

Pomerance v McGrath
2014 NY Slip Op 30181(U)
January 21, 2014
Sup Ct, New York County
Docket Number: 650129/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. BARBARA JAFFE **PART 12**
Justice

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

INDEX NO. 650129/11
MOTION DATE
MOTION SEQ. NO. 004
CALENDAR NO.

Plaintiff,

- v -

BRIAN SCOTT MCGRATH, et al.

Defendants.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits _____
Replying Affidavits _____
Cross-Motion: X Yes No

PAPERS NUMBERED

Decided in accordance with accompanying amended decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ J.S.C.

Dated: 01/21/14

J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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

Plaintiff,

-against-

Index No. 650129/11

Motion Seq. No. 004

**AMENDED DECISION &
ORDER**

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, KAREN HUDAK,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:

Brenda Pomerance, Esq., self-represented
Law Office of Brenda Pomerance
310 West 52 Street, Suite 27B
New York, NY 10019
212-245-3940

For defendants:

Paul A. Pagano, Esq.
Kagan Lubic, et al.
200 Madison Avenue, 24th Fl.
New York, NY 10016
212-252-0300

The decision and order dated July 12, 2013 on motion sequence number 004 is hereby
vacated and recalled and the following order is substituted in its place:

By notice of motion dated March 26, 2012, defendants move pursuant to CPLR
3211(a)(5) and (7), 3024, and 214(4) for an order dismissing the second amended complaint in
its entirety or, in the alternative dismissing and/or striking the second amended complaint except
for the fifth cause of action.

Plaintiff opposes, and by notice of cross-motion dated April 5, 2012, moves pursuant to
CPLR 3025(a) for an order declaring that the third amended complaint was authorized and
properly filed or, in the alternative, granting her leave to amend the second amended complaint in

the form of the third amended complaint, deeming the third amended complaint retroactively filed, and granting her leave to replead any claim in the third amended complaint determined to be deficient. Defendants oppose.

I. BACKGROUND

On or about January 18, 2011, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting five causes of action against defendants, the first seeking a declaration that defendant Board of Managers of the 310 West 52nd Street Condominium Association (Board) must permit her to inspect the condominium’s books and records, the second seeking a declaration that the Board must permit her to inspect the books and records as though she were still a member of the Board, the third seeking a declaration that the Board’s composition is improper, and thus, that its actions are null and void, the fourth alleging that defendants breached their fiduciary duties, and the fifth alleging fraudulent misrepresentation. (EFD 1, 69-1).

By notice of motion dated April 22, 2011, defendants moved to dismiss the complaint for, *inter alia*, failure to state a cause of action, and by notice of cross-motion dated May 13, 2011, plaintiff cross-moved for, *inter alia*, leave to amend her complaint. (EFD 74). By decision and order dated December 27, 2011, the justice previously presiding over this part: (1) dismissed the first cause of action with leave to replead and/or add the managing agent as a party; (2) dismissed the second and third causes of action without leave to replead; (3) dismissed the portion of the fourth cause of action seeking punitive damages with prejudice; (4) dismissed the remainder of the fourth cause of action with leave to replead to “clearly allege derivative claims, to set forth allegations that show that the Board’s action had no legitimate relationship to the []

condominium's welfare at large, and to set forth tortious actions of the individual defendants McGrath and Goldner, and how such misconduct caused them personal gain"; and (5) sustained the fifth cause of action. (EFD 25).

On or about February 15, 2012, plaintiff filed an amended verified complaint. (EFD 51). Then, on or about March 6, 2012, without first obtaining leave of court, she filed a second amended verified complaint, asserting 11 causes of action against defendants, the first, third, eighth, ninth, tenth, and eleventh of which were not contained in her original complaint, the second and seventh of which are repleadings of her original first and fourth causes of action, respectively, and the fourth and sixth of which are identical to her original second and third causes of action, respectively. (*Id.*; EFD 69-1, 73).

On or about March 24, 2012, again without leave of court, plaintiff filed a third amended verified complaint.

II. ANALYSIS

"A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. Thereafter, pursuant to CPLR 3025(b), "[a] party may amend his or her pleading . . . at any time by leave of court"

Where a plaintiff has already amended his or her complaint as of right pursuant to CPLR 3025(a), her right to do so may revive upon the defendant's amendment of his or her answer, not, as here, where the plaintiff has amended her complaint with leave of court and seeks to do so again. (5-3025 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3025.02). Accordingly, plaintiff's second and third amended complaints are nullities. (*See Nikolic v Fed'n Empl. & Guidance Serv.*,

18 AD3d 522 [2d Dept 2005] [amended complaint served without leave of court and after time period for amending as of right expired considered a nullity]).

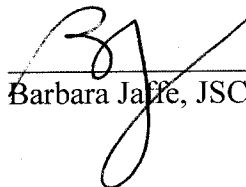
III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion is granted and the second and third amended complaints are dismissed; and it is further

ORDERED, that plaintiff's cross-motion is denied in its entirety.

ENTER


Barbara Jaffe, JSC

DATED: January 21, 2014
New York, New York