

**Park Union Condominium v 910 Union St., LLC**

2017 NY Slip Op 32123(U)

October 6, 2017

Supreme Court, New York County

Docket Number: 650291/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SALIANN SCARPULLA  
*Justice*

PART 39

-----X

THE PARK UNION CONDOMINIUM, THE BOARD OF  
MANAGERS OF THE PARK UNION CONDOMINIUM,  
  
Plaintiff,

INDEX NO. 650291/2015

MOTION DATE 4/12/2016

- v -

MOTION SEQ. NO. 006

910 UNION STREET, LLC,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 218, 220, 221, 222, 223, 224, 225, 226, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 264, 276, 277, 278, 279, 304

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is

In this action for, inter alia, breach of fiduciary duty, third-party defendants Christian Baker (“Baker”), Eric Bloomfield (“Bloomfield”), Chris Brumm (“Brumm”) and KW Property Management & Consulting (“KW”) move (in motion sequence number 006), pursuant to CPLR §3211 (a) (7), to dismiss 910 Union Street LLC’s (the “Sponsor”) third-party complaint (“T-P Complaint”). The Sponsor, as third-party plaintiff, moves (in motion sequence number 008), pursuant to CPLR §3025 (b), to amend the pleadings and caption, nunc pro tunc, to reflect the proper parties and status of the claims, and to compel

the Board of Managers of the Park Union Condominium (the "Board"), the individual Board members and Andrew Klein ("Klein") to respond to its discovery demands dated February 24, 2016. Motion sequence numbers 006 and 008 are consolidated for disposition.

The underlying dispute concerns development of the Park Union Condominium (the "Condominium") which is located at 910 Union Street in Brooklyn, New York. In its T-P Complaint, the Sponsor alleges that, in 2012, it developed the original 1914 two-story masonry and brick structure now known as Park Union Condominium, by adding five stories and converting it into 15 residential units. Transfer of control of the Condominium to the current Board took place in or about January 2014. The Sponsor alleges that it owns the largest unit in the premises, measuring 5,820 square feet, which is located on the ground floor and which it operates as a commercial space. It also owns 264 square feet on the roof, which it rents to a commercial tenant. The sponsor's unit has its own designated elevator, used exclusively by the commercial unit tenant and its customers.

The Sponsor contends that the Condominium's by-laws prohibit the Board and the property manager from assessing the commercial unit any assessment or common charge for items that are exclusive to the residential units. On March 17, 2014, the Sponsor received a letter from the Board, through its counsel, detailing complaints and alleged property damage stemming from construction defects and seeking redress. The Sponsor requested an opportunity to inspect the allegedly damaged areas to see whether they were under warranty and subject to repair. Then the Sponsor tendered its defense and

indemnity to its contractor, B & H Construction (“B & H”), and its architect, ME Architect P.C. (“ME”), pursuant to their respective contracts.

As per the T-P Complaint, the Board denied the Sponsor access to the damaged areas despite repeated requests during the month of April 2014. Due to a storm on April 30, 2014, which “dumped more water than Hurricane Sandy resulting in county wide flooding,” the Condominium’s already compromised residential elevator and elevator machine were flooded, causing the elevator control panel to short, and leaving the elevator inoperable. The flood also caused property damage to the residential units below.

#### **Special Proceeding in New York State Supreme Court, Kings County**

After being advised by the Board and KW that they were moving forward with planned repairs as of May 5, 2014, the Sponsor filed a petition, on May 1, 2014, seeking an emergency temporary restraining order and a preliminary injunction against the Condominium and the Board in the Supreme Court, Kings County (the “Kings County Proceeding”).<sup>1</sup> In the Kings County Proceeding, the Sponsor sought, among other things, access to the Condominium to conduct an inspection of alleged construction defects, and to enjoin respondents from moving forward with planned construction, maintenance, and repairs of the building.

The court in the Kings County Proceeding granted Sponsor’s petition on May 1, 2014 and stayed construction on the roof and windows through May 6, 2014, and stayed

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<sup>1</sup> *910 Union Street, LLC v 910 Union Street, Park Union Condominium, Board of Managers of Park Union Condominium*, Index No. 503840/2014.

other construction through May 9, 2014. Pursuant to the order, the Sponsor was also allowed to conduct inspections of the premises. The Sponsor determined, post-inspection, that the residential unit owners' elevator was damaged and inoperable, that only the bulk head roof over the elevator machine room required immediate repair, and that the repairs to the roof were covered under warranty.

Following unsuccessful informal settlement discussions between the parties, the Sponsor filed another order to show cause, on June 27, 2014, seeking to enjoin the Board from moving forward with a planned July 1, 2014 assessment, and requesting a hearing to determine whether the special assessment was void ab initio and whether the Board failed to protect the premises during the storm.

On July 1, 2014, the Board voted to collect a special assessment, in the amount of \$400,000, "to conduct emergency repairs to the items allegedly damaged following the April 30, 2014 storm." The Sponsor's pro rata share of the assessment constituted 20.55%, or \$71,425.50.

The Sponsor alleges it was not responsible for any costs associated with the elevator used by the residents. The T-P Complaint further alleges that the Board and KW intentionally misled the Sponsor and all the unit owners as to the nature of the repairs, by characterizing them as "emergency and necessary" when they were instead upgrades and capital improvements.

The Supreme Court, Kings County, denied the Sponsor's order to show cause for a temporary restraining order, and referred the matter of whether the special assessment

was void ab initio to a referee to hear and report.<sup>2</sup> However, on July 23, 2015, the parties stipulated to withdraw the petition seeking the framed issue hearing, and various related motions seeking to dismiss the petition and for discovery. The special proceeding was discontinued, with prejudice, on July 13, 2016.

### **The November 10, 2014 Settlement Agreement**

On November 10, 2014, the Condominium and its Board entered into a settlement agreement (the “Agreement”) with the Sponsor. The Agreement, which was executed by Baker, in her capacity as President of the Board, on behalf of the Board, the Condominium and the unit owners, provides in relevant part:

**WHEREAS**, the Condominium and Individual Unit Owners, through the Board, possessed certain claims (the “Board Claims”) against, among others, the Sponsor, pertaining to the construction of the Condominium building. . .

**WHEREAS**, the Sponsor commenced a special proceeding against the Condominium and the Board in the Supreme Court of the State of New York, County of Kings, styled *910 Union Street, LLC v. 910 Union Street et al.*, under Index No. 503840/2014 (the “Sponsor Action”) . . .

**WHEREAS**, the Board has sought to amend certain provisions of the By-Laws as it pertains to the Sponsor and the Commercial Unit, to which the Sponsor has objected. . .

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<sup>2</sup> The court held that “[t]he propriety of how [the assessment] was calculated or applied and claims relating to mitigation of damages shall not be the subject of the hearing. The only subject shall be whether the Board had authority to make this special assessment.” *910 Union Street, LLC v. 910 Union Street, Park Union Condominium, Board of Managers of Park Union Condominium Sup Ct, Kings County*, July 18, 2014, Knipel, J..

WHEREAS, the Parties appeared at a mediation on September 30, 2014, and agreed to resolve their respective claims, including the Board Claims, subject to the terms and conditions of this Agreement.

\* \* \*

1. **SETTLEMENT AMOUNT.** The Sponsor has offered and the Board has agreed to accept, in consideration of the settlement of the Board Claims and the Sponsor Action, a total amount of \$550,000.00 (the "Settlement Amount"), subject to the terms and conditions set forth below.

\* \* \*

4. **SPECIAL ASSESSMENT AND COMMERCIAL UNIT.** Upon timely receipt of the Settlement Amount, the Board agrees (a) that the Commercial Unit's share of the special assessment, assessed by the Board on or about June 5, 2014 (the "Special Assessment"), including, all interest, late fees, and attorneys' fees incurred in connection therewith, shall be deemed paid in full; and (b) to discharge Sponsor's responsibility and/or liability as it relates to the Special Assessment.

\* \* \*

**8. RELEASES.**

(a) Upon execution of this Agreement, the Parties agree to execute Releases (the "Releases") in favor of one another in the forms annexed hereto as **Exhibits "E," "F," and "G."**

(b) Said Releases, referenced in paragraphs 2 and 8 (a) above, shall not become effective unless and until the Board receives timely payment of the full Settlement Amount (*i.e.*, Initial Payment and Second Payment).

(c) It is expressly understood and agreed that the Releases do not abrogate any responsibilities or obligations of the Parties under this Agreement.

The Sponsor alleges that on November 18, 2014, 7 days after the Agreement was signed, it was informed for the first time, that the insurance company Chubb had paid out a total of \$400,000 to three of the unit owners of the Condominium – Baker, Klein and Pollack – for the same dates of loss and damages that the Board sought recovery from the Sponsor, and was asserting its right of subrogation over the \$550,000 settlement figure.

It is the Sponsor's contention that the Board intentionally withheld information relating to the payouts and Chubb's potential first party liens prior to and during the mediation, as well as during the drafting and execution of the Agreement. The Sponsor claims that the Board, or at least Baker and Klein, were complicit in committing insurance fraud by submitting reports from the Board's expert during mediation that were different from the inflated reports submitted to Chubb, to obtain a higher insurance payout.

As a result, the Sponsor insisted on getting revised releases because it claimed that the original releases were defective in that they fail to reference the Chubb claim, and the Agreement fails to refer to the Chubb payouts. The \$550,000 settlement amount has not been not paid.

### **The Present Action**

The action before me was initiated, on February 2, 2015, by the Condominium and the Board against the Sponsor via a motion for summary judgment in lieu of complaint, seeking enforcement of the Agreement. I denied the motion on July 9, 2015 and treated the affidavit in support thereof as the complaint (the "July 2015 decision").

In November 2015, the Sponsor commenced this third-party action against KW, B & H, and ME and four Condominium unit owners, in their individual capacities and as members of the Board: Baker, Bloomfield, Brumm and Klein. In its T-P Complaint, the Sponsor seeks declaratory relief and asserts causes of action against Baker, Brumm,

Bloomfield, Klein and KW for breach of fiduciary duty, and against B & H and ME for negligence and/or culpable conduct.<sup>3</sup>

Plaintiffs appealed my July 2015 decision and, on June 30, 2016, the Appellate Division, First Department, reversed and granted the Condominium's and the Board's motion for summary judgment in lieu of complaint. (the "First Department Decision"). The First Department held that "the parties' settlement agreement constituted 'an instrument for the payment of money only' (CPLR 3213) and that defendant defaulted by failing to make payment under its terms." *The Park Union Condominium v. 910 Union Street, LLC*, 140 A.D.3d 673 (1st Dept. 2016). The First Department further stated that:

In opposition, defendant failed to raise a triable issue as to a defense to the instrument []. The agreement contained an unconditional promise by defendant to pay plaintiffs upon the execution of releases attached to the agreement, and it required no additional performance by plaintiffs as a condition precedent to payment or otherwise made defendant's promise to pay something other than unconditional.

We have considered the defenses raised, including that plaintiffs intentionally concealed that the condominium's individual unit owners had made claims to their insurer related to defendant's construction of the condominium, and find them unavailing as a matter of law.

*Id.* at 673-674.

Baker, Bloomfield, Brumm (together the "Individual Third-Party Board Defendants") and KW (collectively, the "Third-Party Board Defendants") now move to dismiss the T-P Complaint, pursuant to CPLR §3211 (a) (7), arguing that the matters

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<sup>3</sup> The Sponsor executed a stipulation of discontinuance without prejudice, on March 16, 2016, as to B & H and ME and a stipulation of discontinuance with prejudice, on January 18, 2017, as against Andrew Klein. Thus, I will not address any claims/causes of action that pertain to Klein, B & H and ME on this motion.

addressed in the T-P Complaint “concern[] matters that are two years old, have been resolved by the parties’ Settlement Agreement, no longer concern the Sponsor, and [] fail to state cognizable claims.”

### Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). In deciding a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR §3211 (a) (7), the “court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dept. 2002).

A claim based on misrepresentation, fraud, or breach of trust, however, must be pleaded with particularity according to CPLR § 3016 (b). *See EBC I, Inc. v. Goldman Sachs & Co.*, 91 A.D.3d 211, 219 (1st Dept. 2011). To withstand scrutiny under CPLR § 3016, the complaint need only set forth the alleged misconduct in sufficient detail to inform the defendants of the substance of the claims. *Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 320 (1st Dept. 1997).

In addition, where a party seeks to dismiss declaratory causes of action on a CPLR § 3211 (a) (7) motion, the court shall only consider “the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration.” *North Oyster Bay Baymen’s Assn. v. Town of Oyster Bay*,

130 A.D.3d 885, 890 (2d Dept. 2015) (internal quotation marks and citations omitted).

### **Cause of Action for Declaratory Relief**

On its declaratory judgment cause of action, the Sponsor requests the court to determine that: 1) the Condominium special assessment was improperly calculated and assessed as it pertains to the Sponsor, and void it as a matter of law; and 2) the Board failed to properly protect the premises during the April 30, 2014 storm and is, therefore, responsible for the property damage flowing from the storm.

The Third-Party Board Defendants contend that this cause of action fails to state a claim because the April 2014 “storm” related issues, and the resulting June 2014 “special assessment,” are matters that were resolved in the Agreement.

For a court to entertain a motion for a declaratory judgment, the controversy must be live and justiciable. A court is precluded from considering questions rendered moot in light of an intervening settlement agreement. *See Amherst & Clarence Ins. Co. v. Cazenovia Tavern*, 59 N.Y.2d 983, 984 (1983); *Stulz v. 305 Riverside Corp.*, 150 A.D.3d 558, 559 (1st Dept. 2017) (dismissing declaratory judgment cause of action because the claim was moot).

Here, the Agreement explicitly states that the Sponsor agreed to pay \$550,000 to the Board to settle both the Board’s claims pertaining to the alleged construction defects and the Sponsor’s Kings County action. Hence, the Agreement conclusively renders moot the issues in the Sponsor’s third-party demand for declaratory relief relating to the rights and duties of Baker, Bloomfield, Brumm and KW regarding the assessment, and damages to the building before, during, and after the storm.

In addition, the issues raised in the Kings County Action mirror those raised by the Sponsor as an alleged controversy in this action. Indeed, the issues for which the Sponsor seeks declaratory relief here were raised in the petition and order to show cause filed in the Kings County Action, and were later settled and subsumed in the Agreement.

Thus, the parties' execution of the Agreement, which globally resolved their dispute and which was upheld by the Appellate Division, and the releases exchanged relating to the Agreement, render the cause of action for declaratory relief moot. In other words, there is no justiciable controversy for the court to determine. *See, e.g., Matter of Gates v. Hernandez*, 26 A.D.3d 288, 289 (1st Dept. 2006) (dismissing an appeal because “[o]nce petitioner agreed to [the] settlement, the lawsuit's controversy became moot.”); *Matter of Ideal Mut. Ins. Co.*, 174 A.D.2d 420, 421-422 (1st Dept. 1991) (finding that in light of the parties' release agreement there was no justiciable controversy). The Sponsor's declaratory judgment cause of action is therefore dismissed.<sup>4</sup>

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<sup>4</sup> Because I am granting dismissal based on the absence of a justiciable controversy, I do not address the Third-Party Board Defendants' other arguments in favor of dismissal. I note, however, that KW's argument that it is improperly identified and sued as the Condominium's property manager is meritless. The T-P Complaint identifies “KW” as the property manager based on minutes of the Board meetings that state that “[a]lso in attendance was Andy Ashwal of KW Management (‘KW’ or ‘Managing Agent’).” The Board also notes that “Park Union had now signed a contract with KW to act as the new managing agent for the Condominium.” The affidavit of Andy Ashwal in which he avers that NNC rather than KW is the managing agent and that to “[his] knowledge, KW is not even a legal entity” is confusing, because he is listed as the Executive Director of KW on its website and both NNC and KW list the same New York address.

### **Breach of Fiduciary Duty Claim Against Baker, Brumm, Bloomfield, and KW**

In its T-P Complaint, the Sponsor alleges that Baker, Brumm, Bloomfield and KW breached their fiduciary duty by “failing to protect the Premises during the April 30, 2014 storm,” “intentionally withholding knowledge of first party payout during the mediation, refusing to provide Sponsor with the appropriate Releases and Hold Harmless, committing insurance fraud, intentionally miscalculating the share of the Special Assessment and misleading the Sponsor as to [the assessment’s] underlying basis.” The Sponsor further alleges KW, as the property manager, joined the Board in harassing and maligning the Sponsor in breach of its fiduciary duty and the Condominium by-laws.

In their motion to dismiss, the Third-Party Board Defendants argue that they owe no fiduciary duties to the Sponsor and that the Appellate Division decision held that the Sponsor’s claims of wrongdoing by the Board defendants are “unavailing as a matter of law.” *See Park Union Condominium*, 140 A.D.3d at 674.

Contrary to the Third-Party Board Defendants’ position, assuming the Sponsor’s allegations are true -- that it owned the commercial unit in the Condominium at the time of the alleged wrongdoing, -- the Sponsor has standing to bring this suit. Further, the June 25, 2014 deed, states, in relevant part, that the commercial condominium unit(s) located at 910 Union Street, Brooklyn, were transferred from 910 Union Street, LLC to Grand Army Union LLC.

Notwithstanding the foregoing, the Third-Party Defendants have made out a *prima facie* case in support of dismissal. First, pursuant to General Obligations Law § 15-108 (c), a plaintiff who has obtained his own release may not seek contribution from a third

party. See *Gonzales v. Armac Indus.*, 81 N.Y.2d 1, 5 (1993) (General Obligations Law § 15-108 (c) establishes a *quid pro quo* arrangement, where the settling tortfeasor limits its liability but in exchange forfeits any right to contribution); see also *Diversified Group, Inc. v. Marcum & Kliegman LLP*, 129 A.D.3d 552, 552 (1st Dept. 2015).

Next, as to KW, a managing agent is a fiduciary to the condominium, not to the individual unit owners. *Caprer v. Nussbaum*, 36 A.D.3d 176, 192 (2d Dept. 2006). Further, even though there was no formal release between KW and the Sponsor, the latter is barred from pursuing a contribution claim pursuant to General Obligations Law § 15-108 (c). *Gonzales*, 81 N.Y.2d at 6.

Lastly, with respect to Baker, Bloomfield and Brumm, the Sponsor does not adequately plead a cause of action for breach of fiduciary duty. Directors and officers, in their capacity as members of a board, owe a fiduciary duty to individual unit owners in their management of the common property. See, e.g., *Bryan v. West 81 St. Owners Corp.*, 186 A.D.2d 514, 515 (1st Dept. 1992); *Caprer*, 36 A.D.3d at 193. However, “the business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority.” *Berenger v. 261 West LLC*, 93 A.D.3d 175, 184 (1st Dept. 2012). Moreover, without allegations of independent tortious conduct, individual members of condominium boards cannot be held liable for breach of fiduciary duty. Here, Sponsor’s T-P Complaint does not allege any individual conduct by Baker, Bloomfield and Brumm other than the allegations that it makes against the Board. I therefore dismiss the cause of action for breach of fiduciary duty.

### **Motion to Amend Pleadings and Caption and Compel Discovery**

On July 22, 2016, the Sponsor moved, pursuant to CPLR § 3025 (b), for leave to serve an amended T-P Complaint and to amend the caption because of the First Department Decision. The Sponsor seeks to add “necessary parties” and add new causes of action for fraud, fraudulent inducement, aiding and abetting fraud, negligent misrepresentation, breach of contract and unjust enrichment. The Sponsor further contends that a pleading and caption amendment would not prejudice any party.

The Sponsor also moved, pursuant to CPLR § 3124, for the Court to direct the Board, Board members, and Klein to comply with its February 24, 2016 discovery demands, and, pursuant to CPLR § 3126, to strike the pleadings of the Board, Board members, and Klein if they fail to comply with the discovery demands.<sup>5</sup>

In opposition, the Third-Party Board Defendants argue that the proposed amended T-P Complaint is futile, because the Sponsor’s claims are barred under the doctrines of law of the case, res judicata and collateral estoppel.

The gravamen of the Sponsor’s proposed amended complaint is that the Condominium, the Board, Baker, Bloomfield, and Brumm, individually and in their capacity as Board members, and Klein, along with NNC and KW fraudulently induced the Sponsor to enter into the Agreement, and thereby obtained double recovery. The record reveals that the Sponsor previously raised these claims in its opposition to the

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<sup>5</sup> Any arguments relating to Klein are moot because on or about January 18, 2017 the parties stipulated to discontinue with prejudice the action as against him.

summary judgment in lieu of complaint, and that the Appellate Division rejected the claims as a matter of law:

“We have considered the defenses raised, including that plaintiffs intentionally concealed that the condominium's individual unit owners had made claims to their insurer related to defendant's construction of the condominium, and find them unavailing as a matter of law.”

*Park Union Condominium*, 140 A.D.3d at 674.

The third-party action has been rendered moot by the Appellate Division's decision granting plaintiffs' motion for summary judgment, which operated as a final judgment on the merits. *Id.* Thus, the Sponsor is precluded from seeking a second chance to litigate these issues, and I deny as academic its motion to amend the pleadings and caption and to compel discovery.

In accordance with the foregoing, it is

ORDERED that the motion of third-party defendants Christian Baker, Eric Bloomfield and Chris Brumm, individually and in their capacity as executive board members of the Board of Managers of the Park Union Condominium, and KW Property Management & Consulting to dismiss the third-party complaint (motion sequence No. 006) is granted, and the third-party complaint is dismissed in its entirety as against these third-party defendants, with costs and disbursements to the third-party defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the third-party defendants; and it is further

ORDERED that the third-party plaintiff's motion to amend the pleadings and caption and to compel discovery (motion sequence No. 008) is denied.

This constitutes the decision and order of this Court.

10/6/2017  
DATE

Saliann Scarpulla  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
DO NOT POST

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE