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| <b>Gallo v Retreat at Carmel Home Owners Assoc., Inc.</b>                                                                                                                                                                                                        |
| 2014 NY Slip Op 33082(U)                                                                                                                                                                                                                                         |
| September 23, 2014                                                                                                                                                                                                                                               |
| Supreme Court, Putnam County                                                                                                                                                                                                                                     |
| Docket Number: 2716/13                                                                                                                                                                                                                                           |
| Judge: Lewis J. Lubell                                                                                                                                                                                                                                           |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

Dispo

To commence the 30 day 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

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF PUTNAM**

-----X  
JOHN R. GALLO,

Plaintiff,

-against -

THE RETREAT AT CARMEL HOME OWNERS  
ASSOCIATION, INC., JACK BELL,  
JAMES P. MULLEN, and PULTE HOMES  
OF NEW YORK, LLC,

Defendants.

-----X  
**LUBELL, J.**

**DECISION & ORDER**

Index No. 2716/13

Sequence No. 1 & 2  
Motion Date 6/16/14

As newly captioned (see Decision & Order of April 28, 2014 wherein certain former defendants were dropped from the action<sup>1</sup>], the following papers were considered in connection with **Motion Sequence #1** by Pulte Homes of New York, LLC ("Pulte") for an Order pursuant to CPLR 3211(a)(7) dismissing plaintiff's verified complaint against defendant with prejudice; and **Motion Sequence #2** by defendants The Retreat at Carmel Homeowners Association, Inc., Jack Bell and James P. Mullen for an Order dismissing plaintiff's complaint in its entirety and granting summary judgment pursuant to CPLR Rule 3212, along with such other and further relief as to this Court may seem just and proper:

**PAPERS**

**NUMBERED**

|                                                     |   |
|-----------------------------------------------------|---|
| NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS A-B | 1 |
| AFFIRMATION IN OPPOSITION/EXHIBIT 1                 | 2 |

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<sup>1</sup> By way of Partial Stipulation to Discontinue dated February 3, 2014, all claims and causes of action have been discontinued by plaintiff as against defendants John Bell, Pulte Services Corporation and Pulte Realty of New York, Inc, with prejudice, and, correspondingly, those branches of their CPLR §3211(a)(7) motion and CPLR §8303-a motion have been withdrawn.

|                                               |   |
|-----------------------------------------------|---|
| NOTICE OF CROSS MOTION/AFFIRMATION/AFFIDAVIT/ |   |
| EXHIBITS A-E                                  | 3 |
| AFFIRMATION IN OPPOSITION/EXHIBITS 1-3        | 4 |
| REPLY AFFIRMATION/EXHIBIT A-B                 | 5 |

Plaintiff, an owner of a residential condominium unit at the condominium development known as The Retreat at Carmel - Phase II, brings this action against the various defendants in connection with alleged preferential treatment accorded to (now) non-party John Bell, the son of defendant Jack Bell, a board member of defendant The Retreat at Carmel Homeowners Associate, Inc. ("HOA"). Plaintiff alleges breach of, among other things, the covenants and rules of the HOA. Among the causes of action advanced are those for alleged violations of the Fair Housing Act (42 USC §3601, et seq.), New York Executive Law §296, section 1226.1(a) of the NYCRR, breach of contract, breach of fiduciary duty and negligence.

This action stems from asserted preferential treatment afforded by the HOA through defendant board member, Jack Bell, to non-party John Bell in breach of the covenants contained in the HOA rules and in alleged abuse of discretion of the business judgment rule.

Plaintiff seeks declaratory relief with respect to non-party John Bell's ability to reside at defendant Jack Bell's condominium unit, declaratory relief with respect to commercial parking upon the condominium complex premises, an injunction directing the HOA to designate an accessible garage parking space and, among other things, compensatory and exemplary damages.

### **Motion Sequence #1**

Pulte's motion to dismiss the causes of action advanced as against it (the fourth, fifth and seventh causes of action in the complaint), for failure to state a cause of action is granted. To the extent that plaintiff seeks denial of this aspect of the motion pursuant to CPLR 3211(d), such is denied, the Court not being persuaded that "facts essential to justify opposition may exist but cannot [now] be stated" (CPLR 3211[d], supra).

As to the fourth cause of action sounding in breach of contract, admittedly, there is no contract between plaintiff and Pulte.

The breach of fiduciary duty claim asserted in the fifth cause of action is, in part, advanced against Pulte as allegedly complicit in the asserted misdeeds committed by Jack Bell and the HOA "by having majority control [of the HOA]." However, no

fiduciary relationship exists between a sponsor and a condominium association (Caprer v Nussbaum, 36 AD3d 176, 191 [2d Dept 2006]). In any event, even upon the most liberal of readings and according plaintiff every benefit, the Court finds that the fifth cause of action fails to state a cause of action as against Pulte. Bald conclusory allegation that Pulte "abused" its rights and duties as sponsor are not sustainable (see Berardi v Berardi, 108 AD3d 406, 406-07 [1st Dept 2013] lv to appeal denied, 22 NY3d 861 [2014]).

The seventh cause of action for negligence is dismissed for want of the existence of a cognizable duty between Pulte, as sponsor, and plaintiff with respect to the relief therein sought. As such, a cause of action for negligence cannot be sustained.

## **Motion Sequence #2**

### HOA

The motion for summary judgment by defendant HOA dismissing the action as against it is granted. The HOA has come forward with sufficient proof in admissible form establishing its entitlement to judgment in its favor as a matter of law and plaintiff has not refuted same, such as would raise a material question of fact warranting trial. The HOA has adequately established that it constitutes the overall homeowners association for the entire development consisting of The Retreat at Carmel Condominiums I and The Retreat at Carmel Condominiums II, and that it is the actions of The Retreat at Carmel Condominiums II about which this case is concerned.

### Mullen

Since "all events" given rise against defendant James P. Mullen ("Mullen") derive from the Pulte defendants, against which this case has since been discontinued or dismissed, the causes of action against Mullen (the fourth, fifth and sixth causes of action) are dismissed as well. In any event, plaintiff has not sufficiently advanced a contract as between himself and this individual defendant over which to sustain a cause of action. Mullen is not even mentioned in the fifth cause of action and cannot reasonable and fairly be imputed to same. Finally, at the very least, plaintiff has failed to adequately plead tortious interference with contract as between plaintiff and the HOA (see Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 [1996]).

### Jack Bell

The first and second causes of action allege the wrongful

abolition of an accessible parking space designation in the inside parking garage of The Retreat at Carmel Condominiums II by defendants HOA and Jack Bell, a board member of The Retreat at Carmel Condominiums II and the HOA, rendering the "remaining parking spaces . . . less available for Plaintiff".

A review of the subject resolution reveals that it was passed by The Retreat at Carmel Condominiums II and not the HOA. Thus, summary judgment in defendants favor is appropriate as against both defendants in this regard. This determination is without prejudice, however, to any other timely and proper action that plaintiff may wish to advance as to his Fair Housing Act (42 USC §3601) and/or Executive Law §296 causes of action as against proper defendants and/or any board members against whom an individual claim can be maintained.

The remaining causes of action against Bell and to any further extent against the HOA and Mullen, are protected by the business judgment rule in response to which plaintiff has failed to raise any triable issue of fact.

Based upon the foregoing, and there being no merit to any further opposition by plaintiff to these motions, it is hereby

ORDERED, that this action be and is hereby dismissed in all respects, without prejudice as herein indicated.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York  
September 23, 2014

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