SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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YORGO VALYRAKIS, MARIA VARELA as executor of the ESTATE OF RAMON TAPIA, CASSANDRA GREGOV, POPI STEFANIDIS, and ADELAIDE MORRO, individually and on behalf of 346 WEST 48TH STREET HOUSING DEVELOPMENT FUND CORPORATION AND ITS SHAREHOLDERS,

Plaintiffs,

-against-

346 WEST 48TH STREET HOUSING DEVELOPMENT FUND CORPORATION, GINA GEORGIOU, ROGER CELESTIN, CARMEN AREVALO a/k/a ARCHUNDIA DIMITRIOS a/k/a JIMMY LAMBOURAS, individually and as members of the Board of Directors of 346 WEST 48TH STREET HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

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Index No. 152111/16

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.

For plaintiffs:
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Andrea Shapiro, Esq., PLLC
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212-965-8300

For defendants:
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By order to show cause, plaintiffs, individually and derivatively, seek injunctive and declaratory relief against defendants, both in their individual capacities and as members of the board of directors of a housing development fund corporation in which plaintiffs are shareholders. Defendants oppose and cross-move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the complaint. Plaintiffs oppose.

I. BACKGROUND

A. Undisputed facts

In 1987, the City of New York incorporated the 346 West 43rd Street Housing Development Fund Corporation (HDFC), authorizing it to issue a maximum of 2,500 voting shares. (NYSCEF 44). In its offering plan, the City, then the sponsor, converted the property to a co-op, offering ten apartments, each apartment representing 250 shares at a par value of one dollar. (NYSCEF 15).

The offering plan provides that "[s]hareholders will cast one vote per share in all shareholder decision-making, including electing members of the Board," and that personal tax deductions for shareholders are prohibited as "each apartment offered pursuant to [the offering plan] is allocated an equal number of shares without regard to its size or other characteristics which have a bearing on its fair market value, ..." (*Id.*). Additionally, each apartment must be used by the shareholder as his or her primary residence, and unless multiple apartments are adjoining or have been combined into a single unit, an owner may not maintain primary residences in multiple apartments. (NYSCEF 15).

In 1989, HDFC purchased the co-op from the City. In 1995, defendant Georgiou, an initial subscriber under the offering plan and owner of unit 5W, became treasurer of HDFC's board of directors. In July of that year, she purchased from HDFC the adjacent unit, 5E, acquiring an additional 250 shares, for $2,000. Following a board meeting at which plaintiff Stefanidis, decedent Tapia (the estate of whom plaintiff Varela is executor), and Georgiou were present, the board adopted a resolution approving the transfer. To "eliminate any conflict of interest issues," Georgiou abstained from voting. (NYSCEF 47, 66). Sometime thereafter,

Georgiou combined units 5E and 5F into a single unit, and as a result, held 500 shares in the co-op. (NYSCEF 23-24, 86).

At a shareholders meeting held in November 1995, at which plaintiffs Stefanidis, Valyrakis, Morro, and Tapia were present, Morro "raised the issue of . . . [the] sale of [apartments] 5E to 5W," but was "reminded and acknowledged" that Georgiou had briefed her on this issue. (NYSCEF 91). At a 1997 meeting, Morro "asked how many votes [Georgiou] had, [Stephanidis] asked why, [Morro] started to say something but then said forget it, [Georgiou] said she had two." (NYSCEF 71). Later that year, the board held an election at which all parties were present and agreed to elect defendant Arevalo to the board. (NYSCEF 82).

At a December 2007 meeting, all parties were present and, by unanimous vote, reelected Stefanidis, Georgiou, and defendant Celestin to president, vice president, and secretary, respectively. (NYSCEF 83).

At a board meeting held on April 20, 2015, the parties discussed amending HDFC's resale policy, determined by consensus that "there should be a resale policy, that capital improvements should be reimbursed and that there should be a base equity benefit," and agreed that at the next meeting, the parties would discuss other details before amending the existing policy. During the meeting, Valyrakis asked how apartments would be valuated if resold, to which counsel for HDFC responded that "all unit owners get 250 shares regardless of the size of the unit." Thus valuations based on shares was not recommended. Valyrakis also questioned the time frame for resale and whether the policy should even be discussed. (NYSCEF 87). An election was held. (NYSCEF 18).

B. Procedural history

By letter dated November 19, 2015, addressed to HDFC's attorney, plaintiffs demanded that Georgiou's shares be reduced from 500 to 250 and that she be given a single vote as required in the offering plan and under applicable law. Plaintiffs claimed that to the extent that the board had relayed the co-op's annual financial statements to Stefanidis, he had not distributed them to shareholders, that the proposed amended resale policy discussed on April 20 would "not be approved by the shareholders" as it violated the co-op's governing documents and its continued pursuit was a "waste of corporate assets," and that the board's failure to obtain audited financials and distribute them to shareholders also violated the bylaws. (NYSCEF 48). By letter dated January 22, 2016, defendants rejected the demand. (NYSCEF 49).

On March 7, 2016, plaintiffs commenced this action, advancing causes of action for: (1) a declaration that Georgiou is entitled to only 250 shares for apartments 5E/5W and one vote, as she had allegedly cast two votes during the April 20, 2015 election, and compelling defendants to restrict her voting rights accordingly; (2) a declaration and order directing defendants to allow Varela, as executor of Tapia's estate, to vote her shares and inspect the board's books and records; (3) a declaration that, because of the foregoing, the results of the April 2015 election were "not properly counted or reported"; (4) a declaration and order directing defendants to notice a new election to be held in April 2016; (5) a declaration and order directing the appointment of an unbiased inspector to be present at the April 2016 election; (6) a declaration and order directing defendants to allow plaintiffs "unfettered inspection of the minutes, books, records, documents and accounts" of HDFC; (7) a temporary and permanent injunction enjoining defendants from entering contracts or undertaking expenditures on behalf of the board, except for

"day to day expenditures"; (8) a declaration that the proposed resale policy violates the deed, certificate of incorporation, and proprietary lease, and an injunction restraining defendants from presenting it for a vote; (9) a declaration that defendants were required to issue an annual verified financial statement and conduct an audit of its books and records; (10) a declaration and order directing defendants to provide an accounting "for the expenditure of all of the funds of the corporation"; (11) damages exceeding $250,000; and (12) attorney fees. (NYSCEF 1).

By order to show cause dated March 17, 2016, plaintiffs seek, by way of preliminary injunction, the same relief requested in the first, second, fourth, fifth, and seventh causes of action in their complaint. (NYSCEF 3, 52). On March 22, 2016, another judge of this court, sitting in the ex parte part, temporarily restrained defendants from "undertaking to enter contracts on behalf of the HDFC including [its managing agent and law firm] and from making financial expenditures other than those ordinary day to day expenditures necessary to operate the building" pending the April 2016 meeting. (NYSCEF 53). At the June 8 hearing on the order to show cause, I lifted the TRO. (NYSCEF 99).

I address defendants' cross motion first.

II. DEFENDANTS' CROSS MOTION

A. Statute of limitations

1. Contentions

Defendants contends that plaintiffs' claim that the board's April 2015 election results were not properly counted or reported is time-barred, having been sought more than four months after the results of the election became final. The board's approval of Georgiou's acquisition of 250 additional shares is also time-barred, they argue, as it is being challenged more than 20 years

after the board's resolution. In any event, the approval of her acquisition is authorized by the HDFC's certificate of incorporation, its offering plan, and Business Corporation Law § 612(a), and plaintiffs cite no authority for the proposition that, by virtue of combining the two apartments, Georgiou forfeited half of her shares. Moreover, Stephanidis, Morro, and Tapia had been aware that Georgiou had two votes since at least 1997. (NYSCEF 72).

In opposition, plaintiffs deny that their challenge of the board's resolution is time-barred, as defendants' continuing duty to comply with the offering plan constitutes a "continuous wrong." They argue that defendants' continuing failure to remit a percentage of the proceeds of the sale to the City, thereby accruing interest on it, or alternatively, defendants' concealment of the details of the sale, tolled the statute of limitations. They also allege that Georgiou did not cast two votes until the April 2015 election, and that defendants rejected their November 2015 demand to restrict Georgiou's voting rights less than four months from the commencement of the action. They rely on minutes from the 1997 and 2007 shareholder elections in arguing that Georgiou cast only one vote and that votes were, until 2015, recorded orally, and Morro's May 22, 2016 affidavit, wherein she attests that she would have no reason to ask Georgiou in 1997 if she had a second vote, since she was allowed to cast only one vote at the time, and that plaintiffs "did not participate" in the sale and transfer to Georgiou of the second apartment. (NYSCEF 79-80).

In reply, defendants observe that absent a petition for mandamus, it is irrelevant that plaintiffs were unsuccessful in seeking a restriction on Georgiou's voting rights after the April 2015 election, and that therefore, the period within which they were required to commence suit began to run on either July 5, 1995, when the board notified plaintiffs that Georgiou would

acquire 500 shares and corresponding votes in the co-op, or October 12, 1995, when the topic was addressed and plaintiffs were present, or at the latest, the November 1997 shareholders meeting, where Georgiou herself clarified that she had two votes. To the extent that plaintiffs deny having discovered Georgiou's second vote before 2015, defendants observe that they do so notwithstanding the existence of "transparent, properly-conducted and recorded business transactions," and plaintiffs' apparent concession that they were aware of Georgiou's two votes in November 2015. Defendants also dispute that the board's approval of Georgiou's acquisition of 500 voting shares constitutes a continuing wrong, as her voting rights were fixed in 1995 and have not changed, and argue that the statute does not recommence each time Georgiou had an opportunity to exercise her voting rights, as to hold otherwise would effectively negate the statute. (NYSCEF 89-90).

2. Analysis

Pursuant to CPLR 3211(a)(5), a party may move to dismiss a cause of action as time-barred, and bears the initial burden of establishing that the statute has run on the plaintiff's cause of action, including the date on which the cause of action accrued. (*Lebedev v Blavatnik*, AD3d , 2016 NY Slip Op 06463, *3 [1st Dept 2016]; *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). A proceeding challenging an action taken by a cooperative corporation must be commenced within four months after the corporation's "determination to be reviewed becomes final and binding . . . ." (CPLR 217[1]; *Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012]; *Buttitta v Greenwich House Coop. Apartments, Inc.*, 11 AD3d 250, 251 [1st Dept 2004]). A determination is final when the party challenging it becomes aware of being aggrieved by it. (*Matter of Martin v Ronan*, 44 NY2d 374, 380-381 [1978]; *Matter of Hia v New York City Dept.*

of Corr., 110 AD3d 570, 571 [1st Dept 2013]).

When seeking to compel a corporation to perform a duty, the proceeding must be brought within four months after the corporation's refusal to act "upon the demand of the petitioner . . . ." (CPLR 217[1]; *Flosar Realty LLC v New York City Hous. Auth.*, 127 AD3d 147, 154 [1st Dept 2015]; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]). The party "may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. . . . [and thus] must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief"; otherwise the claim is barred by laches. (*Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182 [4th Dept 2014]).

In either case, the statute is tolled where the corporation's final determination is ambiguous, or whether there is evidence of the corporation's "continuing improper practice" preventing the accrual of the plaintiff's cause of action. (*Matter of Kaufman v Town of New Castle*, 116 AD3d 1044, 1045 [2d Dept 2014]; *Cannon Point N., Inc. v City of New York*, 87 AD3d 861, 716 [1st Dept 2011]). Tolling is "predicated on continuing wrongful acts and not the continuing effects of earlier unlawful conduct"; it pertains to harm that cannot be exclusively traced back to the time of the first violation. (*Capruso v Vil. of Kings Point*, 23 NY3d 631, 639-640 [2014]).

a. First cause of action

The cause of action seeking to compel the board to reduce Georgiou's share allocation to 250 shares accrued on January 22, 2016, when the board rejected plaintiffs' demand for such a reduction. As plaintiffs commenced this action on March 7, 2016, it is timely, and thus

defendants fail to meet their initial burden of establishing that the statute has run. However, as the 1995 and 1997 meeting minutes demonstrate that, as early as 1997, Tapia, Stefanidis, and Morro were or should have been aware that Georgiou had two votes resulting from her acquisition of 500 shares, and the minutes from the 1997 and 2007 elections do not prove otherwise or that Georgiou did not cast two votes until 2015. Given plaintiffs' longstanding awareness of the main issue here, the 18-year delay in making their demand is unreasonable, constitutes laches, and thereby equitably bars the first cause of action. (*See Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233, 233 [1st Dept 2005], *affd* 7 NY3d 427 [2006] [petitioner's awareness of restitution obligation for nearly three years following forfeiture, and offered no excuse for waiting to demand that district attorney apply forfeited funds toward obligation and thus proceeding barred by laches]; *Leising v Town of Clarence*, 144 AD2d 969, 970 [4th Dept 1988] [laches barred plaintiffs' action to enjoin defendants given plaintiffs' 30-year acquiescence in alleged violation of ordinance]).

Plaintiffs' contention that the statute of limitations is tolled by defendants' alleged ongoing violation of HDFC's governing documents is without merit, as defendants' alleged approval of the sale and transfer of shares to Georgiou constitutes a discrete wrongful act, notwithstanding her ongoing ability to cast two votes. (*See Selkirk v State of New York*, 249 AD2d 818, 819 [3d Dept 1998] [petitioner could not rely on "continuing effects of earlier unlawful conduct" to toll limitations period]; *cf. 1050 Tenants Corp. v Lapidus*, 289 AD2d 145, 147 [1st Dept 2001] [each day lessees failed to maintain leaking air-conditioning unit, allowing nuisance to persist, constituted accrual of new cause of action, thereby tolling limitations period]). To the extent that HDFC continues to be harmed by accrued interest on its unpaid

obligation to the City, the allegation is conclusory and unsubstantiated.

b. Third cause of action

For the reasons set forth above, the third cause of action is time-barred.

B. Individual claims

Defendants argue that as plaintiffs allege harm to the co-op, not themselves individually, they lack standing to sue in their individual capacities, and to the extent that their personal and derivative claims are intermingled, the entire complaint must be dismissed. (NYSCEF 72). Plaintiffs disagree and suggest that the court is able to differentiate between the individual and derivative claims. (NYSCEF 79). In reply, defendants reiterate their previous contentions. (NYSCEF 89).

Where a shareholder sues a corporation in his or her individual capacity "to recover damages resulting from harm, not to the corporation, but to individual shareholders, the suit is personal, not derivative, and it is appropriate for damages to be awarded directly to those shareholders." (*Glenn v Holeltron Sys., Inc.*, 74 NY2d 386, 392 [1989]). Thus, a shareholder has no individual cause of action against a party who has injured the corporation, except when the alleged wrongdoer has breached an independent duty to the shareholder distinct from that owed to the corporation. (*Serino v Lipper*, 123 AD3d 34, 39 [1st Dept 2014]). Where it is not apparent whether a claim is brought derivatively or individually, the court should consider "who suffered the alleged harm . . . [and] who would receive the benefit of any recovery or other remedy." (*SFR Holdings Ltd. v Rice*, 132 AD3d 424, 425 [1st Dept 2015], *lv dismissed* 27 NY3d 977 [2016]; *Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]).

Here, given plaintiffs' failure to delineate of their claims, which are couched in terms of

defendants' wrongdoing rather than who bore the injury, it is not apparent whether they are advanced individually or on behalf of HDFC. With the exception of the claims by which they seek the vindication of Verela's voting rights and the rights of individual plaintiffs to inspect corporate books and records (second and sixth causes of action), the remaining claims concern alleged harm to the co-op and its shareholders as a whole, all of whom would benefit from the relief sought. Thus, to the extent causes of action are advanced in plaintiffs' individual capacities, they are dismissed. (*See Tae Hwa Yoon v New York Hahn Wolee Church, Inc.*, 56 AD3d 752, 755 [2d Dept 2008] [as record demonstrated that plaintiff sought to vindicate the non-profit corporation's rights, causes of action brought in individual capacity dismissed]).

C. Derivative claims

1. Contentions

Defendants contend that plaintiffs' desire to remove individual defendants from the board in an effort to amend HDFC's resale and subletting policy with terms more favorable to them preclude them from suing defendants on behalf of HDFC absent a showing that they can fairly represent its interests. They also argue that plaintiffs fail to allege that they first demanded that HDFC pursue the claim, or that such a demand would have been futile, and deny that the November 19, 2015 letter constitutes a demand. (NYSCEF 72).

In response, plaintiffs assert that they properly demanded that defendants "comply with their duties on the threat of litigation," and that they are otherwise "competent" to bring these claims. They deny any conflict, as defendants do not comprise a majority necessary to amend the resale policy. (NYSCEF 79). In reply, defendants deny that the November 19 letter constitutes a demand under Business Corporation Law § 626(c), absent a demand that the board initiate a

lawsuit. (NYSCEF 89).

2. Analysis

Pursuant to Business Corporation Law § 626, a shareholder of a domestic or foreign corporation may commence an action "in the right" of the corporation, and the complaint "shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." Such a demand has been "universally held to be a substantive requirement" for bringing a derivative claim. (*Central Laborers' Pension Fund v Blankfein*, 111 AD3d 40, 46-47 [1st Dept 2013], citing *Kamen v Kemper Fin. Servs., Inc.*, 500 US 90, 96-97 [1991]). Absent a demand, the shareholder may obtain the right to derivatively sue by alleging with particularity:

> (1) that a majority of the board of directors is interested in the challenged transaction, which may be based on self-interest in the transaction or a loss of independence because a director with no direct interest in the transaction is "controlled" by a self-interested director, (2) that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances, or (3) that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors.

(*Taylor v Wynkoop*, 132 AD3d 843, 844-845 [2d Dept 2015] [internal quotation marks omitted], citing *Marx v Akers*, 88 NY2d 189, 200-201 [1996]).

While the November 19, 2015 letter does not contain a demand that the board initiate suit, it sufficiently placed the board on notice of the alleged abuses, and gave it an opportunity to investigate and decide whether or not to take corrective action. (*See generally Barr v Wackman*, 36 NY2d 371, 378 [1975] [demand requirement animated by principle of corporate control that board shall "have primary responsibility for acting in the name of the corporation and . . . are often in the best position to correct alleged abuses without resort to the court"]).

The motives defendants ascribe to plaintiffs, at this stage, are speculative and thus do not preclude the derivative claims. (*Cf. James v Bernhard*, 106 AD3d 435, 435 [1st Dept 2013] [plaintiff substituted in derivative suit where he commenced action two months after corporation instituted internal disciplinary proceedings against him, which suggested improper motivation]; *Gilbert v Kalikow*, 272 AD2d 63, 63 [1st Dept 2000], *lv denied* 95 NY2d 761 [manifest hostility between parties evidenced by various pending litigation "suggest(ed) that the commencement of the action may have been inappropriately motivated by a desire to retaliate . . . or obtain leverage," thus precluding derivative claim]).

However, the November 19 letter only references the alleged wrongs of the corporation which serve as the basis for the first, third, eighth, and ninth causes of action, and thus plaintiffs fail to comply with BCL § 626(c) as to the remaining causes of action.

D. Claims against individual defendants

As plaintiffs allege no affirmative tortious conduct by defendants in their individual capacities, the complaint is dismissed as against them individually. (*See Pomerance v McGrath*, AD3d , 2016 NY Slip Op 06462, *4 [1st Dept 2016] [mere alleged nonfeasance of board members not sufficient to impose personal liability]).

E. Business judgment rule

The seventh cause of action, as asserted both individually and derivatively, is dismissed. (*Supra*, II.B.C.). Accordingly, the branch of defendants' motion relying on the business judgment rule is academic and need not be addressed.

F. Remaining causes of action

Defendants do not oppose the second, fourth, and fifth causes of action and consent to the

relief requested therein, to the extent that Varela may vote Tapia's shares, that a new shareholder election will be held following disposition of this motion, and that an unbiased inspector attend the election, with the proviso that HDFC's managing agent and attorney not be deemed biased for purposes of selecting an inspector. (NYSCEF 72).

III. PLAINTIFFS' MOTION

As the first and seventh causes of action have no merit, and as defendants consent to the relief requested in the second, fourth, and fifth causes of action, there is no basis for injunctive relief. In any event, the relief sought by plaintiffs would not preserve the status quo, and is identical to the ultimate relief sought in the complaint, notwithstanding their inclusion of an additional, unspecified cause of action for damages. Absent extraordinary circumstances not present here, particularly as the alleged occurrences giving rise to plaintiffs' claims have persisted for decades, a preliminary injunction is inappropriate. (*See Bd. of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824 [2d Dept 2010] [board not entitled to preliminary injunction compelling defendants to restore condominium unit to original condition as it sought identical relief in complaint]; *see also SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005] [order compelling defendant to affirmatively take action did not preserve status quo and thus inappropriate for preliminary injunction]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for a preliminary injunction is denied; it is further

ORDERED, that defendants' motion is granted to the extent as follows: the complaint is dismissed in its entirety as against defendants to the extent named in their individual capacities;

the first, third, seventh, and tenth causes of action are dismissed in their entirety; the sixth cause of action is dismissed to the extent asserted derivatively; and the eighth, ninth, eleventh, and twelfth causes of action are dismissed to the extent asserted individually; and it is further

ORDERED, the remaining causes of action (sixth as asserted individually; eight, ninth, eleventh, and twelfth as asserted derivatively; second, fourth, and fifth are severed.

ENTER:

Barbara Jaffe, JSC

DATED: October 13, 2016
New York, New York