

S-L Props. v 246 W. 38th St. Tenants Corp.
2012 NY Slip Op 33359(U)
July 6, 2012
Supreme Court, New York County
Docket Number: 651091/2011E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

Index Number : 651091/2011 *E*

S-L PROPERTIES

VS.

246 WEST 38TH STREET TENANTS

SEQUENCE NUMBER : 002

DISMISS DEFENSE

PART 12

INDEX NO. 651091/118

MOTION DATE _____

MOTION SEQ. NO. 002

_____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

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

Dated: JUL 06 2012

[Signature] _____, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
S-L PROPERTIES,

Plaintiff,

Index Number 651091/2011E

Mot. Seq. No. 002

-against-

246 WEST 38TH STREET TENANTS CORP., and BART
VOORSANGER as member of the board, and JOHN
DELGUIDICE as member of the board, and MARIO
LIPARI as member of the board, and ROBERT LIDZ
as member of the board, and ALEX WEISS as member
of the board, and AMNON KASHI as member of the
board, and HASSAN ZAMEL as member of the board,
and JOHN DOES NUMBERS 1 THROUGH 5, Being
Fictitious Names of Unidentified Persons Who are
Members of the Board of Directors of 246 WEST
38TH STREET TENANTS CORP.,

DECISION AND ORDER

Defendants.

-----X
Appearances:

For the Plaintiff:

Nathan M. Barotz, PLLC
By: Nathan M. Barotz, Esq.
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For the Defendants:

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
By: Jonathan E. Meer, Esq.
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New York, NY 10017
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Efiled papers considered in review of this motion:

Notice of motion, Memorandum of law, Francoeur affirmation and annexed
exhibits A - I
Plaintiff's memorandum of law in opposition, Chekijian affidavit and
annexed exhibits A - Q
Defendants' reply memorandum of law
Transcript of oral argument

E-filing Document Numbers:

22 - 22-11

26 - 27

31

33

PAUL G. FEINMAN, J.:

Defendants, 246 West 38th Street Tenants Corp. and its individually named directors,
move to dismiss of plaintiff, S-L Properties', breach of a fiduciary duty and breach of proprietary
lease causes of action, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7). Plaintiff opposes. For

the reasons which follow, the motion is granted.

BACKGROUND

This case arises out of an internal dispute between the two partners of S-L Properties, a New York general partnership with its principal offices located at 246 West 38th Street, 10th floor, New York, New York, which has boiled over into a dispute between S-L and 246 West 38th Street Tenants Corp., (“the Co-op”) the cooperative corporation which owns the commercial building located at 246 West 38th Street (“the Building”). The individual defendants are believed to be, or have been, members of the Co-op’s board of directors during the events at issue.

1. Amended Verified Complaint

The following allegations are taken as asserted in the amended verified complaint. S-L purchased 66 shares of the cooperative’s stock and entered into a propriety lease for the tenth floor of the Building in 1984. The verified amended complaint alleges that from 2006 through the present, the Co-op failed to provide notice of annual meetings and hold meetings of shareholders, in alleged violation of Article II of the Co-op’s by-laws, and did not hold the elections of its directors in accordance with Article III of the Co-op’s by-laws (Doc. 22-3, ex. A, Ver. am. compl. at ¶ 14). It further alleges that between January 2006 and June 2007, the Co-op “was in violation of Article III, Section 2 of the Co-op’s By-Laws by having as a member of the board of directors at least one director who was not a shareholder or authorized representative of a shareholder of the Co-op” (*id.* at ¶ 15). It next claims that “sometime during 2007 through the present,” the Co-op amended the Proprietary Lease and Rider without following the procedures set forth in Section 6 of the Rider and Article V of the by-laws (*id.* at ¶ 16). The verified amended complaint alleges that the Co-op wrongfully charged S-L in the amount of \$31,440.12, which was allegedly incurred by the Co-op during the period of April 10, 2007, through March 7, 2011, and which fees were paid by S-L “under protest and with a reservation of rights and

remedies” (*id.* at ¶¶ 17-18). It is further claimed that the Co-op failed to distribute the full amount of proceeds due to S-L as a result of the Co-op’s November 30, 2007 refinancing transaction, so that \$15,465.52 of the \$64,350.00 due to S-L has not been distributed. Finally, the verified amended complaint alleges that the Co-op, at some point in 2008 or 2009, “knowingly entered into a settlement agreement and made a payment of ... (\$15,465.52) to a person who was not an authorized representative of S-L” (*id.* at ¶ 23).

Based on these allegations, S-L asserts three causes of action against all defendants: (1) breach of fiduciary duty; (2) breach of proprietary lease; and (3) declaratory judgment declaring that S-L does not owe the Co-op \$31,440.12 in fees.

2. Dispute between S-L’s Partners

The verified amended complaint omits some key facts from its narrative that S-L and defendants have subsequently revealed in connection with the instant motion. The most notable omission is the lack of any reference to S-L Properties’s partners, Robert Liss and Sage Systems, Inc., and their protracted internal dispute. Plaintiff’s first mention of these pertinent facts is in its opposition to the instant motion to dismissal. The affidavit submitted by Shahan Chekijian, President of Sage Systems and the exhibits annexed thereto reveal that S-L Properties’s partners attempted to use the Co-op to the disadvantage of the other partner.

Plaintiff submits a copy of an unsigned letter, dated December 19, 2005, from Shahan Chekijian to Bart Voorsanger, then President of the Co-op’s Board, in which Chekijian claimed that Robert Liss was no longer an authorized agent of “S-L Properties Co.” because Liss allegedly breached S-L’s partnership agreement and had threatened to dissolve the partnership (Doc. 26-4, ex. D, Dec. 19 letter to Voorsanger). Chekijian further demanded that Liss be removed from his position on S-L Properties’s Board. Annexed to Chekijian’s letter was a copy of a letter addressed to Liss, demanding the he resign from the Co-op’s Board and purporting to

revoke Liss's agency with respect to exercising any voting rights of the partnership in the Co-op (Doc. 26-5, ex. E, Dec. 19 letter to Liss). Plaintiff next attached another unsigned letter, this one dated January 17, 2006, in which Chekijian advises Voorsanger that it would be a violation of Article III, Section 2 of the Co-op's By-Laws, to permit Liss to continue to serve on the Co-op's Board because he was not individually a shareholder (Doc. 26-6, ex. F, Jan. 17 letter to Voorsanger). He also emphasized that he viewed the disagreement as one between the S-L partners, and not one involving the Co-op (*id.*).

The amended verified complaint further omits any mention of the litigation which ensued between Liss and Sage Systems. In that action, Liss sought judicial dissolution of the partnership. Chekijian's opposition affidavit indicates the Co-op's President was subpoenaed and deposed in January of 2007 in connection with that case. After three years of litigation, by decision dated February 10, 2009, Sage Systems's motion for summary judgment dismissing the complaint was granted and dissolution was denied (Doc. 26-2, ex. B, *Liss v Sage Systems, Inc.*, Sup Ct, NY County, Feb. 10, 2009, James, J., index no. 100205/2006).

3. Distribution of Mortgage Refinancing Proceeds

In late 2007 or early 2008, the Co-op entered into a refinancing transaction and distributed the proceeds to its shareholders. Knowing that the partners of S-L Properties were engulfed in internal litigation, the Co-op's counsel sent a letter to the attorneys for each partner asking how to proceed (Doc. 26-7, ex. G, Feb. 26, 2008 letter). The Co-op declined to comply with Liss's attorney's suggestion that the proceeds be sent directly to Liss, absent consent from Sage Systems (Doc. 26-8, ex. H, March 17, 2008 letter). Eventually, a check for \$48,884.48 was mailed by letter dated April 7, 2008, and addressed to "S&L Properties" at the tenth floor of the Building (Doc. 26-9, ex. I, Apr. 7, 2008 letter). That check was subsequently in the possession of Nathan M. Barotz, Esq., counsel for Sage Systems, Inc., but at least as of July 17, 2008, it had

not been negotiated (Doc. 26-10, ex. J, July 17, 2008 letter). Solomon I. Lesch, Esq., Liss's attorney, asked the Co-op's managing agent to reissue the check to S-L Properties, and direct the check to his office, but the Co-op refused "absent appropriate instructions from S-L Properties or its authorized agent" (*id.*).

4. Civil Court Action

Meanwhile, at some point in late June or early July of 2008, Solomon Lesch filed an action on behalf of "S-L Properties (A NY Partnership)" against the Co-op and Bart Voorsanger alleging that the sum due to S-L from the mortgage refinancing distribution was \$64,350.00, yet only \$48,884.48 had been forwarded to S-L "and its partners" (Doc. 22-8, ex. F, Civil Court compl.). The complaint asserted causes of action sounding in conversion against the Co-op, and breach of fiduciary duty against Voorsanger, seeking \$15,465.52 as damages. That action was subsequently discontinued and a release was executed by Lesch, on behalf of S-L Properties, and the Co-op's attorney releasing the named defendants from all claims asserted in the complaint (Doc. 22-9, ex. G, Release). As a condition of the release, the Co-op agreed to pay S-L Properties \$15,465.52. The release was executed by Robert Liss, as a partner of S-L Properties, and a check was forwarded to Solomon Lesch on December 19, 2008 (Doc. 22-10, ex. H). In the instant action, the amended verified complaint alleges defendants breached their fiduciary duties by, among other things, "not distributing" the \$15,465.52 payment to plaintiff and by "knowingly paying an unauthorized individual" (Doc. 22-3, ex. A, Am. ver. compl. at ¶ 26). It should be noted that the events described in this section all took place while the dissolution action by Liss against Sage Systems was pending.

5. Compliance with By-laws and Proprietary Lease

As described above in Section 1, the amended verified complaint claims various violations of the Co-op's By-Laws and Proprietary Lease, the details of which were only

provided in plaintiff's opposition papers. Specifically, plaintiff alleges that the Board failed to comply with: (1) the annual meeting requirement and related notice requirements found in the By-Laws; (2) the voting requirement, "that at each meeting of shareholders each shareholder present in person or by proxy shall be entitled to one vote for each share registered in his name," by not allowing plaintiff to vote or provide proxies; (3) the requirement that each director of the corporation be a shareholder, by failing to remove Liss from the Board when it allegedly knew that he was not an authorized agent of S-L Properties on June 5, 2006, and by reinstating Liss as an active and voting member of the Board on October 25, 2006; and (4) any of the notice requirements, by failing to "send S-L any notices" (Doc. 26, Chekijian affid. at ¶¶ 26 -37). Plaintiff also claims the Board improperly amended the By-Laws to permit the Co-op to distribute the proceeds of its mortgage refinancing, since the change was proposed and adopted by "an illegally elected Board, of which Mr. Liss was illegally a director" (*id.* at ¶ 40). Plaintiff challenges the Co-op's amendment of the Proprietary Lease in January of 2008, which modified the Lease to provide that "the Lessee shall also be obliged to reimburse the Lessor for any cost, fees or expense[s] incurred by the Lessor (whether paid or not) ... in connection with or relating to or arising out of any dispute between the Lessees ..." (*id.* at ¶ 41). This amendment was allegedly improper because it was proposed and adopted by an "illegally elected Board" at a special meeting that was improperly noticed and because the Board failed to notify plaintiff of the changes (*id.* at ¶ 42).

6. Additional Disputed Charges

Plaintiff disputes the Co-op's contention, as set forth in a letter written by the Co-op's counsel to S-L Properties, dated March 28, 2011, that S-L Properties owes the Co-op \$31,440.12 for the period of April 10, 2007, through March 7, 2011 (Doc. 26-3, March 28, 2011 letter). Plaintiff argues the Board has failed to send it "copies of legal bills amounting to \$31,440.12,"

even though Chekijian sent two e-mails to the Board's then President, Voorsanger, on March 10, 2008, and March 11, 2008, asking for an "explanation of unexplained charges on S-L's statement" (Doc. 26, Chekijian affid. at ¶ 43). It further contends that even if the Proprietary Lease was properly amended in January 2008, that amendment would not allow the Co-op "to pass through legal expenses that the Co-op incurred prior to the alleged adoption" (*id.* at ¶ 48).

7. Sage's Request for an Affidavit in 2006

Plaintiff next argues that the Board and its individual members breached their fiduciary duty by refusing to provide an affidavit as requested by Sage Systems in October of 2006. The requested affidavit would have stated that "S-L Properties was not in default of the Proprietary Lease," and would have been used by Sage Systems in connection with its litigation with Liss (*id.* at ¶ 50). The Board allegedly refused to provide an explanation for its refusal to provide the affidavit. Plaintiff claims that such refusal was a breach of the Board's fiduciary duty to plaintiff.

8. Liss's Death

Defendant's reply memorandum of law mentions, without providing any details or supporting evidence, that Robert Liss "continued to have apparent authority up until his *death* in 2011 ..." (Doc. 31, Reply memo. at 3). There is nothing in plaintiff's opposition or amended verified complaint that suggests Liss died in 2011, but plaintiff's counsel did not dispute this contention at oral argument.

ANALYSIS

1. Motion to Dismiss - General Standards

"On a motion to dismiss pursuant to CPLR 3211 motion to dismiss, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; citing CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the

benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88; citing *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). Under CPLR 3211 (a) (1), dismissal is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.* at 88). Dismissal may be granted under CPLR 3211 (a) (5) where the “cause of action may not be maintained because ... payment, release, *res judicata*, [or] statute of limitations” Where a motion to dismiss is made pursuant to CPLR 3211 (a) (7), for failure to state an actionable claim, the court “may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Leon*, 84 NY2d at 88; citing *Rovello*, 40 NY2d at 634).

2. Partnership Law

The court begins by noting that the record does not contain a copy of any written partnership agreement between Sage Systems and Liss for S-L Properties. Thus, the court will presume that the default standards of New York’s Partnership Law are applicable. If, as defendants suggest, Robert Liss passed away in 2011, absent a contrary provision in the S-L Properties partnership agreement, Liss’s death would have caused the dissolution of the partnership (*see Vick v Albert*, 17 AD3d 255, 258 [1st Dept 2005]; Partnership Law § 62 [4]). Because the record does not sufficiently address Liss’s death or the effect it would have, the court is unable to further address these issues.

3. Breach of Fiduciary Duty

“It is black letter law that ‘a corporation does not owe fiduciary duties to its members or shareholders’” (*Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012]; quoting *Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]; also citing *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [2009]). Accordingly, plaintiff’s cause of action

alleging breach of fiduciary duty must be dismissed as against the Co-op.

As to the remaining individual defendants, generally, courts are prohibited from inquiring into the propriety of actions taken by a director on behalf of the corporation (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). “The business judgment rule protects individual board members from being held liable for decisions ... that were within the scope of their authority” *Berenger v 261 W. LLC*, ___ AD3d ___, 2012 NY Slip Op 00738, *6 [1st Dept 2012]). To “trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith” (*40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]). Also, “[i]ndividual board members may be validly be sued for breach of fiduciary duty if the complaint pleads independent tortious acts on the part of those individual directors” (*Weinreb v 37 Apartments Corp.*, ___3d___, 2012 NY Slip Op 03754 [1st Dept 2012]; citing *Berenger*, 2012 NY Slip Op at *6; *Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449 [1st Dept 2010]).

Here, plaintiff argues that the business judgment rule does not apply because “plaintiff has set forth in the affidavit of Mr. Chekijian a number of examples in which the cooperative did not follow the procedures set forth in the [Cooperative’s g]overning [d]ocuments” (Doc. 27, S-L’s opp. memo. at 7). Elsewhere in plaintiff’s papers it alleges that the Board failed to comply with the By-Laws by failing to send “any” notices to plaintiff “from July 2007, and during all of 2008, 2009, and 2010,” by failing to comply with the By-Laws’s voting provisions and by not complying the applicable procedure for amending the Proprietary Lease and Ride. Based on these allegations, plaintiff’s claims the Co-op and its Board have breached their fiduciary duties (*id.* at 3).

Plaintiff further alleges in the Chekijian opposition affidavit that on June 5, 2006, and

June 6, 2007, “each individual Board member acted outside the scope of his authority by re-electing himself with a board motion instead of complying with the ‘Voting Requirement’ (Doc. 26, Chekijian affid. at ¶ 30).

Even accepting the truth of all factual allegations asserted in the amended verified complaint and in plaintiff’s opposition papers, plaintiff still fails to sufficiently plead its fiduciary duty claims with respect to any of the individual defendants. Plaintiff does not plead independent tortious acts on the part of any individual Board member (*see Weinreb*, 2012 NY Slip Op 03754). While plaintiff alleges in opposition that “each Board member acted outside the scope of his authority by re-electing himself with a board motion instead of complying with the “Voting Requirement,” (Doc. 26, Chekijian affid. at ¶ 30), in June of 2006 and 2007, any claim arising out of these actions would be time-barred by the three-year statute of limitations applicable to fiduciary duty claims where, as here, the primary relief sought is monetary damages (*see Kaymakjian v Bd. of Mgrs. of the Charles House Condominium*, 49 AD3d 407, 407-408 [1st Dept 2008]; citing *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]; CPLR 214 [4]). This action was not commenced until 2011, more than three years after the Board elections in June 2006 and 2007. Moreover, the Board minutes submitted by plaintiff show that Chekijian and Liss were both present at the June 2006 and 2007 Annual Shareholder Meetings, and neither objected to the procedure employed for the election of the Co-op’s Board. In any case, plaintiff does not specifically allege how any individual defendant failed to comply with the Co-op’s By-Laws or how any such failure caused plaintiff to suffer damages.

Accordingly, defendants’ motion to dismiss the fiduciary claims as against the individual board members is granted.

4. Breach of Proprietary Lease

The second cause of action asserted in the amended verified complaint alleges that

“defendants improperly amended the Proprietary Lease and Rider and therefore breached the Proprietary Lease and Rider,” and “defendants wrongfully charged S-L for the Fees, which S-L paid under protest and with a full reservation of rights and remedies, and therefore breached the Proprietary Lease and Rider” (Doc. 22-3, ex. A, Am. ver. compl. at ¶¶ 29-30). In the “Facts” section of the amended verified complaint, plaintiff alleges that the Co-op amended the Lease without following the procedures set forth in Section 6 of the Rider and Article V of the By-Laws, “and therefore was in violation of the Proprietary Lease and Rider and the Co-op’s by-laws” (*id.* at ¶ 16). It also alleges that the Co-op wrongfully charged plaintiff \$31,440.12 in fees allegedly incurred by the Co-op during the period of April 10, 2007, through March 7, 2011, which plaintiff paid on May 17, 2011.

Defendants argue that plaintiff’s cause of action sounding in breach of the Proprietary Lease is duplicative of plaintiff’s fiduciary duty claim, and as such, should be dismissed. In opposition, plaintiff contends only that its “claim that the defendants made a payment to an unauthorized person arises from the fiduciary duty owed by the defendants to the plaintiff and is separate and independent from any claim stemming from the breach of the Proprietary Lease” (Doc. 27, S-L’s opp. memo. at 10). Therefore, plaintiff concludes, “[t]he claim is not duplicative of a breach of Proprietary Lease claim” (*id.*).

In opposition to the instant motion, plaintiff submits an affidavit of Sage System’s President, Chekijian, alleging that the Board’s undated amendment to the Proprietary Lease was proposed and adopted by an illegally elected Board, that the Board failed to give notice to plaintiff of the proposed change, of the Special Meeting during which the vote was held on the proposed changes, and failed to notify plaintiff that the alleged changes had been adopted (Doc. 26, Chekijian affid. at ¶ 42). These allegations were also asserted in connection with plaintiff’s breach of fiduciary duty claims (*id.* at ¶¶ 26-36). Both causes of action are based, in part, on the

underlying allegation that the Co-op should have removed Robert Liss from its Board in response to the letters sent to the Board's President by Chekijian in December of 2005 and January of 2006, in which Chekijian purported to revoke Liss's authority to act on behalf S-L Properties. Tellingly, the only allegations made in support of plaintiff's contention that the Board was illegally elected are found in the section of Chekijian's opposition affidavit titled "the Board and the Individual Board Members Did Breach Their Fiduciary Duties to S-L By Failing to Follow the Procedures Set Forth in the Governing Documents." Moreover, plaintiff seeks the same monetary amount as damages in connection with both the first and second causes of action. Since plaintiff's first and second cause of action involve the same underlying facts and seek the same damages, they are duplicative.

In any case, plaintiff has not stated a cause of action for breach of the Proprietary Lease as against the individual defendants, as they are not signatories to the Proprietary Lease between S-L and the Cooperative corporation (*see Andejo Corp. v South Street Seaport LP*, 40 AD3d 407, 407 [1st Dept 2007]).

As mentioned above, plaintiff contends in its opposition that the amendment made to the Proprietary Lease was made by an "illegally elected" Board who failed to give S-L notice of relevant events and changes. Paragraph 6 of the Proprietary Lease allows changes to the "form and provisions of all the proprietary leases then in effect and thereafter to be executed ... by the approval of les[s]ees owning at least 66 2/3% of the Lessor's shares ... and such changes shall be binding on all lessees even if they did not vote for such changes ..." (Doc. 22-4, ex. B, Propriety Lease at ¶ 6). Plaintiff does not dispute that the amendment made to the Proprietary Lease was approved by greater than 66 2/3% of the lessees at a February 8, 2008 Special Shareholders Meeting. S-L Properties had notice of this Special Shareholders Meeting as evidenced by the presence of Liss. Under the Section 43 of the Lease, any notice given to a person named on the

Lease is deemed sufficient and has the same force and effect as if given to all persons named on the Lease. S-L Properties's Proprietary Lease lists both Sage Systems and Liss. Thus, under Section 43, Liss's knowledge of the proposed amendment satisfied the notice requirement for S-L Properties.

Chekijian also argues in his affidavit that even if the amendment was legally adopted in January 2008, "the language of the amendment does not allow the [Co-op] to pass through legal expenses that the [Co-op] incurred prior to the alleged adoption" (Doc. 26, Chekijian affid. at ¶ 48). From various allegations asserted by Chekijian and the amended verified complaint, it appears that plaintiff is alleging that pursuant to the January 2008 amendment, additional charges of an unspecified amount were included on S-L Properties's February statement. These charges were deducted from the Co-op's distribution of the proceeds of a mortgage refinance transaction in February 2008, in the amount of \$15,465.52. Chekijian questioned these charges in March of 2008 in two e-mails sent to the Board's then-President.

However, the undisputed documentary evidence shows that this \$15,465.52 was the subject of an action commenced on behalf of S-L Properties against the Co-op in Civil Court in June of 2008. That action was discontinued after a settlement was reached between the Co-op and S-L Properties in which the Co-op agreed to return the \$15,465.52 to S-L Properties in exchange for a release of all causes of action asserted in the complaint. On December 19, 2008, the Board sent a check made out to "S-L Properties, A N.Y. Partnership," for \$15,465.52 to the attorney representing S-L Properties in that action. Thus, plaintiff's claim that the "language of the amendment does not allow the [Co-op] to pass through legal expenses that the [Co-op] incurred prior to the alleged adoption" is simply an attempt to recover the same money that was previously returned to S-L Properties in December of 2008 as a result of the Civil Court settlement and release. Therefore, by the plain terms of the release, which was executed on

behalf of S-L Properties to settle claims asserted solely in S-L Properties's name, plaintiff is barred from seeking the exact same relief in this action on behalf of S-L Properties.

Accordingly, dismissal of plaintiff's second cause of action for defendants' alleged breach of the Proprietary Lease is warranted under CPLR 3211 (a) (1), (5) and (7).

Plaintiff's attempts to avoid the consequences of the settlement and release in the Civil Court action are unavailing. The amended verified complaint's conclusory allegation that "the Co-op knowingly entered into a settlement agreement and made a payment ... to a person who was not an authorized representative of S-L ..." is insufficient (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 471, 471 [1st Dept 2009] ["court is not required to accept factual allegations that are contradicted by documentary evidence, or legal conclusions that are unsupportable in the face of undisputed facts"]; quoting *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]; see also *NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426, 428 [1st Dept 2011] ["conclusory allegations are insufficient"]). Although the amended verified complaint fails to specify the "person who was not an authorized representative of S-L," plaintiff's opposition papers identify this person as Robert Liss. While plaintiff submits evidence showing that the Co-op knew of a dispute between Liss and Sage Systems in which Sage Systems' President purported to revoke Liss's agency on behalf of S-L Properties in late 2005 and early 2006, the same evidence shows that the Co-op was never provided sufficient documentation showing that Sage Systems could unilaterally revoke Liss's authority to act on S-L Properties's behalf. Furthermore, the documentary evidence submitted by plaintiff shows that Liss's attempt to have S-L Properties dissolved against Sage Systems's will was unsuccessful. Thus, Liss was a partner of S-L Properties at all times relevant to the Civil Court action. Liss's name was never removed from the Proprietary Lease or the Business Certificate for Partners on file with the County Clerk (Doc. 22-11, ex. I, Certificate). Absent any allegation that S-L Properties's written partnership

agreement restricted Liss's ability to commence actions on S-L Properties's behalf and that the Co-op knew of this restriction, plaintiff is barred from bringing this collateral proceeding in S-L Properties's name for claims that are subject to the 2008 release.

Accordingly, it is:

ORDERED that defendants' motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision and order of the court.

Dated: July 6, 2012
New York, New York


J.S.C