

**Board of Mgrs. of 823 Park Ave. Condominium v 823  
Park Ave. LLC**

2016 NY Slip Op 31328(U)

July 12, 2016

Supreme Court, New York County

Docket Number: 154423/2015

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION  
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THE BOARD OF MANAGERS OF 823 PARK  
AVENUE CONDOMINIUM,

Plaintiff,

Index No. 154423/2015

- against -

823 PARK AVENUE LLC and ELLIOT JOSEPH,

Defendants.  
-----x

**Hon. C.E. Ramos, J.S.C.:**

In motion sequence number 002, the plaintiff the Board of Managers of 823 Park Avenue Condominium (the Board) moves pursuant to CPLR 2221(a) and (b) to vacate or clarify this Court's so ordered transcript, dated February 3, 2016 (the February Order) (NYSCEF Doc. No. 24).

**Background**

This is an action by the Board of a condominium located at 823 Park Avenue, New York, NY, to recover damages from the condominium's sponsor, defendant 823 Park Avenue LLC and its principal Elliot Joseph (collectively, the Sponsor). The damages arise out of an extensive remediation project to the common elements of the condominium.

On July 31, 2015, the Sponsor moved to dismiss the complaint pursuant to CPLR 3211(a)(5), or alternatively, to dismiss the second through fourth causes of action pursuant to CPLR 3211(a)(1) and (7), and CPLR 3016(b), or to strike certain

portions of the complaint that contained references to settlement communications between the parties (Resnick Aff., Ex. B).

On February 3, 2016, during oral argument of the Sponsor's motion to dismiss, the Court, *sua sponte*, dismissed the complaint with leave to replead, conditioned upon the Board's payment of the expenses incurred by the Sponsor (Resnick Aff., Ex. E, 8:1-9).

Thereafter, the Board moves to vacate the February Order pursuant to CPLR 2221(a), or in the alternative, for clarification of the word "expenses" as it appears in the February Order pursuant to CPLR 2221(b).

#### Discussion

The Board argues that the February Order should be vacated because the Court exceeded its authority in dismissing the complaint and awarding attorney's fees to the Sponsor.

This Court grants the Board's motion to vacate and upon vacatur the Court dismisses the complaint without prejudice and awards the Sponsor that portion of attorney's fees incurred by the Sponsor in moving to strike the paragraphs in the complaint that contained references to the settlement communications.

This Court finds that the improper inclusion of the obvious settlement communications constitutes bad faith, and is sufficient to warrant the imposition of attorney's fees incurred

by 823 Park in moving to strike those paragraphs (22 NYCRR 130-1.2).

The inclusion of settlement communications is clearly barred by the pre-negotiation agreement executed by the parties, which states that "[a]ll statements, communications, correspondence, etc. exchanged between the parties during these discussions constitute settlement communications and may not be used in any manner for any purpose" (Resnick Aff., Ex. E, Ex. 5, § iv).

Furthermore, the complaint should be repled without the offending allegations.

Accordingly, it is hereby

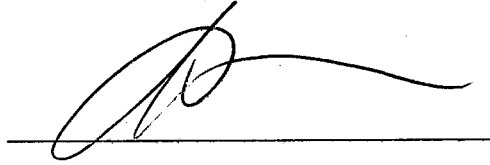
ORDERED that the plaintiff's motion to vacated is granted to the extent that the Court adheres to its prior order, but clarifies to the extent that the complaint is dismissed with leave to replead upon the plaintiff's payment of reasonable attorney's fees incurred by the defendants in moving to strike the settlement communications from the complaint, and it is further

ORDERED that the defendant shall file an affirmation setting the amount of legal fees incurred in making the motion to the extent of striking the settlement communications from the complaint and shall annex legal invoices, redacted of privileged information, substantiating the amount sought, and the plaintiff shall have 30 days thereafter to pay such amount and file proof

of payment with the Court and may, thereafter, file its amended complaint, if so advised, except that if the plaintiff challenges the amount sought by defendants, it shall file such objection and seek a conference with the Court.

DATED: July 12, 2016

ENTER:

A handwritten signature in black ink, appearing to be 'C. Ramos', is written over a horizontal line.

J.S.C.

**CHARLES E. RAMOS**