

Pomerance v McGrath
2014 NY Slip Op 31686(U)
June 27, 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
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,

Index No. 650129/11

Plaintiff,

Mot. seq. nos. 005, 006

- against -

DECISION AND 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, and KAREN HUDAK,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:
Brenda Pomerance, self-represented
310 West 52 Street, Suite 27B
New York, NY 10019
212-245-3940

For defendants:
Paul A. Pagano, Esq.
Kagan Lubic, *et al.*
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New York, NY 10016
212-252-0300

Plaintiff moves pursuant to CPLR 3025 for leave to file an amended complaint.

Defendants oppose and cross-move for sanctions, which plaintiff opposes. Defendants also
move for summary judgment dismissing plaintiff's action. Plaintiff opposes.

I. PERTINENT PROCEDURAL BACKGROUND

On or about January 18, 2011, plaintiff commenced the instant action whereby she
asserted five causes of action against, as relevant here, the board of the condominium where she
resides and members of the board in their individual capacities. In three causes of action, she
sought declaratory relief: 1) requiring that the board permit her to inspect the condominium's
financial records, 2) requiring that the board permit her to inspect the records as though she were

a board member, and 3) that board actions thereafter were null and void. In her fourth cause of action, plaintiff asserted that defendants' mismanagement of the condominium's finances and their commencement of unnecessary and wasteful litigation against the sponsor constituted a breach of fiduciary duty. In her fifth cause of action, for fraudulent misrepresentation, she alleged that in a December 11, 2008 report to unit owners, defendants falsely represented that the condominium's finances were in order and that there would be no need for increases in common charges, improperly characterized an insurance reimbursement as operating incoming, and failed to disclose \$100,000 in litigation costs, thereby improperly inflating the operating surplus. According to plaintiff, defendants thereby intended to induce unit owners to vote for the existing board members. (NYSCEF 1).

Defendants thereafter moved to dismiss the complaint for, *inter alia*, failure to state a cause of action. Plaintiff opposed, and cross moved, *inter alia*, for leave to amend her complaint. By decision and order dated December 27, 2011, the justice previously presiding in this part dismissed the first cause of action with leave to replead and/or add the managing agent as a party, dismissed the second and third causes of action without leave to replead, and dismissed the remainder of the fourth cause of action with leave to replead for plaintiff to allege derivative claims, to explain how the board's actions had no legitimate relationship to the condominium's welfare, and to allege more clearly how defendants Brian Scott McGrath and Bonnie Goldner personally benefitted from their tortious actions as board members. Only the fifth cause of action was sustained. (2011 NY Slip Op 34060[U] [Sup Ct, New York County 2011], NYSCEF 25).

On or about February 15, 2012, plaintiff filed an amended verified complaint containing 11 causes of action. (NYSCEF 51). On March 6, 2012, without first obtaining leave, she filed a

new amended complaint. (NYSCEF 69-1). On March 7, 2013, the Appellate Division, First Department, as relevant here, affirmed the December 2011 order. (104 AD3d 440 [1st Dept 2013]). Then, again without leave, plaintiff filed another amended verified complaint dated March 24, 2013. (NYSCEF 67).

By amended decision and order dated January 21, 2014, I held that the first and second amended complaints constitute nullities, thereby granting defendants' motion to dismiss them. I also denied plaintiff's cross-motion for leave to amend her complaint in the form of the nullified second amended complaint. (2014 NY Slip Op 30181[U] [Sup Ct, New York County 2014], NYSCEF 186).

Following submission of the instant motion, I granted plaintiff permission to submit a revised complaint, and permitted the parties to submit new papers in light of it, advising them that papers previously submitted on the motion would also be considered. Plaintiff thereafter filed a proposed amended complaint dated February 19, 2014 (NYSCEF 190), now addressed.

II. PLAINTIFF'S MOTION

A motion for leave to amend pleadings pursuant to CPLR 3025(b) is left to the sound discretion of the trial court, and should be freely granted, "upon such terms as may be just including the granting of costs and continuances," and absent prejudice or surprise. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). Pursuant to CPLR 1003, parties may be added, *inter alia*, by leave of court.

A party is prejudiced within the meaning of CPLR 3025(b) when it "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981]). That a defendant

will be compelled to expend additional resources in preparing its case or that it now faces greater liability as a result of the amendment does not constitute prejudice. (*Jacobson v McNeil Consumer & Specialty Pharm.*, 68 AD3d 652, 654 [1st Dept 2009]). To avoid needless and costly litigation, courts should examine the causes of action sought to be added. If they plainly lack merit, leave must be denied. (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55 [1st Dept 2005]).

Plaintiff's most recent complaint contains 17 causes of action. Defendants contend that all the causes of action are improper, and that plaintiff's successive amendments to her pleadings have already required an excessive amount of legal fees. (NYSCEF 191).

A. First cause of action: violation of bylaws: board member must be owner-occupant

Plaintiff seeks an order declaring that Goldner's membership on the board violates the condominium's bylaws, which require that all non-sponsor appointed board members be owner-occupants, and violates the Condominium Act, Real Property Law § 339-j, which requires strict compliance with the bylaws. Plaintiff alleges that Goldner did not live in the building during her tenure on the board. (NYSCEF 190).

Defendants argue that plaintiff repleads a cause of action that was previously dismissed without leave to replead. They also claim that it constitutes an election-based challenge that must be raised in an Article 78 proceeding, and is thus time-barred. (NYSCEF 191).

Plaintiff's original third and fourth causes of action were dismissed on grounds unrelated to Goldner's alleged ineligibility as a board member. Thus, plaintiff's reference to Goldner's ineligibility elsewhere in her original complaint is immaterial, and defendants cite no authority for the proposition that her exclusive remedy is an Article 78 proceeding. In any event, authority

is to the contrary. (*See Brasseur v Speranza*, 21 AD3d 297, 297-98 [1st Dept 2005] [claim that condominium board breached bylaws not amenable to Article 78 proceeding, particularly when relief sought involves more than ministerial act; *Doo v Sie-En Yu*, 31 Misc 3d 1204[A], 2011 NY Slip Op 50494[U] [Sup Ct, Queens County 2011] [rejecting defendants' contention that plaintiff should have brought action, which challenging condominium board elections as Article 78 proceeding]). Consequently, defendants fail to show that this cause of action is plainly without merit.

B. Second cause of action: aiding and abetting violation of bylaws:
board member must be owner-occupant

Plaintiff seeks leave to add as party-defendants Robert J. Braverman and Braverman Greenspun P.C. (collectively, Braverman), and alleges that they improperly advised the board that all of its members were qualified to serve, despite Goldner's ineligibility. She relies on rule 1.2 of the New York Rules of Professional Conduct, which prohibits lawyers from assisting clients in illegal or fraudulent conduct. (NYSCEF 190).

As a matter of public policy, an attorney discharging her professional duties in protecting the interests of her client cannot be held liable to nonclients. (*Pecile v Titan Capital Group, LLC*, 96 AD3d 543, 544 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]; *Art Capital Group LLC v Neuhaus*, 70 AD3d 605 [1st Dept 2010]). And, an ethical violation does not, in and of itself, give rise to a private cause of action. (*Shapiro v McNeill*, 92 NY2d 91, 97 [1998]; *Art Capital Group LLC*, 70 AD3d at 607).

Here, plaintiff's allegations provide no basis for holding Braverman liable. (*See Pecile*, 96 AD3d at 544 [complaint properly dismissed as allegations of fraud, collusion, malice and bad

faith on part of defendants were conclusory]; *Art Capital Group LLC*, 70 AD3d at 607 [attorney providing advice, negotiating transactions on behalf of client were all within scope of her professional duties; causes of action for aiding and abetting client's fraud, breach of fiduciary duty, and conspiracy to defraud thus dismissed]). Consequently, this cause of action is plainly without merit.

C. Third cause of action: violation of Condominium Act: concealing termination of insurance

Plaintiff seeks an order declaring that defendants' failure to notify unit owners that the condominium's insurance terminated on or around October 2008 violated the notice requirements of the bylaws and RPL §-339-bb. Defendants contend that this cause of action is new, and that the prior justice prohibited plaintiff from pleading new causes of action. (NYSCEF 139, 191).

Nothing in the December 2011 decision precludes plaintiff from pleading new causes of action.

D. Fourth cause of action: aiding and abetting violation of the Condominium Act: concealing termination of insurance

This cause of action, leveled against Braverman for its alleged improper legal advice, is meritless for the reasons set forth *supra*, at II.B.

E. Fifth cause of action: election fraud

Plaintiff alleges that in concealing the termination of the condominium's insurance, failing to give proper notice concerning election procedure, and misrepresenting facts in their December 2008 report, defendants intended to induce unit owners to vote for the current board.

Defendants argue that plaintiff has expanded her original fifth cause of action, which the

prior justice sustained, to the point that it must be considered an entirely new cause of action, and that her repeated amendments to this cause of action are prejudicial. (NYSCEF 139). They also allege that it constitutes a time-barred election challenge. (NYSCEF 191).

Defendants fail to explain how the amendment of this cause of action is prejudicial (*see Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 210-11 [1st Dept 1997] [conclusory allegations of prejudice insufficient to defeat proposed amendment]), or that it is plainly without merit (*supra*, at II.A.).

F. Sixth cause of action: aiding and abetting election fraud

Plaintiff alleges that Braverman aided defendants in concealing the fact that the insurance was terminated, relying on Braverman's failure to mention it while reporting to unit owners during a meeting held on November 19, 2008. She also alleges that Braverman assisted defendants in misleading unit owners about election procedure.

To sustain a cause of action for aiding and abetting fraud, the plaintiff must allege: 1) the existence of the underlying fraud, 2) the defendant's actual knowledge of it, and 3) that the defendant substantially assisted in it. (*Oster v Kirschner* 77 AD3d 51, 55-56 [1st Dept 2010]). The plaintiff must allege facts permitting an inference, based on the surrounding circumstances, that the defendant had actual knowledge of the fraud. (*Id.*; *see also* CPLR 3016[b]). Thus, in *Oster*, allegations that the defendant law firm was aware of its clients' prior convictions for securities and tax fraud and that it drafted memoranda misrepresenting this information to investors sufficiently raised an inference that it actually knew that defendants were perpetrating a Ponzi scheme. (*Id.*, at 55-57).

Here, plaintiff provides no description of the contents or circumstances of Braverman's

report, what relevance insurance coverage had to it, why Braverman had a duty to disclose it, and whether he knew of defendants' intentions to conceal it. And, in contrast to the allegations found sufficient in *Oster*, she furnishes no facts giving rise to an inference that Braverman had actual knowledge of any fraud. (See *Art Capital Group*, 70 AD3d at 607 [aiding and abetting fraud claim against attorney dismissed when plaintiffs failed to allege that any misrepresentations had been made to them]; *Natl. Westminster Bank USA v Weksel*, 124 AD2d 144, 147 [1st Dept 1987] [aiding and abetting fraud cause of action dismissed in absence of allegations permitting inference that law firm knew of or intended to aid client in commission of fraud]).

G. Seventh cause of action: attorney deceit (Judiciary Law § 487)

Plaintiff alleges as follows: On December 16, 2008, Braverman, as counsel for the board, appeared in court for oral argument on an application for a temporary restraining order postponing board elections which were scheduled for that evening. McGrath, allegedly an attorney, was present. Braverman informed the court that most votes would be cast at the meeting and not through proxies, and that one of the candidates had postponed a trip abroad in order to attend that evening. The election was permitted to proceed as scheduled, with the court cautioning McGrath to inform unit owners of the pertinent procedures. Plaintiff alleges that Braverman and McGrath acted deceitfully as both knew that proper notification would be difficult given the high percentage of non-primary residence unit owners, and that most unit owners would not be present in person at the election. (NYSCEF 190).

Pursuant to Judiciary Law § 487, any attorney who is “guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages.” To prevail on a cause of action based on Judiciary Law § 487, a

plaintiff must establish that the defendant engaged in an “extreme pattern of legal delinquency” (*Lifeline Funding, LLC v Ripka*, 114 AD3d 507, 508 [1st Dept 2014]), “a chronic and extreme pattern of legal delinquency” (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]), or “an extreme case of attorney misconduct” (*Lifeline*, 114 AD3d at 508).

To the extent that plaintiff has sufficiently alleged that Braverman and McGrath colluded in deceiving the court, she has not alleged a chronic and extreme pattern of legal delinquency, intentionally egregious misconduct, or an extreme case of attorney misconduct sufficient to hold either liable under Judiciary Law § 487. (*Strumwasser v Zeiderman*, 102 AD3d 630 [1st Dept 2013] [single alleged act of deceit not sufficiently egregious to support claim under Judiciary Law § 487; *Kodski v Gee*, 100 AD3d 437, 439 [1st Dept 2012], *lv denied* __NY3d__, 2014 NY Slip Op 74024 [2014] [leave to amend complaint to assert Judiciary Law §487 properly denied in absence of showing that defendants engaged in chronic or extreme pattern of legal delinquency]; *Havell v Islam*, 292 AD2d 210 [1st Dept 2002] [Judiciary Law §487 claim dismissed, as alleged misconduct did not evince chronic and extreme pattern of legal delinquency]; *Mehlman v Gold*, 183 AD2d 634 [1st Dept 1992] [leave to replead cause of action under Judiciary Law §487 denied in absence of showing that statements made were knowingly false]).

H. Eighth cause of action: violation of bylaws: unapproved elevator cab improvements

Plaintiff seeks an order declaring that defendants’ approval of improvements to the condominium’s elevator cab without seeking approval from a majority of unit owners constitutes a violation of the bylaws, which require approval for all improvements exceeding \$10,000. Defendants allege, without support in the record, that these allegations replead a cause of action

that had been dismissed.

As the original dismissed cause of action was premised on a breach of fiduciary duty, plaintiff's new cause of action based on a violation of the bylaws is not precluded by the prior dismissal.

I. Ninth cause of action: aiding and abetting violation of bylaws:
unapproved elevator cab improvements

This cause of action is plainly without merit. (*Supra*, at II.B.).

J. Tenth and eleventh causes of action: violation of bylaws:
improper assessment of construction portion and improper assessment of legal fund portion

Plaintiff seeks an order declaring that the board's decision, as announced in a December 2010 letter, to allocate \$490,000 to construction and \$550,000 to a legal fund from the condominium's \$1,040,000 assessment constitutes a violation of the bylaws. She alleges that defendants ignored requirements in the bylaws that: 1) the board give written notice to unit owners, setting forth in reasonable detail, the nature and purpose of common expenses, and that 2) improvements exceeding \$10,000 in cost must be approved by a majority of unit owners.

Defendants allege that plaintiff alleges facts that are substantially similar to those set forth in her first complaint, whereby she complained generally of the December 2010 \$1,040,000 assessment.

That plaintiff alluded to the assessment in the first complaint does not bar her from pleading these new causes of action.

K. Twelfth cause of action: violation of bylaws: failure to conduct annual elections

Plaintiff seeks an order declaring that the board's failure after 2008 to muster a quorum of unit owners at annual elections constitutes a violation of the bylaws, which, in her view,

“implicitly imposes on the [b]oard a duty of mustering a quorum.” (NYSCEF 190). Although defendants do not deny that this cause of action has substantive merit, they claim that it is substantially the same as previously dismissed causes of action.

In her original third cause of action, plaintiff alleged that the board was composed of members whose terms had expired, and that its actions were therefore null and void. Here, by contrast, plaintiff alleges that the board breached a duty, allegedly imposed by the bylaws, to muster a quorum. And the original fourth cause of action was for breach of fiduciary duty. Consequently, plaintiff is not precluded from pleading this cause of action, which is distinct from the original third and fourth causes of action.

M. Thirteenth cause of action: violation of RPL § 339-w

Plaintiff seeks an order declaring that defendants’ denial of her request to inspect and copy monthly financial reports and building invoices violates RPL § 339-w. She alleges that since December 2007, the condominium’s managing agent prepares monthly reports of receipts and expenditures, which it sends to board members, and that by letter dated March 16, 2011, she fruitlessly demanded records from the board. Plaintiff also alleges that by letter to the board dated May 22, 2013, she demanded inspection of financial reports, which was refused by letter from Braverman dated May 31, 2013.

As defendants observe, plaintiff repleads her original first cause of action, which was dismissed with leave to replead.

N. Fourteenth cause of action: aiding and abetting a violation of RPL § 339-w

This cause of action is plainly without merit. (*Supra*, at II.B.).

O. Fifteenth and seventeenth causes of action: breach of fiduciary duty

Plaintiff alleges that defendants’ refusal to allow her to inspect board meeting minutes

constitutes a breach of fiduciary duty and arises from their desire to avoid scrutiny of the incumbent board members and ease their reelection. She claims to be the only person ever denied inspection and relates the board's refusal to a January 27, 2010 memorandum prohibiting desk staff from responding to pre-midnight noise disputes, maintaining that it was issued in violation of the bylaws and to retaliate against her for questioning McGrath about the misuse of condominium funds, as she is the only resident who regularly complains about noise.

In her seventeenth cause of action, plaintiff alleges that defendants acted in bad faith and breached their fiduciary duty with wasteful litigation, financial mismanagement, and attempts to deprive the sponsor of board seats, thereby repleading her original fourth cause of action. She relies on *Fletcher v Dakota, Inc.*, 99 AD3d 43 (1st Dept 2012), for the proposition that she need not plead independent tortious activity. (NYSCEF 128).

Defendants argue that as plaintiff had an opportunity to, but did not brief *Fletcher* on appeal from the December 2011 order, the appellate affirmance of the dismissal of her breach of fiduciary duty cause of action with leave to replead constitutes the law of the case.

As plaintiff has, in compliance with the December 2011 order and broadly interpreted here, alleged the independently tortious nature of defendants' conduct, she has sufficiently pleaded a breach of fiduciary duty, and defendants have not shown that these causes of action are plainly without merit. Consequently, there is no need to address the impact of *Fletcher*.

P. Sixteenth cause of action: aiding and abetting breach of fiduciary duty

This cause of action is plainly without merit. (*Supra*, at II.B.).

III. DEFENDANTS' CROSS-MOTION FOR SANCTIONS

Defendants allege that plaintiff, in seeking again to amend her complaint, has violated prior court orders, and that without the imposition of sanctions, she will continue to plead and

replead new causes of actions. (NYSCEF 114, 139, 191). Plaintiff disputes defendants' contention that she was barred from repleading new causes of action, noting that defendants rely on a now vacated decision and order in support. (NYSCEF 192).

Pursuant to the rules of the chief administrator, a court, in its discretion, may sanction any party or attorney who engages in frivolous conduct. (22 NYCRR § 130-1.1). Conduct is deemed frivolous if it is, *inter alia*, undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another, or if it is completely without merit in the law. (*Id.*).

In light of the liberal policy of encouraging amendments to pleadings (*supra*, II.), and defendants' erroneous contention that plaintiff is prohibited from pleading new causes of action (*supra*, II.C.), defendants have not sustained their burden establishing that plaintiff acted frivolously. *Papa v Burrows* is distinguishable. There, the Court affirmed sanctions when the plaintiff, whose previous complaint was dismissed without leave to replead, thereafter served a second complaint, which added nothing of substance to distinguish it from the first. (186 AD2d 375 [1st Dept 1992]). Here, by contrast, plaintiff's most recent amended complaint is substantially different from her prior pleadings.

Jones v Camar is also distinguishable. There, sanctions were upheld given the plaintiff's *ad hominem* attacks on members of the judiciary and efforts to harass his adversaries. (167 AD2d 285, 286-88 [1st Dept 1990]). Absent sufficient evidence that plaintiff's intent in bringing this action is to harass defendants, I decline to impose sanctions or costs. (*See Peach Parking Corp. v 346 West 40th Street, LLC*, 52 AD3d 260, 261 [1st Dept 2008] [costs and fees properly denied where motions to amend neither frivolous nor intended to harass]). However, my discretion in granting amendments is limited and is now likely exhausted. (*See Schwartzman v Weintraub*, 56

AD2d 517 [1st Dept 1977] [suggesting court exercised “outer limits of discretion” in granting successive motions for leave to amend]).

IV. DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

Having granted plaintiff leave, in part, to amend her complaint, I may not address defendants’ motion, which is for summary dismissal of a now superseded complaint. (*Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012] [upon service of amended complaint, action proceeds as if original complaint never served]; *Schoenborn v Kinderhill Corp.*, 98 AD2d 831, 832 [3d Dept 1983] [in light of amended pleading, court powerless to grant summary judgment on superseded original pleading]; *see also Pomerance*, 104 AD3d at 442 [declining to address merits of superseded complaint]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the first, third, fifth, eighth, tenth, eleventh, twelfth, thirteenth, fifteenth, and seventeenth causes of action and to this extent the amended complaint in the form e-filed at NYSCEF Doc. No. 190 shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED, that leave to amend the complaint is denied with respect to the proposed second, fourth, sixth, seventh, ninth, fourteenth, and sixteenth causes of action and those causes of action are stricken, without leave to replead; it is further

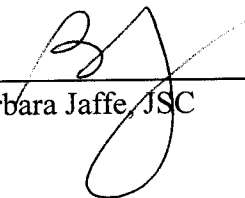
ORDERED, that defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; it is further

ORDERED, that defendants’ cross-motion for sanctions is denied; it is further

ORDERED, that defendants' motion for summary judgment is denied as academic; and it is further

ORDERED, that the parties are directed to appear for a status conference in Room 279, 80 Centre Street, on Wednesday, July 23, 2014, at 2:15 pm.

ENTER:



Barbara Jaffe, JSC

DATED: June 27, 2014
New York, New York