admittance to the managing agent's office to view the Engineering Report and then, when told that all unit owners had to sign a confidentiality agreement in order to view the Report, would not sign it as the agreement was "unconscionable" in its restrictions (Doc. 10 Mot. ex. A, Ver. Compl. ¶¶ 186, 192- 194).

Defendants argue that the first cause of action is "moot," in that under New York Condominium law and the Link condominium's By-laws, she is explicitly entitled, as a unit

owner, to view certain corporate records all of which are kept at the managing agent's office. Plaintiff provides evidence that defendant's counsel has stated that since bringing the lawsuit, Pomerance has lost her right under the By-laws to the examine any records outside of judicial process (Doc. 15 Pl. Memo of Law in Opp ex. 3 [letter 03/16/11, Aronstam to Colbert]). Defendants' further argument is that the complaint appears to allege only that it is the managing agent, not named as a party, who has denied plaintiff access to records. Defendants are correct. Even assuming the managing agent is acting on behalf of the Board, this cause of action as currently drafted fails to sufficiently allege a claims against defendants, and thus must be dismissed without prejudice to repleading and/or adding the managing agent as a party, as appropriate (CPLR 3013, 3025 [b]; 1003). However, as stated by the court at oral argument, to the extent that any of these documents are in danger of being discarded or otherwise lost, the Board is directed to ensure their preservation (Doc. 24, Tr. at p. 17).

2. Second cause of action

The second cause of action seeks a declaration that as a former Board member, Pomerance is entitled to and must be permitted access to all of the books and records of the Link that would have been available to a member of the Board during her tenure in 2008-2009 (Doc. 10, Mot. Ex. A, Ver. Compl. ¶ 231). She provides no case law to support her claim that a former member of a board of managers is entitled to documents or information after the time the member has served on the board. Contrary to her argument, the right plaintiff seeks to vindicate is not one to which she is entitled as an individual unit owner. To the extent this cause of action intends to alleges misfeasance by the Board in denying her as a Board member access to materials necessary to perform her fiduciary duties, it would be a derivative claim and likely

subsumed under the fourth cause of action alleging breach of fiduciary duty. As the second cause of action impermissibly mingles individual and derivative claims and as the extant record does not indicate the existence of a viable claim, the second cause of action is dismissed, without leave to replead (*see*, *Fischbein v Beitzel,* 281 AD2d 167, 167 [1st Dept 2001], *lv denied* 96 NY2d 715 [2001], citing *Marx v Akers*, 88 NY2d at 198).

3. Third cause of action

The third cause of action seeks a declaratory judgment that the actions and resolutions of the Board in 2010, in particular the 2011 special assessment imposed on all unit holders, are null and void because the Board consisted of members whose one-year terms had expired, namely Chernoff, McGrath, Gates, Oppen, Hsu, and Nutt (Doc. 10, Mot. Ex. A, Ver. Compl ¶¶ 233-239). The initial problem here is that while brought in the name of the unit holders, the third cause of action alleges that declaratory relief is needed because plaintiff herself has no adequate remedy at law, thus impermissibly intermingling the individual with the derivative.

The third cause of action also fails to state a viable cause of action. The complaint appears to allege that when as here, the one-year term of the Board members expired ,but because of a lack of quorum no election to elect a new board has taken place, there is no longer a governing structure and nothing can be proposed or undertaken by the now-expired Board.[5] Plaintiff provides no rule or other provision in the Link corporate documents to establish that her claims is sustainable. As the record does not indicate the existence of a viable claim, the third

[5]Defendants note that plaintiff could have availed herself of the provision in the By-laws empowering a unit owner to petition for a special meeting of the unit owners to be held in order to hold a Board elections (Doc. 10 p. 80 [Mot. ex B, By-laws, Article III, § 3]). The issue of course, is the apparent difficulty in getting a 50 percent ownership quorum.

cause of action is deemed dismissed, without leave to replead (*see, Fischbein v Beitzel,* 281 AD2d 167).

4. Fourth cause of action

The fourth cause of action alleges that defendants breached their fiduciary duty to act in good faith and with loyalty toward the unit owners (Doc. 10, Mot. ex. A, Ver. Compl ¶¶ 240-246). It alleges that the defendants' "willfully" engaged in "intentional war-mongering and wasteful litigation with the [s]ponsor," wasted the condominium's assets, failed to comply with the By-laws and Condominium Law or timely disclose significant financial changes, refused to investigate unit owners' complaints, and caused great harm to the condominium and its unit owners as manifested in the imposition of an approximately 50 percent increase in the monthly common charges and the special assessment (*id*). In addition to claiming damages of no less than $2,000,000, the complaint alleges that plaintiff herself seeks punitive damages in the amount of $6,000,000 (*id.* ¶ 247).

As to the claim for punitive damages, the Court of Appeals has explained that they are an "extraordinary remedy" when awarded to a private individual, and granted only upon a demonstration of "egregious tortious conduct" that was part of a pattern of similar conduct directed at the public generally (*Rocanova v Equitable Life Assur. Soc'y of the U.S.,* 83 NY2d 603, 613 [1994]). The allegations of the complaint do not demonstrate that an award of punitive damages would, even if all the allegations are true, be applicable. Therefore the claim seeking punitive damages is dismissed with prejudice.

Because the fourth cause of action, as drafted, makes claims on behalf of both the unit owners and plaintiff individually, it cannot stand, even without the branch seeking punitive

damages on behalf of plaintiff individually. Defendants argue, moreover, that plaintiff cannot establish a cause of action alleging breach of fiduciary duty, as the business judgment rule precludes examination of their work on behalf of the condominium. Under the business judgment rule, corporate directors are presumed to act in good faith and to exercise honest judgment in lawful furtherance of corporate purposes (*Jones v Surrey Coop. Apts. Inc.*, 263 AD2d 33, 36 [1st Dept 1999]). To sufficiently establish a claim sounding in breach of fiduciary duty, the complaint must allege the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the misconduct (*Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007]). Here, therefore, the complaint must allege facts showing that the board's actions had no legitimate relationship to the welfare of the corporation at large (*see Bryant v One Beekman Place, Inc.*, 73 AD3d 616, 616 [1st Dept 2010], *lv denied* 16 NY3d 701 [2011], citing *Levandusky*, 75 NY2d at 538, 540).

A threshold inquiry is whether the complaint sufficiently alleges that the board failed to act within the scope of its authority under its bylaws, and that the board's action was not taken in good faith to further a legitimate interest of the condominium (*see Perlbinder v Board of Mgrs of 411 E 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009]). The core of plaintiff's complaint, but not the totality, is that too much money has unwisely been expended in litigation against the sponsor without the knowledge or approval of the unit holders, such that they now are faced, without prior warning, with a nearly 50 percent increase in the common charges, as well as a special assessment. It also alleges that McGrath in particular was unwilling to work with the sponsor to correct the various construction defects of concern to the owners but chose litigation, and that as he is selling his unit, he will not be faced with the increased common charges or the

assessment. There is no allegation, however, as to what McGrath or any of the other "hand-picked" Board members personally gained. Simply alleging that the members of the Board acted in agreement does not mean that they did not exercise independent judgment to arrive at the same conclusion. Unless there is a showing of fraud, self-dealing or unconscionability, the court will not inquire as to the wisdom or soundness of the business decisions (*Perlbinder v Board of Mgrs of 411 E 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009], citation and quotation omitted). The court only makes inquiry into claims of fraud and self-dealing where a factual basis is presented to support such a claim (*Jones v Surrey Coop. Apts. Inc.*, 263 AD2d 33, 36 [1st Dept 1999]).

The complaint alleges a breach of duty in the preparation of the financial statements and the timely reporting of legal fees which, if true, could rise to the level of fraud or possible self-dealing. Although plaintiff unsuccessfully contends that the Board members wrongly continued in office after their terms expired, the clause of the By-laws relied upon by defendants to justify their action also contains a requirement unaddressed by the parties that the Board always consist of "an odd number of Managers" (Doc. 10 p. 72 [Mot. ex. B, By-laws]). According to the complaint, no seventh member was appointed to the Board after the sponsor lost representation (Doc. 10 Mot. ex. A, Ver. Compl. ¶ 179). Again, if true, this may rise to the level of a breach of fiduciary duty. In addition, as discussed above, to the extent that plaintiff alleges that the Board improperly denied documents to her or any other member of the Board, so that the Board's ability to fully function on behalf of the condominium, this too supports a claim of breach of duty. The allegation that the law firm of the husband of Board member Goldner, suggests, but does not sufficiently allege self-dealing or unconscionability.

The individual Board members seek dismissal of the complaint as against them based on the case law holding that board members will not be subjected to personal liability absent allegations that they committed separate tortious acts (*see, e.g. Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]), and based on Article II, § 15 of the By-laws, which states that "members of the Board of Managers shall not be liable to the Unit Owners for any mistake of judgment, negligence, or otherwise, except for their own individual willful misconduct or bad faith." (Doc. 10 pp. 77-78 [Mot. ex. B, By-laws]). The complaint in its current form does not, except for McGrath and Goldner, allege any individual misconduct or bad faith, and as to these two individuals, while it alleges misconduct, it is silent as to how their actions are separately tortious or how they personally gained from the course of conduct undertaken by the Board.

The fourth cause of action is dismissed with leave to replead, so as to clearly allege derivative claims, to set forth allegations that show that the Board's actions had "no legitimate relationship" to the Link condominium's welfare at large (*Bryant v One Beekman Place, Inc.*, 73 AD3d at 616), and to set forth the independent tortious actions of the individual defendants McGrath and Goldner, and how such misconduct caused them person al gain.

5. Fifth cause of action

The fifth cause of action alleges fraudulent misrepresentation by McGrath, Chernof, Goldner, and Moshinsky. The elements of fraud that must be pled are a misrepresentation or material omission of fact which was known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party, and injury (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007], citation omitted). When involving claims against a board of directors, the complaint must make a showing of fraud, self-dealing or

unconscionability, otherwise the court will not inquire as to the wisdom or soundness of the business decisions (*Perlbinder v Board of Mgrs of 411 E 53rd St. Condominium*, 65 AD3d at 989, citation and quotation omitted). The court will only make inquiry into claims of fraud and self-dealing where a factual basis is presented to support such a claim (*Jones v Surrey Coop. Apts. Inc.*, 263 AD2d at 36). When alleging fraud, "the circumstances constituting the wrong shall be stated in detail." (CPLR 3016 [b]).

The complaint alleges that during the 2008 election campaign leading up to the second annual Board meeting and election in 2008, McGrath, Chernoff, Goldner, and Moshinsky made known false statements in the December 11, 2008 letter report issued by the Board (Doc. 10 Mot. ex. A, Ver. Compl. ¶¶ 102-103, 248-255). This report falsely stated that the finances were in order,"characterized insurance reimbursement as operating income," thus inflating the surplus, indicated there was an operating surplus, and that there would be no need for an increase in common charges, when in fact $100,000 in litigation costs were not included and their inclusion would have shown the condominium was in the red. These misstatements were intended to induce the unit owners to vote for the existing Board rather than voting in a new Board, including Pomerance, that would have better addressed expenditures. The unit owners relied on these misstatements and voted for the McGrath slate, to their detriment, as the unit owners now face large increases to the common charges, along with an assessment, and the Link remains involved in ongoing litigation (*id.*) Doc. 10 Mot. Ex. A, Ver. Compl ¶¶ 248-255). Here, contrary to defendants' arguments, the allegations of fraud are sufficient to maintain the cause of action against the four Board members.

Plaintiff's Cross Motion

Based on the discussion above, the branch of the cross motion seeking permission to amend the complaint pursuant to CPLR 3025 (b) is granted to the extent set forth above. The branch seeking to convert the motion to dismiss the first cause of action into a motion for summary judgment is denied for the reasons set forth above. The branch seeking an order lifting the automatic stay is rendered academic, inasmuch as plaintiff must first file and serve an amended complaint, after which defendants shall answer and then respond to the discovery demands in accordance with the the CPLR. The branch seeking an order permitting Pomerance to examine the books and records of the Link condominium pursuant to BCL § 624 is denied as premature and going to the ultimate relief of the declaratory action.[6] The branch of the cross motion seeking attorney's fees based on defendants' bad faith is denied. It is

ORDERED that the motion to dismiss the complaint is granted in part as follows: the second and third causes of action are dismissed in their entirety; the first and fourth causes of action are dismissed with leave to replead as discussed above, with the claim for punitive damages being dismissed in its entirety; the fifth cause of action stands; and it is further

ORDERED that plaintiff shall file and serve her amended complaint within 30 days of the date of entry of this decision and order and, upon failure to timely file and serve, the complaint will be deemed dismissed with prejudice; and it is further

ORDERED that the cross motion is granted to the extent that the court has permitted re-pleading as set forth above and otherwise denied; and it is further

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[6]As noted above, to the extent that the documents at issue are in danger of being discarded or lost, defendants are charged with ensuring their preservation, as directed by the court at oral argument (Doc. 24, Tr. at p. 17).

ORDERED that this matter shall be set down for a preliminary conference on March 21, 2011 at 2:15 p.m. in Part 12, 60 Centre Street, Room 212, New York, NY 10007.

This constitutes the decision and order of the court.

Dated: December 27, 2011
New York, New York

J.S.C.