

**Hersh v One Fifth Ave. Apt. Corp.**

2015 NY Slip Op 32922(U)

March 17, 2015

Supreme Court, New York County

Docket Number: 153735/2014

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~JUSTICE CAROL EDMEAD~~ Justice

PART 35

Anita Hersh
One Fifth Ave Apartment Corp, et al

INDEX NO. 157593/14
MOTION DATE 1.30.15
MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying memorandum decision, motion sequence 001 is resolved as follows:

ORDERED that the motion of defendants Alan Belzer and Susan Martin (motion sequence 001) to dismiss the complaint pursuant to CPLR 3211(a)(5), is granted to the extent of precluding plaintiff from recovering, as to the fourth, fifth and sixth causes of action, any damages sustained prior to August 1, 2011. It is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3.17.15

[Signature] J.S.C.
CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
ANITA HERSH,

Index No. 153735/2014

Plaintiff,

-against-

Motion Seq. 001 and 002

ONE FIFTH AVENUE APARTMENT CORP., ALAN  
BELZER, SUSAN MARTIN, CONSTANCE ELLIS,  
JAMIE GRAU, PAUL GIGANTE, ZACHARY PACK,  
PETER PIETRUCHA, ROBET SCHULMAN,  
JEANETTE VARGAS, SHIVASHISH CHATTERJEE,  
MICHAEL DEL NIN, CORSON ELLIS,  
CHARLES HARBUTT, KAREN HARRIS, DALE  
PONIKVAR, RICHARD STEWART and CYNTHIA  
WILBY,

Defendants.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In motion sequence 001, defendants Alan Belzer (“Belzer”) and Susan Martin (“Martin”) move pursuant to CPLR 3211(a)(5) to dismiss the fourth, fifth and sixth causes of action of plaintiff Anita Hersh’s (“plaintiff”) complaint.

In motion sequence 002, the remaining defendants, One Fifth Avenue Apartment Corp. (the “Corporation”), Constance Ellis, Jamie Grau, Paul Gigante, Zachary Pack, Peter Pietrucha, Robert Schulman, Jeanette Vargas, Shivashish Chatterjee, Michael Del Nin, Corson Ellis, Charles Harbutt, Karen Harris, Dale Ponikvar, Richard Stewart, and Cynthia Wilby move pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss the first, second, third, fourth and sixth causes of action.

For purposes of judicial economy, the motions are consolidated for joint disposition.

### *Factual Background*<sup>1</sup>

Since 1998, plaintiff has been a shareholder, and proprietary lessee of, Apartment 19G (the “Apartment”) on the 19<sup>th</sup> floor of the Corporation’s building located at One Fifth Avenue in Manhattan. Belzer and Martin are the shareholders and proprietary lessees for Apartment 20C-D, which is located above the Apartment. Martin and the remaining individual defendants are current and former members of the Corporation’s board of directors (collectively, the “Board”); *i.e.*, Belzer is the only individually named defendant who was/is not on the Board.<sup>2</sup>

The Apartment has sustained occasional water infiltrations from the exterior of the building and the terrace roof above the Apartment and pertaining to Apartment 20C-D (the “Terrace”) since 1998. The Terrace contains a greenhouse located directly above the Apartment.

Plaintiff alleges that the infiltrations have been due to the Corporation’s failures to act in her best interest, make timely repairs, and take appropriate measures to curtail the infiltrations. She further alleges that the Board has been aware of the water infiltrations since their inception.

Throughout the duration of her residency, plaintiff has undertaken to repair damage caused by the infiltrations. With further regard to specific incidents, plaintiff alleges that “major and catastrophic” leaks from the Terrace occurred in September 2012 and November 2013. The alleged damage from these incidents was so severe that plaintiff was forced to vacate the Apartment in September 2012; she has not resided there since. Water continues to pour into the Apartment with every heavy rainstorm, and the Corporation has done nothing to ameliorate the

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<sup>1</sup> The Factual Background is derived from the complaint.

<sup>2</sup> Although Martin is alleged to have been and/or be on the Board, she moves to dismiss the complaint with Belzer and does not join the Board’s motion.

condition.

With further regard to the history of the water infiltrations, in 1998, the Board undertook to perform brick repointing and applied a silicone treatment on a parapet on the building's south wall. Plaintiff alleges that, in this vein, repairs could not be made to the parapet because the Terrace greenhouse sat too close to the parapet.

In 2002, leaks were documented in the Apartment by Superstructures Engineers & Architects ("Superstructures"), an entity retained by the Board. In or about July 2002 and January 2003, the Board reviewed reports and proposals from Superstructures regarding Terrace leaks. In May 2003, plaintiff reported four active leaks in her bedroom (in an area directly under the greenhouse), and seven active leaks in the south wall of her living room. Between 2003 and 2005, plaintiff reported to the Corporation the existence of continuing and escalating leaks and water damage in the Apartment.

In an October 2005, Superstructures reported to the Board issues with the greenhouse's condition, as well as the fact that a leak had made its way into the Apartment. The report concluded that in order to correctly install new counterflashing below the greenhouse framing, the entire greenhouse would have to be removed and rebuilt.

In May 2006, Superstructures reported that water tests of Apartment 20C-D produced leaks into plaintiff's Apartment and reiterated that the correct solution to the problem would require disassembly/reconstruction of the greenhouse.

The Board's January 2007 meeting minutes show that the leaks into the Apartment had not been resolved at that time. In August 2007, the Board announced the commencement of façade repair work on the southeast side of the 19<sup>th</sup> floor. Around the same time, Superstructures

advised that repairs to the greenhouse with silicone tape and sealant were not permanent and would have to be inspected and redone yearly. Nevertheless, three months later, plaintiff reported a newly developing water leak in her living room ceiling.

Throughout 2008, plaintiff was in communication with Board members, the building superintendent and the managing agent regarding continuing leaks and proposals to address the ongoing issues. Nevertheless, in June 2008, plaintiff reported new cracks in the south wall/west corner of her living room. About one year later, plaintiff reported signs of a water leak in the living room ceiling in the same area as previous leaks.

In September 2011, the Board required replacement of a terrace on the 23<sup>rd</sup> floor (including the removal of a greenhouse thereon) to resolve leaks and water damage into an apartment on the 22<sup>nd</sup> floor.

In November 2012 (one month after the “significant” infiltration incident), the Board approved replacement of the roof terraces on the 10<sup>th</sup> and 20<sup>th</sup> floors and advised that work would commence in the Spring of 2013.

The Board minutes of October 2012 recite that the Board had approved a policy “in or about December of 2012” requiring that each of the building’s six greenhouses be subjected to an annual inspection, with the cost of the inspection and any necessary repairs to be borne by the shareholder. A letter was distributed to shareholders advising of the new greenhouse policy. However, such policy was never enforced by the Board. Also, no work was commenced in 2013 to replace the Terrace roof or greenhouse.

As noted above, the Apartment suffered another catastrophic leak in November 2013. After this incident, engineers retained by the Board recommended that temporary protected

measures be taken to prevent further water infiltration into the Apartment. Such measures included the laying of a protective tarp over the Terrace, re-sealing the greenhouse, and removing the trees/plants/planters from the Terrace. The report also noted the deteriorated condition of many of the wooden planters, that many of same were overweight per building guidelines, and concern of loose soil and plant debris clogging existing drain lines.

The trees/plants/planters were eventually relocated to another section of the Terrace. However, this did not prevent leaves and soil from the trees/plants from blowing over to the Terrace, which may have contributed to the clogging of drains.

Plaintiff alleges that water infiltration into the Apartment continues to date, and that the Terrace roof has not been repaired/replaced; the greenhouse has not been resealed; no protective tarp was laid over the Terrace roof and/or if it was, it was ineffective; and the Board has not required that Belzer and Martin remove the greenhouse so that the roof below it can be replaced.

Plaintiff further alleges that she has not been provided with any plans or information concerning repair of the exterior façade and parapets, or any information concerning replacement of the Apartment's ceiling's structural slab (despite a finding in March 2014 of corrosion and deterioration of the metal reinforcement mesh within a portion of the slab, and spalling concrete resulting from years of water infiltration). She further alleges that she removed walls within the Apartment due to mold at her expense. In this regard, plaintiff claims that tests commissioned by her in June 2013 and January 2014 revealed elevated levels of mold in the air in the common hallway outside the Apartment, and the Board was advised of the results of such tests; yet the Board has taken no further steps to investigate or remediate the mold condition.

By the complaint, plaintiff seeks a declaratory judgment and injunction against the

Corporation (first cause of action);<sup>3</sup> breach of the warranty of habitability against the Corporation (second cause of action); breach of the proprietary lease (the “Lease”) against the Corporation (third cause of action); breach of the fiduciary duty against the named defendant members of the Board (fourth cause of action); negligence against all defendants (fifth cause of action); and private nuisance against all defendants (sixth cause of action).

With specific regard to the first cause of action, plaintiff seeks a declaration of her rights under the Lease, and an injunction requiring the Corporation to: undertake complete replacement of the Terrace roof/drainage system, including removal of the greenhouse; require Belzer and Martin to remove/replace the greenhouse to allow access to the roof, wall, parapets and the greenhouse exterior for maintenance and repairs, and obtain all necessary permits/sign-off from the New York City Department of Buildings and take all other steps to legalize the greenhouse; undertake water testing/repairs of the façade walls and parapets along the building’s east wall; replace the structural slab above the ceiling in the Apartment; remove all trees/plants/planters from the Terrace roof with installation of any new such items to conform to building guidelines; and undertake mold remediation of the Apartment and adjacent common areas.

Plaintiff commenced the instant action on August 1, 2014.

#### *Arguments*

In its moving papers, the Board argues that the first cause of action fails to state a claim. Here, plaintiff cannot establish that she does not have an adequate remedy at law, namely money damages; thus, her request for injunctive relief is improper. Plaintiff is ostensibly seeking a declaratory judgment about a controversy concerning her rights under the Lease. And, although

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<sup>3</sup> The parties clarify in their submissions that this cause of action is directed solely against the Corporation.

she alleges she has no adequate remedy at law, she brings a claim for damages based upon the alleged breach of that very same agreement.

The first cause of action contains essentially two controlling allegations -- that plaintiff has not been treated equally with other shareholders, and that the Board, in past incidents of flooding, required owners of greenhouses to remove same so that the roof on the terrace could be replaced. These claims suggest that the real substance of the first cause of action is based on bad faith or disparate treatment by the Board as a shareholder, not as a lessee.

The Board submits an affidavit purportedly sworn to by plaintiff in support of her petition for pre-litigation disclosure in a prior, related action (the "Hersh Affidavit"). The Board contends that the court may consider the Hersh Affidavit as documentary evidence under CPLR 3211(a)(1).

The Hersh Affidavit shows that in 2012, the Board obtained a report from WJE Engineers and Architects ("WJE") concerning the Terrace. In this report, WJE did not recommend that the greenhouse be disassembled and rebuilt; rather it recommended full replacement of the existing quarry tile and waterproofing of the Terrace. And, according to the Hersh Affidavit, at some time prior to April 19, 2013, the Board advised plaintiff that it had no intention of requiring the disassembly of the greenhouse. Plaintiff commenced the instant action at least 15 months after she was advised that the Board had no intention of requiring that the greenhouse be disassembled.

Further, the first cause of action is time-barred. Such claim, which is in the nature of a shareholder challenge to a board decision based on disparate treatment, should have been pursued as an Article 78 proceeding, which is subject to a four month limitations period. Under

CPLR 3211(a)(1), the affidavit is a judicial admission that the court can consider to utterly refute any inference that she might not have known about the Board's decision until sometime after that date. Thus, the four-month limitations period began to run no later than April 19, 2013. Since plaintiff did not commence a proceeding challenging the Board's decision within four months of that date, the first cause of action is time-barred.

The Board further contends that the second and third causes of action (damages for breach of the warranty of habitability and breach of the Lease, respectively) are time-barred under the applicable six-year statute of limitations for both claims. Here, plaintiff seeks abatement from June 2008, as well as the cost of repairs which, according to the Hersh Affidavit, she undertook as early as 1998. Thus, some or all of the damages claimed would be from more than six years prior to plaintiff's commencement of this action in August 2014.

The Board also argues that the fourth and sixth causes of action (seeking damages for breach of fiduciary duty and private nuisance, respectively) must be dismissed as time-barred under the three-year statute of limitations applicable to both claims. Thus, to the extent any of the damages claimed was apparent prior to August 2011 -- as suggested by the allegation that the water leaks were apparent in 1998 -- they must be dismissed as untimely.

In their motion, Belzer and Martin move to dismiss the fourth, fifth and sixth causes of action (breach of fiduciary duty, negligence and private nuisance, respectively) against them based on the statute of limitations. To the extent these causes of action seek recovery for damages alleged prior to August 1, 2011, the claims are time-barred, as they all are subject to a three-year limitations period.

In opposition, plaintiff contends that the motions based on the statute of limitations

should be denied. The complaint alleges a history of leaks into the Apartment beginning in 1998, and that such leaks were documented and reported to the Board. As of 2007, the Board acknowledged that the leaks had not been resolved. New leaks and cracks were reported by plaintiff in 2008, and the complaint alleges other incidents/further damage and that the Corporation has not undertaken numerous remedial measures related to these incidents. Thus, the complaint alleges a history of intermittent and recurring injuries, each of which gives rise to successive causes of action under the continuing wrong doctrine.

Here, the complaint alleges successive and recurring leaks, each of which caused additional damages. It also alleges a continuing duty on the Corporation's part to repair such leaks. Plaintiff concedes that her claim for monetary damages is limited to those damages that occurred within the applicable statute of limitations for each cause of action. Damages for repair costs regarding the September 2012 and November 2013 leaks are within the statute of limitations. Full rent abatement from September 19, 2012 and partial rent abatement dating back to August 1, 2008 would be recoverable under the breach of warranty of habitability. And, plaintiff would be entitled to recovery of other compensatory damages that were incurred within three years of the action's commencement, where applicable.

As to the first cause of action, caselaw provides that both monetary damages and an injunction may be warranted in a breach of warranty of habitability case, as well as in an action where there is an ongoing obligation on the defendant's part to perform repairs. Since landlords cannot be relieved of their responsibility under the warranty of habitability to make repairs, the usual remedies available for a breach thereof are an order directing the landlord to repair the defective condition, and damages (such as a rent abatement). In other words, although damages

may compensate for prior breaches of the warranty, they may not provide an adequate remedy for a continuing breach.

Further, the Hersh Affidavit cannot be considered as documentary evidence in support of a motion to dismiss. This document was submitted in connection with a prior action brought by plaintiff seeking pre-action disclosure and an opportunity to inspect the Terrace before any repairs or replacement by the Corporation. At that time, plaintiff stated that she had been told by the Corporation that it intended to replace the Terrace tiles and waterproofing of Apartment 20C-D, up to the greenhouse on the Terrace, and that the Corporation had no intention of requiring the disassembly of the greenhouse to install proper waterproofing beneath the Terrace. Plaintiff was concerned then, as she is now, that proper repairs be undertaken to remedy the situation permanently. On this note, affidavits are not considered documentary evidence under CPLR 3211(a)(1). Thus, the Board's motion, to the extent it is based on the Hersh Affidavit, should be denied.

On another note, the Corporation has not proffered any evidence of any final Board action setting forth any decision as to the scope of the intended roof repair work as of April 2013. Plaintiff, by an affidavit in opposition, states that during the Spring of 2013, she and the Board were in ongoing discussions regarding the Terrace work. In the prior action, plaintiff was seeking to compel access to the Terrace so that her own experts could inspect the conditions and make their own recommendations in contemplation of a litigation to compel proper and permanent repairs if the Corporation failed to properly resolve the leaks on its own. Thus, a statement of belief as to the Board's intent as of April 2013 cannot be deemed confirmation of knowledge of a final decision of the Board, when there were continuing discussions with the

Board and its representatives as to the proper scope of work, and when considering that the very gravamen of the earlier action was to protect and preserve evidence in advance of litigation to compel the Corporation to perform effective repairs.

Moreover, evidence exists showing that the Board had not made any final decisions, and that discussions regarding the scope of repairs were still ongoing, even after April 2013. Plaintiff submits a letter from the building's property manager dated December 30, 2013, wherein he states that to fully correct the issues regarding the Terrace, the building would need to proceed with the full Terrace replacement. In a separate letter dated April 3, 2014, the Corporation's attorney refers to "removal of the greenhouse --WJE will open up the sides of the Terrace enclosure to see if there is damage and, if so, will treat it accordingly." Thus, a "final decision" had not been made even as late as April 2014.

With further respect to the Hersh Affidavit, same is not a "judicial admission" to utterly refute any inference that plaintiff might not have known about the Board's decision until some time after the date of the affidavit. The doctrine of judicial estoppel does not apply to the instant case because plaintiff is not taking a position herein contrary to any position taken in the prior litigation. Moreover, a statement as to the perceived intent of *another party*, without any personal knowledge of the underlying fact, is neither an admission, nor a "position."

As to the Corporation's argument that the substance of the first cause of action is based solely on bad faith or disparate treatment to plaintiff as a shareholder, this ignores the contractual basis provided by the Lease which requires the Corporation to perform repairs to the roof, exterior façade, and other structural portions of the building. Thus, the claim for injunctive relief is based on the Corporation's obligations under the Lease. On this note, the fact that the

Corporation required removal of a greenhouse regarding other terrace roof repairs evinces that the Board had recognized that removal of a greenhouse would be required to completely and effectively resolve water infiltration problems. Here, plaintiff also suggests that the fact that Martin was on the Board for many years may explain the Board's reluctance to compel removal or disassembly of the 20C-D greenhouse.

Additionally, the Corporation ignores the full thrust of the first cause of action for injunctive relief by focusing solely on the language therein regarding removal of the greenhouse. The relief sought in the first cause of action includes numerous other requests, and ultimately, what is being sought is an order to compel the Corporation to do whatever may be necessary to address all problems arising from water infiltrations. None of the other relief sought has anything to do with removal of the greenhouse that was the subject of the quoted language from the Hersh Affidavit.

In reply, the Board reiterates that the first cause of action must be dismissed as time-barred. Here, plaintiff, in reality, seeks a reversal of the Board's determination not to remove the greenhouse on the Terrace. She is not interpreting the Lease. Thus, the instant proceeding, couched in various ways as an action for breaches of the warranty of habitability, the Lease, and fiduciary duty, and for nuisance and property damage, should have been brought as an Article 78 proceeding to challenge the Board's decision. Plaintiff cannot avoid the four-month statutory period by cloaking the action as one for a declaratory judgment and injunctive relief, and by framing her claims as a continuing wrong.

Here, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought. If the court determines that the underlying

dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation is statutorily provided, then the limitation period governs the declaratory/injunctive relief action. To the extent that plaintiff is trying to couch her claims as though they are for equitable relief, such attempt does not cure her failure to comply with the statute of limitations.

Alternatively, the first cause of action should be dismissed since it tracks the breach of contract (Lease) claim in the third cause of action.

Moreover, the Hersh Affidavit remains a proper form of documentary evidence for the court to consider. It establishes that plaintiff had knowledge of the Corporation's decision that it would not require removal of the greenhouse; thus, it qualifies as an informal judicial admission which may be considered in the instant motion.

Plaintiff cannot avoid her statements made in the Hersh Affidavit. Here, defendants' essential argument is that plaintiff's claims are time-barred because she had knowledge of the Corporation's decision to not remove the greenhouse, and thus had four months beginning in April 2013 to dispute that decision.

Additionally, the Board asserts that plaintiff's evidentiary submissions in opposition are unverified and inadmissible hearsay, and that they do not actually refute her own affidavit.

In reply, Belzer and Martin note that their motion pertains only to plaintiff's fourth, fifth and sixth causes of action. Notwithstanding allegations in the complaint of damages sustained since 1998, plaintiff concedes that she cannot recover under these causes of action for damages allegedly sustained prior to August 1, 2011. Thus, since there is no dispute in this regard, plaintiff should be limited to any potential recovery under these causes of action to damages

sustained after August 1, 2011.

*Discussion*

*Legal Standards*

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448 [1<sup>st</sup> Dept 2011], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1<sup>st</sup> Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1<sup>st</sup> Dept 2013]). On a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"In moving to dismiss a complaint pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima*

*facie*, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period” (*Papa v Fairfield on the Green*, 123 AD3d 990 [2d Dept 2014]).

*Belzer and Martin's Motion*

Belzer and Martin move to dismiss plaintiff’s fourth through sixth causes of action to the extent that they seek recovery for damages alleged prior to the applicable statutes of limitations to these claims. The fourth cause of action (breach of fiduciary duty) has a three-year limitations period when the plaintiff is, as here, seeking money damages (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]). Likewise, the fifth cause of action (negligence) has a three-year limitations period (*see Brunero v City of New York Dept. of Parks and Recreation*, 121 AD3d 624 [1<sup>st</sup> Dept 2014]). The sixth cause of action (private nuisance) also has a three-year limitations period (*see Essa Realty Corp. v J. Thomas Realty Corp.*, 932 NYS2d 760 [Sup Ct New York Cty 2011]).

In opposition, plaintiff states that she does not seek damages for any period prior to the applicable statute of limitations for each claim.

Accordingly, as there is no dispute in this regard, Belzer and Martin’s motion is granted to the extent of precluding plaintiff from recovering, as to the fourth, fifth and sixth causes of action, any damages sustained prior to August 1, 2011.

*The Board's Motion*

Under the same reasoning, the Board’s motion as to the second, third, fourth and sixth causes of action is granted. As such, the Board’s motion is granted to the extent of precluding

plaintiff from recovering, as to the second and third causes of action, any damages sustained prior to August 1, 2008 (*see Roman v Emigrant Sav. Bank-Brooklyn/Queens*, 111 AD3d 692 [2d Dept 2013] (statutory period for breach of warranty of habitability claim is six years); *Kent v 534 East 11<sup>th</sup> Street*, 80 AD3d 106 [1<sup>st</sup> Dept 2010] (statutory period for breach of lease is six years)). And, like as to Belzer and Martin discussed above, the Board's motion is further granted to the extent of precluding plaintiff from recovering, as to the fourth and sixth causes of action, any damages sustained prior to August 1, 2011.

Thus, the only issues remaining before the court pertain to plaintiff's first cause of action, which, as noted above, is directed only towards the Corporation.

It is clear from the complaint that plaintiff seeks both injunctive relief (by her first cause of action) as well as damages (by her remaining causes of action). Although plaintiff seeks damages for, *inter alia*, breach of the warranty of habitability, such damages might compensate her only for prior breaches of the warranty (*see Bartley v Walentas*, 78 AD2d 310 [1<sup>st</sup> Dept 1980]). In other words, such damages might not provide an adequate remedy for a continuing breach, proof of which might be forthcoming upon trial (*id.* at 314) ("Although damages may compensate for prior breaches of the warranty, they may not provide an adequate remedy for a continuing breach. Thus, for example, a shutdown of elevator service in a highrise apartment, a shutoff of hot or cold water, a failure to provide heat during the winter and other similar drastic continuous action by a landlord breaching the warranty may well require injunctive relief to restrain the continuation of the breach").

Here, plaintiff alleges, *inter alia*, breaches of the Lease and warranty of habitability, and seeks damages to compensate her regarding water infiltration incidents such as the September

2012 and November 2013 water infiltrations (including rent/maintenance abatements, and reimbursements for repairs and other out-of-pocket costs). Plaintiff alleges that such water infiltrations rendered her Apartment uninhabitable.

Simultaneously, plaintiff alleges that water infiltrations have “continued unabated, despite demand that the leaks be repaired” (Complaint, ¶ 54), and that her Apartment has remained uninhabitable to date due to such infiltrations. In this regard, plaintiff seeks various forms of injunctive relief; *e.g.*, replacement of the Terrace, repairs of façade walls, and replacement of a structural slab above the Apartment’s ceiling.

Thus, an alleged continuing breach of a lease, for which damages may not provide an adequate remedy, can sustain a claim for injunctive relief (*see 82 Retail LLC v Eighty Two Condominium*, 117 AD3d 587 [1<sup>st</sup> Dept 2014], *citing Bartley, supra*; *see also Nasaw v Jemrock Realty Co.*, 225 AD2d 385, 386 [1<sup>st</sup> Dept 1996] (“While we warned [in *Bartley*] that the function of the Supreme Court was not the detailed management of a building, we also noted that damages ‘may not provide an adequate remedy for a continuing breach . . . [which] may well require injunctive relief’”)).

Accordingly, at this juncture, plaintiff is permitted to seek damages arising from the prior alleged water infiltrations, as well as injunctive relief to remedy the alleged current and ongoing water infiltrations, despite the fact that both sets of allegations are based on theories such as breach of the Lease and breach of the warranty of habitability. The cases cited by the Board in their moving papers are distinguishable in that they do not concern allegations of such continuing breaches.

However, the first cause of action, to the extent it seeks a declaratory judgment, must be

dismissed for failure to state a claim. A cause of action for a declaratory judgment is “unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action” (*see Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50 [1<sup>st</sup> Dept 1988]). Here, plaintiff’s rights will be determined in the court’s evaluation of her claims for injunctive relief, and breaches of the Lease and warranty of habitability.

Additionally, the Board’s argument that the four-month statute of limitations applicable to Article 78 proceedings applies to bar the first cause of action is unavailing. It cannot be said that the first cause of action consists only of a challenge to the Board’s decision that it was not going to fully remove and replace the subject greenhouse on the Terrace.

As noted above, the first cause of action seeks injunctive relief in various other ways beyond the replacement of the greenhouse. Thus, the Board’s claim that the “real substance” of the first cause of action is based on a challenge to a Board decision based on alleged bad faith or disparate treatment is contradicted by the plain language of the complaint.

Moreover, even assuming the first cause of action seeks only to challenge a Board decision, the Board fails to show in its pre-answer motion to dismiss, by “documentary evidence” or otherwise, that the Board actually decided at some time prior to the execution of the Hersh Affidavit that the subject greenhouse would not be removed and replaced. Even assuming the Hersh Affidavit is admissible under CPLR 3211(a)(1), the statement at issue, supplemented by plaintiff’s affidavit submitted in opposition, does not “utterly refute” the complaint’s allegations. The statement, made on or about April 18, 2013, and pointed to by the Board in support of its claim, consists of the following: “I have been told by the Corp. that they intend to replace the terrace tiles and waterproofing of Unit 20C-D, up to the greenhouse on this terrace. The Corp.

has no intention to require the disassembly of the greenhouse in order to install proper waterproofing beneath the section of the terrace under the terrace” (Hersh Affidavit, ¶ 37).

Plaintiff, in opposition, clarifies that this statement expressed nothing more than her “belief” that the Board did not intend to remove the greenhouse in conjunction with Terrace roof repairs “at that time” (Affidavit in Opposition, ¶ 12), and that she was merely “reciting my understanding of the Board’s [then] current position with regard to the [T]errace roof repairs” (Affidavit in Opposition, ¶ 11). Moreover, plaintiff submits letters from the Corporation’s property manager and counsel dated well after the Hersh Affidavit which indicate that the Board had continued to contemplate full Terrace (and thus greenhouse) replacement.

The Board’s claim, made in passing, that the letters constitute a “slew of unverified and otherwise inadmissible hearsay . . . that do not actually refute [the Hersh Affidavit]” is unavailing. Such letters, made by the Board’s agents, could be admissible under the party admissions exception to the hearsay rule (*see Lloyds of London v Evanston*, 2014 WL 2763314 [Sup Ct New York Cty 2014]; *Rojas v Choice Hotels Intern. Services Corp.*, 2012 WL 893853 [Sup Ct New York Cty 2012] (hearsay statement of agent is admissible against employer under admissions exception to hearsay rule if making of the statement is an activity within the scope of agent’s authority)).

Thus, when considering plaintiff’s affidavit and the letters of the Corporation’s property manager and counsel in opposition, the court cannot conclude that the Hersh Affidavit “utterly refutes” any allegation in the complaint. And, the parties’ submissions fail to establish, as a matter of law, that a Board decision regarding the removal of the greenhouse was ever made. Thus, in addition to the reasons stated above, the four-month statute of limitations which governs

Article 78 proceedings is inapplicable here.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Alan Belzer and Susan Martin (motion sequence 001) to dismiss the complaint pursuant to CPLR 3211(a)(5), is granted to the extent of precluding plaintiff from recovering, as to the fourth, fifth and sixth causes of action, any damages sustained prior to August 1, 2011. It is further

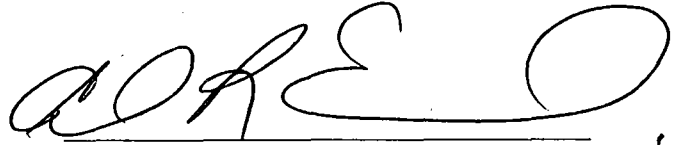
ORDERED that the motion of One Fifth Avenue Apartment Corp., Constance Ellis, Jamie Grau, Paul Gigante, Zachary Pack, Peter Pietrucha, Robert Schulman, Jeanette Vargas, Shivashish Chatterjee, Michael Del Nin, Corson Ellis, Charles Harbutt, Karen Harris, Dale Ponikvar, Richard Stewart, and Cynthia Wilby (motion sequence 002) to dismiss the complaint is granted pursuant to CPLR 3211(a)(5) to the extent of precluding plaintiff from recovering, as to the second and third causes of action, any damages sustained prior to August 1, 2008; and as to the fourth and sixth causes of action as to any damages sustained prior to August 1, 2011. It is further

ORDERED that the motion to dismiss the first cause of action is granted solely to the extent that plaintiff's request for a declaratory judgment is dismissed pursuant to CPLR 3211(a)(7); it is further

ORDERED that the remainder of the Board's motion (*i.e.*, that related to the remainder of the first cause of action) is denied. It is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on all parties within 20 days of entry.

This constitutes the decision and order of the Court.

A handwritten signature in black ink, appearing to read 'CAROL EDMEAD', written over a horizontal line.

Hon. Carol R. Edmead, J.S.C.

Dated: March 17, 2015

**HON. CAROL EDMEAD**