

**Board of Mgr. of Foundry at Washington Park  
Condominium v Foundry Dev. Co., Inc.**

2012 NY Slip Op 33703(U)

July 5, 2012

Supreme Court, Orange County

Docket Number: 4484/2010

Judge: Paul I. Marx

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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ORANGE  
HON. PAUL I. MARX, J.S.C.

To commence the statutory  
time period for appeals as of  
right (CPLR 5513 [a]), you  
are advised to serve a copy  
of this order, with notice of  
entry, upon all parties.

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**THE BOARD OF MANAGERS OF  
FOUNDRY AT WASHINGTON PARK  
CONDOMINIUM, AS AGENT FOR ALL  
UNIT OWNERS,**

Plaintiff,

-against-

**FOUNDRY DEVELOPMENT CO., INC.  
PAUL & JOSEPH MANAGEMENT  
COMPANY, INC., POLONIA VENTURES  
LLC, GERARDO SANCHEZ, NIRVA  
SANCHEZ, JOSEPH SUAREZ and "JOHN  
DOE" and/or "JANE DOE" the last 2 names  
being fictitious and unknown to plaintiff, the  
person or parties intended being the persons or  
parties, if any, having or claiming an interest in  
or lien upon the mortgaged premises described  
in the complaint,**

Defendants.

-----X

DECISION AND ORDER

Index No.: 4484/2010

Motion Date: April 18, 2012

Motion Sequence ## 12 and 16

The following papers numbered 1 to 10 were read on: (1) the motion of Defendant Nirva Sanchez to dismiss for failure to join necessary and indispensable parties, pursuant to CPLR §§ 1001(b) and 3211(a)(10), and for failure to state a cause of action, pursuant to CPLR §3211(a)(7); and (2) the motion of Defendant Gerardo Sanchez, Polonia Ventures, LLC, and Foundry Development Co., Inc. (collectively, "Team Sanchez") to dismiss for failure to join necessary and indispensable parties, pursuant to CPLR §1001(b):

Nirva Sanchez Notice of Motion-Motion to Dismiss for Lack of Indispensable Parties and Failure to State a Claim . . . . .	1-2
Affidavit in Opposition by Gardiner S. Barone-Exhibit A . . . . .	3

Reply to Plaintiff's Opposition-Plaintiff's First Amended Complaint-  
(including Exhibits) ..... 4-5

Team Sanchez Notice of Verified Motion to Dismiss for Lack of Indispensable  
Parties and Other Relief-Verified Motion to Dismiss ..... 6-7

Affidavit in Opposition by Gardiner S. Barone-Exhibits A through C ..... 8

Reply to Plaintiff's Opposition-Plaintiff's First Amended Complaint  
(including Exhibits) ..... 9-10

Upon reading the foregoing papers it is ORDERED that the separately filed motions to dismiss of Defendant Nirva Sanchez and Team Sanchez are denied for the reasons that follow.

This action by the Board of Managers of Foundry at Washington Park Condominium seeks to recover all of the unpaid common charges related to the unsold units owned at different times by Defendants Foundry Development Co., Inc. ("FDC"), Polonia Ventures LLC, and Paul & Joseph Management Co. (collectively "Defendant Companies"). Plaintiff alleges that Defendants Nirva Sanchez, Gerardo Sanchez, and Joseph Suarez (collectively "Individual Defendants") were principals of, or had a financial interest in, one or all of the Defendant Companies. As such, Plaintiff claims that the Individual Defendants acted in bad faith and violated their fiduciary duties to the Plaintiff as board members by failing to assess and collect common charges owed by Defendant Companies. Plaintiff alleges that Defendant Companies improperly sold or transferred their units to avoid paying said common charges. Plaintiff also alleges that Defendant Companies and the Sanchez and Suarez defendants acted against the interest of the condominium by improperly exercising control over the condominium board, causing the board to amend the Declaration and By-Laws for their personal benefit, and causing Plaintiff to take over FDC's obligation as a sponsor to complete the pool, garage and other common elements.

Nirva Sanchez moves to dismiss the first amended complaint as to her "on the grounds that an absolute defense is founded on documentary evidence; the pleading in the First Cause of Action fails to state a cause of action as against said Defendant; and pursuant to CPLR §1001(b) and 3211(a)(10) that the Court should not proceed in the absence of necessary and indispensable parties." Notice of Motion at p. 1. Only the first cause of action for breach of fiduciary duty is alleged against Nirva Sanchez.

[\* 3]

Team Sanchez moves to dismiss the first amended complaint “for failure to join and include necessary and indispensable parties without whom there can be no jurisdiction and final determination of this action.” Verified Motion to Dismiss at p. 1. The first, second, and fourth causes of action are alleged against Gerardo Sanchez. The second, third, fourth and fifth causes of action are alleged against FDC. The third and sixth causes of action are alleged against Polonia Ventures LLC.

Neither Nirva Sanchez nor Team Sanchez provide a copy of the first amended complaint with their original motion papers. Plaintiff requests in its opposition papers that the motions should be denied because the failure to include the pleading on a motion to dismiss renders the motion a nullity. Both sets of movants, who are self-represented, submitted the first amended complaint with their reply papers. The Court finds that Plaintiff was not prejudiced by the omission of the first amended complaint from the original motion papers. *See Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1008, 864 NYS2d 554 [2<sup>nd</sup> Dept 2008]. Therefore, the Court will proceed to consider the respective motions.

#### Polonia Ventures and Foundry Development

The motion of Defendants Polonia Ventures, LLC and Foundry Development Co., Inc. is denied on the ground that these parties may not proceed without counsel, pursuant to CPLR §321(a), and they may not be represented by Defendant Gerardo Sanchez, because he is not an attorney. Section 321(a) expressly states that “a corporation or voluntary association *shall* appear by attorney.” (emphasis added). Therefore, Foundry Development Co., Inc. cannot be self-represented. The same has been held to be true for a limited liability company. “[L]ike a corporation or a voluntary association, the LLC may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the State of New York.” *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593-594, 835 NYS2d 640 [2<sup>nd</sup> Dept 2007]. The reasoning behind that holding is that a limited liability company “is created to shield its members from liability and once formed is a legal entity distinct from its members.” *Id.* at 593. Accordingly, Polonia Ventures also may not be self-represented. The motion brought by these entities without counsel is thus not properly before this Court and must be denied.

### Documentary Evidence

Nirva Sanchez moves to dismiss based upon documentary evidence, however, she did not provide any documentary evidence with her original motion papers. She provided the following documents with her reply papers: Declaration establishing the condominium, deed from the Newburgh Industrial Development Agency to Polonia Service Co., Inc. transferring condominium units, notices of lien, and a spreadsheet of common charges. The Court declines to consider any of these documents because they were not presented with the original motion papers and Plaintiff has not had a fair opportunity to respond to these submissions. *See Burlington Insurance Co. v Guma Construction Corp.*, 66 AD3d 622, 624, 887 NYS 2d 177 [2<sup>nd</sup> Dept 2009]. Moreover, Nirva Sanchez does not explain how any of these documents might constitute “an absolute defense.”

### Failure to State a Cause of Action

Nirva Sanchez also argues that Plaintiff fails to state a cause of action as to her because she had no duty to collect common charges from FDC since it paid all common charges on the units for which it had obtained certificates of occupancy. *See* Motion to Dismiss at p. 4. This assertion by Defendant may not form the basis for dismissal of the claim against her because it is an issue of fact which requires furnishing proof. “[A] motion to dismiss pursuant to CPLR 3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.” *County of Suffolk v MHC Greenwood Vill., LLC*, 91 AD3d 587, 589-590, 937 NYS2d 89 [2<sup>nd</sup> Dept 2012] (quoting *Sokol v Leader*, 74 AD3d 1180, 1182 [2<sup>nd</sup> Dept 2010], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, there is a significant dispute regarding this essential fact underlying Plaintiff’s claims. Therefore, dismissal pursuant to CPLR §3211(a)(7) must be denied.

### Indispensable Parties

Both Nirva Sanchez and Gerardo Sanchez contend that the amended complaint should be dismissed because there are necessary and indispensable parties without whom “there can be no jurisdiction and final determination of this action.” Nirva Sanchez Motion to Dismiss at p. 2;

[\* 5]

Gerardo Sanchez Verified Motion to Dismiss at p. 1. Both Defendants state that the other members of the Board who served during their tenure on the Board must be joined because the votes of those members were required for the actions now being challenged by Plaintiff. Defendants also contend that the previous owners of the condominium, the City of Newburgh, the Newburgh Industrial Development Agency, and Polonia Service Co., Inc., all must be joined because none of these entities paid common charges on the unsold units that they owned. Defendants contend further that Pyramid Services Corp. and Foundry Development Group, the current owner of the condominium units for which common charges are owed, must also be joined to the action in order to grant complete relief.

Plaintiff argues in opposition that it need not join all other board members to this action because “the liability of a board member for the breach of fiduciary duties is joint and several.” Opposition to Nirva Sanchez at p.3-4; Opposition to Gerardo Sanchez at p. 5. Plaintiff joined as defendants to this action those board members it alleges breached their fiduciary duty by acting in bad faith and engaging in self-dealing. Plaintiff cites cases that hold that “[e]ven if there were [such claims against other board members in the amended complaint], the plaintiff had the option of selecting those directors and officers against whom [it] desired to proceed. The liability of delinquent officers and directors is a joint and several liability and there is no defect of parties defendant where the plaintiff proceeds against only a part of the responsible parties.” *Baker v Baker*, 122 Misc. 757, 758, 204 NYS 11 [N.Y. Sup. Ct. 1924] (citations omitted), *aff'd* 212 AD 850, 207 NYS 809 [1925]; *see also German Am. Coffee Co. v Diehl*, 86 Misc. Rep. 547, 149 NYS 413 [N.Y. Sup. Ct. 1914]; *Buckley v Stansfield*, 155 AD 735, 140 NYS 953 [4<sup>th</sup> Dept 1913]. This appears to still be good law. Furthermore, this Court finds that the other board members are not necessary or indispensable parties to this action as Plaintiff’s claims are predicated upon the unique relationship of the Individual Defendants to the Defendant Companies, which was not shared by any of the other board members.

Defendants do not properly flesh out their claims that the predecessor entities that owned, and the successor entities that own, the unsold units must be joined as parties. Aside from making the bald assertion that relief cannot be accorded in their absence, Defendants fail to articulate how or why it would be impossible for this Court to grant relief without them. Plaintiff asserts that any

claims against the predecessor entities, City of Newburgh and Newburgh Industrial Development Agency, are probably barred by the statute of limitations. More than six years have elapsed since either entity had an ownership interest in the unsold units. Even if that were not the case, “the obligation for common charges is a lien against the unit and not an individual obligation. The obligation for payment exists irrespective of ownership of the unit. ... Real Property Law § 339-z states that “[u]pon the sale or conveyance of a unit, such unpaid common charges shall be paid out of the sale proceeds or by the grantee.” ... the statute in the alternative permits payment of the lien by the grantee because the unpaid charges are a lien which would adversely affect title to the unit.” *Barry v Board of Managers of Elmwood Park Condominium II*, 18 Misc. 3d 559, 566, 853 NYS2d 827 [Civ. Ct. 2007]. Furthermore, “the common charges become a lien automatically subject to satisfaction from the sale or foreclosure of the unit. ... it is a statutory obligation to pay imposed upon each unit.” *Id.* at 566. Accordingly, this Court finds that the predecessor entities, including Polonia Service Co., Inc. against whom the statute of limitations may not have run, need not be joined in this action.

Defendants also fail to articulate their claim that the successor entities, Pyramid Services Corp. and Foundry Development Group (“FDG”), should be joined.<sup>1</sup> Plaintiff’s counsel states in his affidavit that “[P]laintiff reached a settlement with FDG relating to unpaid common charges that should have been assessed during the time FDG owned the 59 units, but [Defendants do] not refer to this settlement nor explain how it impacts [their] claim that FDG is an indispensable party.” Affidavit in Opposition (to G. Sanchez) by Gardiner S. Barone at ¶ 38, p. 12; Affidavit in Opposition (to N. Sanchez) by Gardiner S. Barone at ¶ 17, p. 6.

“[T]he conclusion of indispensability is reached only as a last resort today, if it is reached at all. ... [I]t is a rare case in which such a dismissal is warranted.” Siegel, NY Prac § 268, at 465 [5<sup>th</sup> ed]. The Advisory Committee “adopted an approach of maximum flexibility, leaving the matter [of indispensability] to be determined by the court on a case by case basis and with an abundance of discretion.” *Id.* at § 131, at 234. In light of the Individuals Defendants failure to explain why

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<sup>1</sup> It is not clear from the first amended complaint or any of the papers what role Pyramid Services Corp. had or has with respect to the unsold units. FDG ultimately acquired title to 59 of the unsold units from FDC.

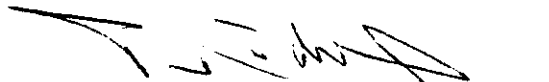
Pyramid Services Corp. and FDG are indispensable parties, the Court finds that there is no basis for resorting to the drastic remedy of dismissal of the action. The Court also declines to join such defendants as parties to the action because it does not appear that their joinder is required for complete relief to be accorded or that the judgment may in some way inequitably affect them due to Plaintiff's claims being centered on FDC's ownership of the unsold units. *See* CPLR § 1001(a).

Accordingly, the motions to dismiss by Nirva Sanchez and the separate motion to dismiss by Gerardo Sanchez, FDC and Polonia Ventures are denied in their entirety. Any contentions not specifically addressed herein have been considered and found to be without merit.

The foregoing constitutes the decision and order of the Court.

Dated: July 5, 2012  
Goshen, New York

ENTER



HON. PAUL I. MARX, J.S.C.