Cutone v Riverside Towers Corp.
2014 NY Slip Op 32749(U)
October 22, 2014
Sup Ct, New York County
Docket Number: 157774/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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LEONARDO CUTONE

Plaintiff,

- v -

RIVERSIDE TOWERS CORP., GREG WITCHELL and MORRIS GURLEY,

Defendants.

---X

Index No. 157774/2013

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Leonardo Cutone ("Plaintiff" or "Cutone") brings this action based on, *inter alia*, a proprietary lease agreement (the "Proprietary Lease") between Plaintiff and defendant Riverside Towers Corp. ("Riverside Corp."), a shareholders cooperative corporation that owns the apartment building and property located at 263 West End Avenue, new York, NY 10023 ("Riverside Towers"). Plaintiff claims to have signed a contract to purchase 70 shares of Riverside Corp. allocated to Apartment 2C (the "Apartment") in January 2007, with the understanding that he would perform extensive renovations on the unit, and to have closed on the Apartment, pursuant to the Proprietary Lease, in May 2007. Plaintiff claims that defendants Riverside Corp., Greg Witchell ("Witchell"), a member of Riverside Corp.'s board of directors from from June 2007 to June 2009, and Morris Gurley ("Gurley") (and together with Witchell, the "Individual Defendants") (collectively, "Defendants"), a member of Riverside Corp.'s board of directors from 2007 to June 2010, unreasonably interfered with Plaintiff's rights under the Proprietary Lease by failing to permit necessary renovations to the Apartment. In addition, Plaintiff claims that Defendants misrepresented the Apartment's value to Plaintiff in order to induce Plaintiff to purchase the shares allocated to the Apartment, and deterred potential buyers for the Apartment, thereby contributing to Plaintiff's inability to secure a purchaser for the Apartment until January 23, 2012.

Plaintiff commenced this action on August 13, 2013. Defendants interposed an answer on October 3, 2013, asserting various affirmative defenses, including documentary evidence, statute of limitations, and failure to state a claim.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's second, third, and fourth causes of action for breach of fiduciary duty, nuisance, and prima facie tort, respectively; and, dismissing Plaintiff's complaint as to Individual Defendants.

Plaintiff opposes. Plaintiff cross-moves for leave to file an amended complaint to delete Plaintiff's fourth cause of action, for prima facie tort; to add causes of action for fraud, breach of warranty of habitability and intentional infliction of emotional distress; and, to add the Board of Directors of Riverside Towers (the "Board") and Brown, Harris, Stevens ("BHS"), the managing agent for Riverside Towers, as additional defendants in this action. Plaintiff submits a copy of its verified amended complaint in the proposed form along with Plaintiff's moving papers.

Defendants oppose Plaintiff's cross-motion.

As an initial matter, CPLR § 3025 permits a party to amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." (CPLR § 3025[b]). Pursuant to CPLR § 3025(b), such "leave shall be freely given upon such terms as may be just including the granting of costs and continuances." (CPLR § 3025[b]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325[1st Dep't 1998]). In addition, pursuant CPLR § 1003, parties may be added at any stage of the action by leave of court. (CPLR § 1003). However, "[w]hen a proposed amendment to a pleading is devoid of merit, leave to amend should be denied so as to avoid needless, time-consuming litigation." (*Terminal Cent. v. Henry Modell & Co.*, 212 A.D.2d 213, 217 [1st Dep't 1995]). Additionally, "[w]here no cause of action is stated, leave to amend will be denied." (*Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 325 [1st Dep't 1998]).

Here, the proposed amendment to delete the fourth cause of action asserted in Plaintiff's original complaint, for prima facie tort, is accepted and Plaintiff's cause of action for prima facie tort is deleted.

As for Plaintiff's proposed cause of action for fraud, however, in a claim for fraudulent misrepresentation, a plaintiff must allege: 1) a misrepresentation or a material omission of fact; 2) which was false and known to be false by defendant; 3) made for the purpose of inducing the other party to rely upon it; 4) justifiable reliance of the other party on the misrepresentation or material omission; and, 5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 [2011]). CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]). In addition, an action based on fraud "must be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." (CPLR § 213[8]).

Here, Plaintiff's proposed amended complaint alleges that Defendants, along with the Board and BHS, "acting in concert either as principals or as aiders and abettors, misrepresented the financial health of Riverside Corp. at the time Cutone contracted to purchase the Apartment in January 2007 and throughout the tenure of the Board of which Gurley was president, and, for a time, while Witchell was a member and its treasurer." Plaintiff's complaint further alleges that, Defendants, the Board, and BHS, "concealed Riverside Corp.'s improper accounting practices, primarily the improper allocation of 'flip tax' capital income to the operating account to make up for the operating fund shortfall." Plaintiff's complaint also asserts that, "These Defendants also hid the improper allocation of the common areas of Riverside Towers by wrongfully assigning large locker rooms in the basement to certain shareholder/residents while depriving others, including Cutone, of any locker room facilities . . . [which] led to the unfair allocation of maintenance burdens to the detriment of deprived shareholders, including Cutone, while rewarding other shareholders with a 'free ride' in getting space designated as common areas for their own use, to the exclusion of other shareholders who were defraying most of the cost of the storage spaces." Plaintiff's proposed amended complaint alleges, "The gross misrepresentations in Riverside Corp.'s financials, for which these Defendants are responsible, were relied upon by prospective apartment purchasers, such as Cutone in January 2007, to their detriment and induced Cutone to purchase the Apartment at an inflated market price." Plaintiff's proposed amended complaint states, "The fraud in the inducement was not discovered by Cutone or anyone else until after 'new' Board unmasked the improper financial practices of the previous Boards when Gurley was its president and, for a time, when Witchell was its treasurer" and that Plaintiff was injured as a result of his alleged reliance on the purported misrepresentations.

Even accepting Plaintiff's allegations as true, Plaintiff's proposed cause of action for fraud is not timely brought. Plaintiff commenced the instant action more than six years after January 2007, when Plaintiff allegedly was fraudulently induced to enter into the contract of sale, more than six years after May 2007, when Plaintiff allegedly closed the sale, and more than two years after June 2010, when the "new" Board replaced the previous Board, shedding light on the purported misrepresentations. Accordingly, Plaintiff's fraud claim is time-barred under either the six-year statute of limitations or the discovery accrual rule and Plaintiff's proposed amendment to add this cause of action therefore is devoid of merit.

As for Plaintiff's proposed cause of action for breach of warranty of habitability, Real Property Law § 235-b (1) provides in pertinent part that:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his *[sic]* direction or control, it shall not constitute a breach of such covenants and warranties.

(RPL § 235-b [1]). Here, the proposed cause of action for breach of warranty of habitability is without merit, as the four corners of Plaintiff's proposed amended complaint do not contain any allegation that Plaintiff resided in the Apartment. (*Frisch v. Bellmarc Management, Inc.*, 190 A.D.2d 383, 390 [1st Dep't 1993] [observing that, "the plaintiff could not avail himself of the protection of the statutory warranty of habitability since he did not personally reside in the unit]). Additionally, the only allegations relating to a breach of warranty of habitability relate to bathroom and kitchen tiles in the Apartment, which Plaintiff alleges he removed prior to obtaining Board approval to renovate the Apartment. Accepting Plaintiff's allegations as true, therefore, the proposed cause of action for breach of warranty of habitability is also deficient in that Plaintiff's own alleged misconduct created the condition at issue. Accordingly, insofar as Plaintiff's proposed cause of

action for breach of warranty of habitability fail to state a claim, leave to amend to add this cause of action will be denied.

As for Plaintiff's proposed cause of action for intentional infliction of emotional distress, the four corners of Plaintiff's proposed amended complaint do not allege any conduct, "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". (*Brasseur v. Speranza*, 21 A.D.3d 297, 298 [1st Dep't 2005]). Rather, Plaintiff's amended complaint alleges that, "Instead of cooperating with his new neighbor, Witchell purportedly acting as a Board member, but motivated by personal animus, made false and malicious claims that work was being conducted in the Apartment on Weekends and beyond the allowed hours under the Riverside House Rules," and that, "Witchell also left children's toys and assorted junk and other items strewn about outside his apartment, smoked cigarettes and other substances incessantly, thereby causing untidy, unhealthy, and obnoxious conditions for the other residents of the apartments on the second floor of Riverside Towers, including Cutone's Apartment." Accordingly, Plaintiff's proposed cause of action for intentional infliction of emotional distress fails to state a claim, and leave to amend to add the cause of action for intentional infliction of emotional distress will be denied.

Additionally, insofar as the remaining causes of action asserted in Plaintiff's proposed amended complaint do not allege a basis for recovery as against the Board or BHS, as discussed below, that portion of Plaintiff's motion to amend to add the Board and BHS as additional defendants in this action is likewise denied. To the extent that Plaintiff's amended complaint in the proposed form is accepted, (omitting the cause of action for prima facie tort and fleshing out the causes of action asserted in the original complaint), however, this Court will address Defendant's motion to dismiss as it pertains to Plaintiff's amended complaint.

Turning now to Defendants' motion to dismiss, CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence; or

> (2) the cause of action may not be maintained because of . . . statute of limitations . . . ; or
>
> (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

Defendants submit Riverside Corp.'s audited financial statements ("Audited Financials") for the years 2005-2010, the last year Individual Defendant Gurley is alleged to have been a member of the Board, and argue that the Audited Financials constitute documentary evidence warranting the dismissal of Plaintiff's amended complaint. The Audited Financials do not flatly contradict the legal conclusions or factual allegations in the amended complaint.

However, as far as the sufficiency of the pleadings is concerned, with respect to Plaintiff's first cause of action, for breach of contract, "[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep't 2009]). As far as individual liability is concerned, "[a] director is not personally liable for a corporation's breach of an agreement merely by virtue of his or her decisions or actions that resulted in the corporation's promise being broken." (*Hixon v. 12-14 E. 64th Owners Corp.*, 107 A.D.3d 546, 547 [1st Dep't 2013]).

Plaintiff's amended complaint alleges that, "Cutone had entered into a contract of sale for the Apartment on January 23, 2007, and he sold the Apartment at a closing on April 19, 2012. That over 5-year period encompasses all of the causes

of actions alleged in this Amended Complaint ('the Relevant Period')." Plaintiff's amended complaint asserts, "The Riverside Corp. Proprietary Lease, By Laws and House Rules, in combination, represent a valid and binding agreement between Cutone and Riverside Corp." Plaintiff's amended complaint further alleges:

> When Cutone purchased the Apartment in May 2007, it was structurally unsafe and completely uninhabitable for his family to move into. Everything inside the Apartment including the kitchen and bathroom tiles that were loose and warped, the flooring that was broken up, then ancient and unsafe electrical system, the antiquated kitchen appliances and the malfunctioning and seriously outdated bath and commode in the filthy bathroom, had to be removed or demolished and replaced with modern, safe products suitable for a family to live in.

Plaintiff's amended complaint asserts:

> From the time Cutone Submitted the proposed alteration agreement to the Board for review until over 4 months later in October 2007, neither Gurley nor the Board responded to Cutone's many requests, which he had made to Gurley as well as to the BHS property manager and the building superintendent, for approval of, or even a response to, his proposed alteration agreement.

Plaintiff's amended complaint further alleges, "During that period, there was no other renovation work taking place in Riverside Towers, and no appropriate reason for Gurley and the Board to have delayed review and approval of Cutone's alteration proposal, as Gurley had assured Gutone and as Cutone was entitled under the Riverside Corp's Proprietary Lease and the By Laws." In addition, Plaintiff's amended complaint alleges, "According to the Riverside Towers House Rules, the Board generally extended a 90-day renewable time period for alteration approvals for Riverside Corp. Shareholders" and that, "by contrast, the renovation period in which to complete the required renovations the board allowed Cutone for the Apartment was only 45 days, which is an impossibly short time frame in which to complete any meaningful renovations," and that, "the Board also imposed an unreasonable $1,000 a day fine to continue the renovations beyond that period if Cutone would be unable to meet that truncated deadline." Plaintiff's amended complaint also alleges, "After renovation work began in the Apartment in late

October 2007, the board, which was led at the time by Gurley, embarked on a successful and malicious campaign, instigated by then-board member Witchell, to disrupt, delay and ultimately stop the approved work in the Apartment before it was completed, with the aid and complicity of BHS, through its property manager who supervised the building personnel."

Plaintiff's amended complaint alleges that, "Witchell, whose apartment was next door to the Apartment, and Morris, his fellow Board member and its president when Cutone became a shareholder, were motivated to take these improper actions against Cutone as a result of individual personal animus against Cutone," and, "was determined to avoid the noise and discomfort of construction next door by misusing his authority as a Board member to accomplish his goal of delaying and obstructing the needed renovations to the Apartment." Plaintiff's amended complaint further alleges that, "Witchell induced employees of Riverside Towers to harass Cutone and to interfere with his efforts to effect the renovations to the Apartment," and that, "Witchell purportedly acting as a Board member, but motivated by personal animus, made false and malicious claims that work was being conducted in the Apartment on weekends and beyond the allowed hours under the Riverside House Rules."

With respect to Gurley, Plaintiff's amended complaint alleges, "In early July 2007, Gurley, using a duplicate key, and without warning, entered the Apartment with the BHS property manager and the building superintendent. At the time Cutone and his father finished removing loose and fallen bathroom ceramic tiles and old kitchen floor vinyl tiles, mostly with their hands, and some with light tools, and had stacked the tiles to be discarded." Plaintiff's amended complaint alleges that, "Gurley angrily screamed at Cutone to stop all work in the Apartment and vacate the premises, which Gurley incorrectly claimed included even the cleaning up of the fallen and loose ceramic and vinyl tiles. There was no such prohibition or rule in the Riverside Corp. Proprietary Lease, By Laws, or House Rules."

Plaintiff's complaint also alleges that, "the building superintendent informed Cutone that Gurley had instructed him not to allow Cutone in the common areas of Riverside Towers during the prolonged 4-month period when Cutone's proposed alteration agreement was pending because Gurley disliked Cutone and did not want Cutone in Riverside Towers while the alteration agreement was pending", and that, that, "the Board directed the BHS superintendent to block Cutone's contractor from replacing antiquated shutoff valves in the plumbing in the Apartment by refusing to shut off the building's water riser to Cutone's apartment line, which is a necessary action routinely allowed for similar valve replacements during renovations." Plaintiff's amended complaint asserts:

> During the last week of the renovation period, the BHS property manager called Cutone and informed him that all the power tools being used for the Apartment renovations had to be brought down to the Riverside Towers basement and could only be used there to cut cabinets and other materials to the proper size for installation. That demand was not in compliance with the approved alteration agreement, which did not forbid the use of power tools in the Apartment during the approved renovation hours" and that "the BHS property manager explained to Cutone that Witchell had insisted that this action be taken because he did not want to be disturbed by the noise when the power tools were being used.

Plaintiff's amended complaint further alleges that "Cutone has been injured as a direct result of those contractual breach [sic] by the Defendants by, among other things, being forced to expend unnecessary funds to comply with unreasonable conditions imposed by the Board."

Here, even accepting Plaintiff's allegations as true, the four corners of Plaintiff's complaint do not plead that Gurley, Witchell, BHS, or the Board were party to the Proprietary Lease. Nor does Plaintiff's amended complaint allege that Gurley or Witchell committed any separate tortious acts in allegedly "delaying" or "disrupting" Plaintiff's proposed renovations. (*Murtha v. Yonkers Child Care Ass'n*, 45 N.Y.2d 913 [1978]). Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint are insufficient to support Plaintiff's first cause of action for breach of contract as against these defendants.

As for Plaintiff's cause of action for breach of fiduciary duty, as against the Board, the Individual Defendants, and BHS, the elements of a cause of action for breach of fiduciary duty include (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683 [2d Dep't 2011]). To state a claim for breach of fiduciary duty under an aider and abettor theory, "a plaintiff must allege that the defendant had actual knowledge of the breach of duty; constructive knowledge will not suffice." (*Brasseur v. Speranza*, 21 A.D.3d 297, 299 [1st Dep't 2005]). CPLR § 3016 requires particularity in the pleading of a cause of action for breach of fiduciary duty. (CPLR § 3016[b]). In addition, the statute of limitations for a breach of

fiduciary duty claim for damages is three years, absent allegations of fraud. (CPLR 214[4]; *Kaufman v. Cohen*, 307 A.D.2d 113 [2003]).

Plaintiff's amended complaint alleges that, "the Board members, pursuant to their fiduciary responsibilities, had the duty to refrain from self-dealing and imposing special rules and conditions, either to favor a current or former Board member or to target an 'outsider' shareholder, such as Cutone", and that, "During the relevant period, the Board, including Gurley and Witchell, breached their fiduciary duties of care, loyalty and good faith to Cutone, as a shareholder of Riverside Corp., by imposing unfair and unreasonable conditions and rules regarding the needed renovations to the Apartment, in an effort to harass and intimidate Cutone and to make it impossible for him to complete the renovations to the Apartment in a timely fashion in order to move there with his family before the birth of his son." Plaintiff's amended complaint further alleges that, "BHS, as Riverside Towers's managing agent, aided and abetted the breach of fiduciary duties by the Board, as initiated by Gurley and Witchell, and which persisted during the entire Relevant Period by the Board's continued unfair treatment of Cutone subsequent to the departures of Gfurley [sic] and Witchell."

Here, even accepting Plaintiff's allegations as true and drawing all inferences in favor or the non-moving party, to the extent that Plaintiff's claim for breach of fiduciary duty seeks to hold the Board liable for the alleged delay in approving Plaintiff's proposed renovations, the four corners of Plaintiff's amended complaint do not allege that the Board was under any obligation to act any more expeditiously than is alleged. Moreover, "[i]t is black letter law that 'a corporation does not owe fiduciary duties to its members or shareholders.'" (*Stalker v Stewart Tenants Corp.*, 93 A.D.3d 550, 552 [1st Dep't 2012]). Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's amended complaint fails to adequately plead claim for breach of fiduciary duty as against the Board.

Furthermore, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's amended complaint fail to state a cognizable claim against Individual Defendants, since there is no allegation that they breached a duty other than, and independent of, those contractually imposed upon the board." (*Brasseur v. Speranza*, 21 A.D.3d 297, 298 [1st Dep't 2005]). As Plaintiff's amended complaint also does not contain any specific allegations that Individual Defendants "acted tortiously other than in their capacity as board members, [this] cause of action states no cognizable claim against them." (*Brasseur v. Speranza*, 21 A.D.3d 297, 298 [1st Dep't 2005] [citing *Murtha*

v Yonkers Child Care Assn., 45 N.Y.2d 913, 915 [1978]). In any event, Plaintiff's amended complaint alleges that Individual Defendants were members of the Board until June 2009 or June 2010. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Individual Defendants' purported fiduciary obligations as members of the board ended in June 2009 or June 2010, more than three years before Plaintiff commenced this action, and Plaintiff's claims for breach of fiduciary duty as against Individual Defendants are time-barred, not having been brought within the applicable three-year limitation period. (CPLR 214 [4]; *Kaufman v Cohen*, 307 A.D.2d 113, [2003]).

As far as the allegations respecting BHS are concerned, the four corners of Plaintiff's amended complaint do not plead a fiduciary obligation between BHS and Plaintiff. Plaintiff's amended complaint also fails to plead that BHS had actual knowledge of any alleged breach, sufficient to support a cause of action for breach of fiduciary duty as against BHS under an aider and abettor theory. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's amended complaint do not plead a cause of action for breach of fiduciary duty as against BHS.

As for Plaintiff's cause of action for private nuisance, the elements of the common law cause of action for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." (*Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 570 [1977]). However, "[u]nder the business judgment rule, it is presumed that the actions of a cooperative's directors are 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'. Absent a showing of a breach of fiduciary duty, 'the exercise of [the co-op board's powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient'". (*40 W. 67th St. v. Pullman*, 296 A.D.2d 120, 126 [1st Dep't 2002] [citations omitted]).

Plaintiff's amended complaint alleges that, "the defendants substantially interfered with Cutone's property rights by: (a) creating unreasonable conditions and rules that deprived Cutone of his right to renovate his Apartment under the same conditions as accorded other shareholders of Riverside Corp.; (b) imposing unreasonable conditions that would have allowed Cutone to sublease his Apartment in an economically reasonable manner, after he was prevented from using and enjoying the Apartment as his family residence; (c) willfully ignoring and violating

the contractual provisions contained in the Proprietary Lease, By Laws, and House rules; and (d) continuing to impose unreasonable sublease conditions and refusing to make needed repairs to the common area water pipes to the Apartment before its sale in April 2012." Plaintiff's complaint further alleges that, "The nuisance perpetrated by the Defendants rose to an intolerable level by the malicious actions of the Riverside Corp. superintendent, with the complicity of the Board and BHS, who undermined a firm $575,000 offer for the purchase of the Apartment by making deliberately false statements to the prospective buyer about the state of the renovations to the Apartment and the percentage of owner occupied apartments in the building." Plaintiff's amended complaint further alleges that such actions "defeated Cutone's ability to sell the Apartment in September 2010, and harmed him by saddling him with the carrying costs of the Apartment for two additional years", and asserts, "Only when Cutone finally was given permission by the Board to sell the Apartment in April 2012 was he no longer subject to this continuous wrongful conduct by the Defendants and he was able to measure the full extent of his monetary damages as a result of the Defendant's wrongful actions."

Here, Plaintiff's claim for private nuisance is based on alleged actions of Riverside Corp.'s directors. However, "[u]nder the business judgment rule, it is presumed that the actions of a cooperative's directors are 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'. Absent a showing of a breach of fiduciary duty, 'the exercise of [the co-op board's powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient'. (*40 W. 67th St. v. Pullman*, 296 A.D.2d 120, 126 [1st Dep't 2002] [citations omitted]). Accordingly, insofar as Plaintiff's amended complaint fails to plead a breach of fiduciary duty, as discussed above, Plaintiff's cause of action for nuisance likewise fails.

Finally, in light of the amended complaint eliminating the fourth cause of action asserted in Plaintiff's original complaint, for prima facie tort, that portion of Defendants' motion seeking to dismiss Plaintiff's fourth cause of action, for prima facie tort, is moot and need not be addressed.

Wherefore, it is hereby

ORDERED that Plaintiff's cross motion to amend its complaint is granted only to the extent indicated above; and it is further

[* 13]

ORDERED that Defendants' motion to dismiss is granted only to the extent that Plaintiff's causes of action for breach of fiduciary duty and nuisance are dismissed and the cause of action for breach of contract is dismissed as to Individual Defendants Greg Witchell and Morris Gurley and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's remaining cause of action, for breach of contract as against Riverside Corp., is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 22 2014

EILEEN A. RAKOWER, J.S.C.