Board of Mgrs. of the 28 Cliff St. Condominium v Maguire
2018 NY Slip Op 30334(U)
February 22, 2018
Supreme Court, New York County
Docket Number: 653115/14
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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BOARD OF MANAGERS OF THE 28 CLIFF STREET CONDOMINIUM, DAVI L. ABRAMSON, DAVID L. ZINSSER, RENATO CAMPORA and REBECCA CAMPORA,

Plaintiffs,

Index No.: 653115/14
DECISION/ORDER

-against-

PHILOMENA MAGUIRE, THOMAS MAGUIRE, BELCOO CORP. and RYAN'S CLIFF STREET CORP.,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

In this civil contract action, defendants move to dismiss the complaint, pursuant to CPLR 3211 (motion sequence number 002). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

The plaintiff Board of Managers of the 28 Cliff Street Condominium (the board) is an association comprised of the apartment unit owners in a four-story, mixed-use commercial/residential building (the building) located at 28 Cliff Street in the County, City and State of New York. *See* notice of motion, exhibit A (complaint), ¶¶ 4-5. Individual plaintiffs Davi L. Abramson (Abramson) and David L. Zinsser (Zinsser) own the building's second floor residential apartment unit, and co plaintiffs Renato and Rebecca Campora (the Camporas) own the building's fourth floor residential apartment unit.[1] *Id.*, ¶¶ 7-10. The individual plaintiffs are

[1] The owner of the building's third floor residential apartment unit is not a party to this action. *See* Abramson aff in opp, ¶ 5.

also members of the board. *Id.* Defendants Philomena and Thomas Maguire (the Maguires) operate a bar/restaurant in the building's first floor commercial apartment unit called Ryan Maguire's. *Id.*, ¶¶ 14-18. Ryan Maguire's is owned by corporate codefendant Belcoo Corp. (Belcoo), which also owns the building's first floor commercial apartment unit, and is operated by corporate codefendant Ryan's Cliff Street Corp. (RCC). *Id.* The Magiures are, respectively, the CEO and president of both corporate codefendants. *Id.* From 2005 through July 2011, Philomena Maguire was also either a member of the board, or its president. *Id.*, ¶ 12.

Underlying this action is a fire which occurred in the building on February 24, 2010. *See* notice of motion, exhibit A (complaint), ¶ 2. The fire began in the first floor commercial unit, destroyed Ryan Maguire's, caused structural damage to the entire building, and obliged the residents of the second, third and fourth floor residential apartment units to relocate until approximately May 2017. *See* Abramson aff in opposition, ¶¶ 8-10, 16.

Plaintiffs allege that, after the fire, the Maguires took control of the building's renovations, but that they engaged in self-dealing and committed a number of other improper acts during the renovation period, all to the building's detriment. They begin by noting that Philomena Maguire was the board's president from the date of the fire until July 2011. *See* Abramson aff in opposition, ¶ 6. Among the allegations plaintiffs raise are that: 1) as board president, Philomena Maguire diverted a portion of the $1.2 million proceeds of the insurance payment that was issued to the building after the fire into a bank account that plaintiffs had no access to, and whose records were never disclosed to them; 2) the Maguires then defalcated a portion of those insurance proceeds by arranging an unnecessary, sham loan for repairs to the building from RCC, which was later repaid directly to Thomas Maguire; 3) the Maguires also

used the proceeds of the insurance payment for the benefit of Ryan Maguire's, while simultaneously de-prioritizing and/or neglecting the necessary renovation work in the building's residential apartment units and common areas; 4) specifically, the Maguires improperly expanded Ryan Maguires from a one-floor restaurant into a two-floor bar by annexing a quantity of space in the building's basement, which had previously been a common area; 5) as part of that annexation, the Maguires relocated the basement boiler room, which serves the building's second- and third-floor residential apartment units, to an inadequately small space which affords plaintiffs no access to their boilers; 6) the Maguires also altered the building's lobby by installing a non-code-compliant sprinkler system \, as well as a new door to Ryan Maguires', which has resulted in bar patrons having unauthorized access to the lobby at all hours; 7) the Maguires failed to provide for adequate soundproofing at Ryan Maguires as part of the renovation work, despite having extended Ryan Maguire's closing time from 11 p.m. to 4 a.m.; 8) Philomena Maguire took actions as the board's president that were either not in conformity with, or in outright violation of, the building's by-laws, including, unilaterally hiring a single architect and a single engineer to oversee both the commercial and the residential renovations; 9) Philomena Maguire did not direct the architect or engineer to keep separate records of the commercial and residential renovation work, and has refused to provide any financial records regarding the renovation work; and 10) by unnecessarily protracting the building's renovation, and performing inadequate work, the Maguires caused plaintiffs to be out of possession of their apartments for an equally protracted amount of time, and to incur excessive costs to pay for alternative housing until they could return to the building. *Id.*, ¶¶ 8-45. Plaintiffs have presented: 1) a copy of the Fire Department's incident report, which recites that the fire originated in the building's

"cooking area/kitchen" for reasons that were "undetermined"; 2) a copy of a 2015 estimate from a boiler maintenance company, that recites that there was "improper venting" in the building's renovated boiler room; 3) a copy of a 2013 sound inspection report that plaintiffs commissioned, that found that Ryan Maguire's activities caused an unreasonable level of noise in the building's second-floor apartment, in violation of New York City noise regulations; 4) a copy of a 2009 work permit application submitted to the New York City Department of Buildings (DOB) by the Maguire's agent, one Charles Feely (Feely); and 5) a copy of a 1996 order issued by the Disciplinary Committee of the Appellate Division, First Department, that suspended Feely from the practice of law. *Id.*, exhibits 8, 9, 10, 11, 12.

For her part, Philomena Maguire denies having committed any of the wrongful acts that plaintiffs have claimed that she performed. She alleges that: 1) the board voted to approve the hiring of the architect and engineer for the building's renovations; 2) the board passed a resolution approving the renovation work to Ryan Maguire's, including the alterations to the building's basement and lobby; 3) there are separate entrances to Ryan Maguire's and to the building's lobby; 4) before the fire, the board voted to install separate water meters for Ryan Maguire's and the building's residential apartment units; and, after the fire, Abramson twice vandalized Ryan Maguire's water meter; 5) Ryan Maguire's installed soundproofing in its ceiling in 2011, however, a flood in Abramson's and Zinsser's second-floor residential apartment unit caused damage to that soundproofing; 6) the $418,000.00 loan from RCC to the building was made *before* the building's insurance company disbursed the proceeds of the fire policy, in order to permit the renovation work to be commenced sooner; 7) the insurance policy disbursement was not sufficient to fully reimburse RCC, and $155,000.00 of that loan remains unpaid; 8) she

commissioned an accounting firm to prepare an audited insurance report, which sets forth a detailed accounting of the expenditures that were made for building renovations from the proceeds of the building's fire insurance policy, and provided that report to all of the building's residents; and 9) after she left the board, she discovered that the current plaintiff/board members had defalcated the funds in the escrow account that had been established to pay for the building's roof repairs, in order to pay for their legal costs in this action. *See* notice of motion, Maguire aff, ¶¶ 5-18. Defendants have presented: 1) a copy of the board's by-laws; 2) copies of board resolutions; 3) copies of correspondence between Philomena Maguire and other board members concerning those resolutions; 4) copies of correspondence between herself and other board members concerning the loan from RCC to the building; 5) a copy of the audited insurance report; 6) copies of itemized receipts and cancelled checks for work performed in connection with the building's renovation; and 7) copies of correspondence with the building's insurance company, including a complete itemization of the insurance settlement. *Id.*, exhibits B, D-V. In defendants' opposition papers, Philomena Maguire has also presented: 1) copies of checks issued to the plaintiff board members by the board for renovation work in their apartment units; 2) copies of correspondence with the plaintiff board members regarding their renovation requirements; 3) copies of correspondence between herself, the plaintiff board members and the building's architect which includes copies of the architect's plans for renovating the building's basement space as part of the expansion of Ryan Maguire's; 4) copies of correspondence with the plaintiff board members concerning the renovation of the basement boiler room; 5) copies of correspondence with the plaintiff board members regarding Con Edison's restoration of the building's gas service in April 2011; 6) DOB documents regarding the removal of the building's

fire related violations in 2011; 7) a copy of the new certificate of occupancy (C of O) that the DOB issued to the building in December 2011, after it lifted the vacate order that it had issued as a result of the fire; and 8) documents regarding Ryan Maguire's liquor license. *See* Zakai affirmation in reply, exhibits B-K.

Plaintiff commenced this action on October 14, 2014 by filing a summons and complaint that sets forth causes of action for:1) breach of fiduciary duty; 2) aiding and abetting breach of fiduciary duty (against Thomas Maguire); 3) fraud; 4) aiding and abetting fraud (against Thomas Maguire); 5) an accounting; 6) violation of Real Property Law (RPL) § 339-w; 7) unjust enrichment; 8) breach of contract (damages); 9) breach of contract (injunctive relief); 10) private nuisance (damages); 11) private nuisance (injunctive relief); and 12) violation of RPL § 339-k. *See* notice of motion, exhibit A. On July 1, 2016, defendants filed an answer with affirmative defenses and counterclaims seeking: 1) compensatory damages; 2) restitution; 3) compensatory damages; 4) punitive damages; 5) an accounting; 6) punitive damages; 7) restitution; 8) an injunction; 9) money damages; and 10) legal fees. *Id.*, exhibit C. Now before the court is defendants' motion to dismiss the complaint (motion sequence number 002).

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences

are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). Here, before reviewing the legal sufficiency of plaintiffs' pleadings, the court must address a procedural argument.

Plaintiffs contend that defendants' CPLR 3211 motion is untimely, because these motions "must be interposed prior to the joinder of the issue," and issue was joined in this action when defendants served their answer on July 1, 2016. *See* plaintiffs' mem of law at 5-9. Defendants reply that this argument is an "egregious misreading of CPLR 3211 (e)," which provides, in part, as follows:

> "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time . . . ."

CPLR 3211 (e). Plaintiffs then assert that, because they "expressly raised these defenses in their answer, all branches of the motion to dismiss are timely." *See* defendants' reply mem of law at 4-6.

The court finds that both of these arguments are facile, since they consist simply of broad statements of the law which do not address the particularities of this case. The court, itself, is mindful of the rule that "CPLR 3211 motions may be made after service of the party's answer in three circumstances: when the motion is based upon subdivision (a) (2) subject matter jurisdiction, (a) (7) failure to state a cause of action, or (a) (10) nonjoinder of a necessary party." *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257 (2d Dept 2012). Here, as will be

discussed, it is clear that the bulk of defendants' motion seeks dismissal on the ground that most of plaintiffs' twelve causes of action fail to state viable claims under New York law. As a result, the fact that defendants served their answer prior to filing this motion is of no moment,[2] and the court rejects plaintiffs' timeliness argument.

Turning to the sufficiency of plaintiffs' pleadings, defendants first argue that eight of plaintiffs' twelve causes of action should be dismissed because they impermissibly "confuse and intertwine derivative and individual claims." *See* defendants' mem of law at 13-17. Plaintiffs cite the holding of the Appellate Division, First Department, in *Yudell v Gilbert* (99 AD3d 108 [1st Dept 2012]) to support the proposition that New York law requires the dismissal of such claims where there is confusion whether the claims are derivative or individual in nature. *See* defendants' mem of law at 13-17. Defendants then argue that the eight subject causes of action herein should be dismissed because it is impossible to determine whether they are intended as derivative or individual claims. *Id.* Plaintiffs respond that defendants' argument fails, because RPL § 339-dd gives plaintiffs "legal capacity and standing to bring this action." *See* plaintiffs' mem of law at 9. Defendants reply that, while that statute may afford standing to the board, it does not do so for the individual plaintiffs. *See* defendants' reply mem of law at 7-9. Defendants also repeat their argument that the complaint is too badly pled to sustain any claims that might be ascribed solely to the board. *Id.* After reviewing the law, the court finds for defendants.

In *Yudell v Gilbert*, the First Department upheld the trial court's dismissal of claims asserted by a plaintiff who claimed to raise them both on his own behalf, and on behalf of a joint

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[2] With the exception of plaintiffs' twelfth cause of action, as will be discussed *infra*.

venture in which he and the named defendants were members. 99 AD3d at 115. The First Department reasoned that, to the extent that plaintiffs' claims were derivative (i.e., asserted on behalf of the joint venture's members), they were required to plead "demand futility" (i.e., the exception to the rule that a plaintiff shareholder who seeks to compel a corporation to enforce his/her shareholder rights must first serve a demand on the corporation's board, which exists where making such a demand would be a futile act) with requisite particularity. 99 AD3d at 113. The First Department ruled that the derivative claims in *Yudell* were properly dismissed because the complaint did not allege facts that would disclose one of the three circumstances under which "demand futility" is recognized to exist. *Id.* at 115; *see e.g. Marx v Akers*, 88 NY2d 189, 194 (1996). Finally, the First Department acknowledged the difficulty that can sometimes arise when a court must attempt to differentiate between direct and derivative claims, and ruled to adopt a test that was originally promulgated by the Delaware Supreme Court in *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031, 1039 [Del 2004]). In a later decision, *Serino v Lipper* (123 AD3d 34 [1st Dept 2014]), the First Department concisely described the *Tooley* test as follows:

> "In order to distinguish a derivative claim from a direct one, the court considers (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually). If there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action. On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand."

123 AD3d at 40 (internal citations and quotation marks omitted).

Here, as in *Yudell*, the complaint fails to allege "demand futility" with reasonable

particularity. Demand futility is shown when: (1) a majority of the board is interested in the challenged transaction, (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to execute sound business judgment in approving the transaction. *Marx v Akers*, 88 NY2d at 200. Here, the complaint alleges that Philomena Maguire has not served on the board since July 2011, and thereby implicitly acknowledges that the individual plaintiffs herein have been the board's only members since that time. *See* notice of motion, exhibit A, ¶ 12. Defendants correctly note that the fact that the individual plaintiffs currently control the board makes it impossible for them to plead any of the three scenarios for which "demand futility" might be found to exist. *See* defendants' reply mem of law at 8-9. Because the complaint fails in this regard, the *Yudell* holding mandates the dismissal of any of plaintiffs' claims that are found to be derivative in nature.

Defendants next argue that, pursuant to the *Tooley* test, it is impossible to distinguish plaintiffs' direct claims from their derivative ones, with the result being that all of them must be dismissed. *See* defendants' mem of law at 13-17. Defendants specifically refer to plaintiffs' eight causes of action that assert: breach of fiduciary duty (1); aiding and abetting breach of fiduciary duty (2); fraud (3); aiding and abetting fraud (4); an accounting (5); violation of RPL § 339-w (6); breach of contract - damages (8); and breach of contract - injunctive relief (9). *Id.* at 17. The court will review each in turn.

Plaintiffs' first claim alleges breach of fiduciary duty, for which a plaintiff must plead the existence of a fiduciary relationship, the defendant's breach thereof, and resulting damages. *See e.g. Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dept 2007). Here, the complaint alleges that: "[Philomena] Maguire breached her fiduciary duties by deliberately misappropriating the

Condominium's insurance proceeds, which were the property of the Condominium, and using some for the expansion and renovation of her own business, Ryan Maguire's, located in the Commercial Unit." *See* notice of motion, exhibit A (complaint), ¶ 92. As stated above, the inquiry mandated by the *Tooley* test is "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)." *Serino v Lipper*, 123 AD3d at 40. Here, the complaint plainly alleges an injury to the plaintiff board via the misappropriation of the building's property (i.e., insurance proceeds). As such, the claim is plainly derivative in nature. Since the court has already determined that plaintiffs are unable to establish "demand futility" as a prerequisite to any derivative claims, the court concludes that plaintiffs' claim for breach of fiduciary duty cannot survive, as a matter of law. Therefore, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' first cause of action pursuant to CPLR 3211 (a) (7) should be granted.

Plaintiffs' second cause of action for aiding and abetting breach of fiduciary duty alleges that "defendant [Thomas] Maguire . . . had actual knowledge of [Philomena] Maguire's breaches of fiduciary duties and substantially assisted [Philomena] Maguire in breaching her fiduciary duties to the Condominium and the Unit Owners." *See* notice of motion, exhibit A (complaint), ¶ 96. This claim is also plainly derivative in nature, since it merely refers to the subject matter of plaintiffs' first claim without making any further allegations. Therefore, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' second cause of action pursuant to CPLR 3211 (a) (7) should be granted for the reasons stated above.

Plaintiffs' third cause of action alleges fraud, the proponent of which "must allege

misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). Here, the complaint claims that "[Philomena] Maguire intentionally failed and refused to provide information and documentation concerning the Project to the other Unit Owners, and intentionally refused to let the other Unit Owners have access to the Building during the Project, in order to conceal the fact that she was using the majority of the Condominium's insurance proceeds to upgrade and enlarge her bar and restaurant." *See* notice of motion, exhibit A (complaint), ¶ 100. Although this claim refers to Philomena Maguire deceiving the individual plaintiffs, it is clear that the harm that it describes is a financial injury to the board - i.e., the same purported misappropriation of building funds that is the subject of plaintiffs' first two causes of action. As a result, the court must deem that this claim, too, is derivative in nature. Therefore, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' third cause of action pursuant to CPLR 3211 (a) (7) should be granted for the reasons stated above.

Plaintiffs' fourth cause of action for aiding and abetting fraud alleges that "defendant [Thomas] Maguire had actual knowledge of [Philomena] Maguire's fraud and substantially assisted [Philomena] Maguire in carrying out her fraudulent scheme." *See* notice of motion, exhibit A (complaint), ¶ 105. This claim, too, is plainly derivative in nature, since it simply refers to the subject matter of the preceding (derivative) claim and makes no further allegations. Therefore, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' fourth cause of action pursuant to CPLR 3211 (a) (7) should be granted for the reasons stated above.

Plaintiffs' fifth cause of action seeks an accounting. It simply "repeats and realleges" the preceding allegations of the complaint, and concludes that "by reason of the foregoing, plaintiffs are entitled to a full accounting with respect to the Project and the use of the Condominium's insurance proceeds." *See* notice of motion, exhibit A (complaint), ¶ 105. Again, the injury that the claim describes is defendants' alleged misappropriation of the board's insurance proceeds; and, again, the court must find that the claim is derivative in nature. Therefore, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' fifth cause of action pursuant to CPLR 3211 (a) (7) should be granted for the reasons stated above.

Plaintiffs' sixth cause of action alleges that defendants violated RPL § 339-w, which provides that the "board of managers . . . shall keep detailed, accurate records, in chronological order, of the receipts and expenditures arising from the operation of the property." *See* notice of motion, exhibit A (complaint), ¶ 111. The complaint further alleges that, "while president of the Condominium, and thereafter, [Philomena] Maguire failed to make the records concerning the Project available to the plaintiff Apartment Unit Owners." *Id.*, ¶ 112. The court notes that this statute has been interpreted as authorizing only derivative claims, and not individual ones. *See Pomerance v McGrath*, 143 AD3d 443 (1st Dept 2016). Because this claim is derivative in nature, it cannot stand. Therefore, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' sixth cause of action pursuant to CPLR 3211 (a) (7) should be granted.

Plaintiffs' eighth and ninth causes of action both allege breach of contract, the proponent of which must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). The portion of the complaint that speaks to contractual obligations alleges as follows:

> "As set forth more fully above, the Condominium Documents impose obligations, requirements and/or other duties upon defendants. Pursuant to [RPL] § 339-j, 'each Unit Owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers.'"

See notice of motion, exhibit A (complaint), ¶¶ 123, 128. The court notes that the contractual text that is quoted in the above claim itself appears to contemplate only a derivative claim. If there were any doubt, however, the court also notes that the Appellate Division, First Department, has plainly held that "violations of the bylaws do not subject board members to individual liability." *Pomerance v McGrath*, 143 AD3d at 448. Because these are therefore clearly derivative claims, they cannot pass the *Tooley* test. Accordingly, the court finds that so much of defendants' motion as seeks the dismissal of plaintiffs' eighth and ninth causes of action pursuant to CPLR 3211 (a) (7) should be granted. The court now turns its attention to plaintiffs' four remaining causes of action, against which defendants have raised separate dismissal arguments.

Plaintiffs' seventh cause of action alleges unjust enrichment. "The criteria for recovery under a theory of unjust enrichment are: '(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.'" *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 (1st Dept 2002), quoting *Moors v Hall*, 143 AD2d 336, 337-338 (2d Dept 1988). Defendants argue that this cause of action both fails to state a claim, and is duplicative of plaintiffs' breach of fiduciary duty and fraud claims. *See* defendants' mem of law at 40-41. The complaint avers that "defendants have

benefitted from [Philomena] Maguire's misappropriation of the Condominium's insurance proceeds and have been unjustly enriched at plaintiffs' expense." *See* notice of motion, exhibit A (complaint), ¶ 111. It is unclear to the court why defendants did not include this cause of action along with the eight that they argued were barred because they impermissibly commingled direct and derivative claims. Plaintiffs' unjust enrichment claim plainly alleges an injury to the board via misappropriation of property, and purports to assert a right to recovery by both the board and the individual plaintiffs. This would appear to be the very definition of a legally deficient claim under the *Tooley* test, which states that, where "an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand." *Serino v Lipper*, 123 AD3d at 40. The court also notes that it would be highly anomalous to permit the board to assert a right to recover against defendants in equity, since their relationship is entirely contractual in nature. In any case, the court finds that so much of defendants' motion as seeks dismissal of plaintiffs' seventh cause of action pursuant to CPLR 3211 (a) (7) should be granted.

Plaintiffs' twelfth cause of action alleges that defendants violated RPL § 339-k. *See* notice of motion, exhibit A (complaint), ¶¶ 137-140. That statute provides that "[n]o unit owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament, nor may any unit owner add any material structure or excavate any additional basement or cellar, without in every such case the consent of all the unit owners affected being first obtained." RPL § 339-k. Defendants argue that this cause of action should be dismissed because it is time-barred. *See* defendants' mem of law at 53-54. In their reply papers, defendants further note that plaintiffs' opposition did not include any objection to this dismissal request. *See* defendants' reply mem of law at 38. At this point, the

court recalls that the statute of limitations defense is one that will be deemed waived unless a defendant asserts it in either a pre-answer motion or a responsive pleading. CPLR 3211 (e). Here, defendants did assert the affirmative defense of statute of limitations in their answer. *See* notice of motion, exhibit C (answer), ¶ 89. As a result, the court may properly consider the defense as a ground for dismissal. Here, also, it appears that claims pursuant to RPL § 339 are governed by a three-year statute of limitations. *See e.g. Pomerance v McGrath*, 124 AD3d 481 (1st Dept 2015). The court notes that the instant work was performed before July 2011 (when Philomena Maguire left the board), and that plaintiffs filed their complaint in October 2014 (beyond the three-year limitations period). In view of this, and also of the fact that plaintiffs did not object to defendants' request to dismiss the twelfth cause of action on statute of limitations grounds, the court grants defendants' request.[3]

Lastly, plaintiffs' tenth and eleventh causes of action both allege private nuisance. "The elements of a private nuisance cause of action are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.'" *Taggart v Costabile*, 131 AD3d 243, 247 (2d Dept 2015), quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977), citing Restatement of Torts § 822. The relevant portion of the complaint states that:

"[b]y failing to properly soundproof the commercial unit, by allowing the second

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[3] The court also notes in passing that plaintiffs' RPL 339-k claim appears to be contradicted by the documentary evidence, inasmuch as defendants have presented copies of correspondence indicating that the individual plaintiffs were apprised of, and consented to, the shoring work that was necessary in order to begin the basement renovations in the building. *See* notice of motion, exhibits D, F, G, I, J, K..

> fire egress to be used for purposes other than solely as a fire exit, and by causing excessive noise and disturbance in the Building, defendants have intentionally, unreasonably and substantially interfered with the plaintiff Apartment Unit Owners' right and ability to use and enjoy their Apartment Units and the [building's] Common Elements."

See notice of motion, exhibit A (complaint), ¶ 132. Defendants argue that the foregoing: 1) fails to state a claim because it insufficiently alleges "intentional" behavior; and 2) fails, as a matter of law, because "plaintiffs knowingly came to the nuisance." *See* defendants' mem of law at 49-53. Plaintiffs' memorandum of law does not directly address these arguments. However, Abramson's affidavit in opposition alleges that: 1) the building's renovations did not include the installation of sufficient soundproofing material in the floor below her second-floor apartment unit and the commercial unit below, where Ryan Maguire's is housed; 2) after the building renovations, the newly expanded Ryan Maguire's extended its closing time from 11p.m. until 4a.m., which resulted in greater noise for a longer period of time; and 3) the current noise level in her apartment unit constitutes a violation of the New York City Noise Code. *See* Abramson aff in opposition, ¶¶ 32-36. Further, Abramson has included a copy of a private noise inspector's report to support the third allegation. *Id.*, exhibit 10.

The court rejects defendants' argument that plaintiffs have failed to adequately allege intentional behavior. In *61 W. 62 Owners Corp. v CGM EMP LLC* (77 AD3d 330, 334 [1st Dept 2010], *affd as mod* 16 NY3d 822 [2011]), the Appellate Division, First Department, expressly found that noise which emanated from a bar that was operating "in furtherance of its own commercial purposes" constituted intentional activity. The Appellate Division also noted that "[t]he noise level, as well as the time of night, also established . . . that the interference was unreasonable and affected the residents' right to use and enjoy their respective apartments." 77

AD3d at 334. In any case, both the complaint and Abramson's opposition affidavit state that the nuisance alleged herein is comprised of excessive levels of noise emanating from Ryan Maguire's until early every morning. Reading this allegation in the light most favorable to plaintiffs, the court finds that this is a sufficient allegation, not only of the "intentional activity" element of a private nuisance claim, but of all of the elements of a private nuisance claim.

The court also rejects defendants' second dismissal argument. Defendants cite the 1934 case of *De File v Hudson Republican Corp.* (151 Misc 256 [Sup St, Columbia County 1934]) to support their contention that "plaintiffs cannot state a claim for nuisance when they knowingly came to it." *See* defendants' mem of law at 51-53. This argument appears to suggest that the act of "coming to the nuisance" will absolutely bar any party who did so from ever seeking redress for that nuisance, as a matter of law. This is not so. As early as 1958, the Appellate Division, First Department, recognized that the act of "coming to the nuisance" was merely a "factor" in determining the viability of a nuisance claim. *See Graceland Corp. v Consolidated Laundries Corp.*, 7 AD2d 89, 93 (1st Dept 1958), *affd* 6 NY2d 900 (1959). The law of private nuisance was reviewed more recently by this court in *Stanley v Amalithone Realty, Inc.* (31 Misc 3d 995 [Sup Ct, NY County 2011, Sherwood, J.]), wherein it was noted that:

> "The law of private nuisance involves a balancing of interests. Persons who live in organized communities have to tolerate some damage, annoyance or inconvenience from each other. In determining whether a defendant's use of property is a nuisance, the court must weigh the gravity of the harm to plaintiff against the utility and necessity for defendant's conduct.
>
> "In *Copart Indus.*, the operator of an automobile servicing business sought damages from a power company on the ground that the noxious emissions from the power plant caused damage to the exterior of cars on plaintiff's premises and that plaintiff had to close his business because of the emissions. The Court of Appeals ruled that a party is

> 'subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities.'
>
> "Generally, when the use of a property is expressly authorized for the operation of a business or activity, and its operation is reasonable, no actionable per se nuisance is created."

31 Misc 3d at 1002-1003. The question, then, is whether the noise emanating from Ryan Maguire's is "reasonable," and the court's function is to perform a "balancing of interests" in making this determination. Certainly, defendants have presented no authority that plaintiffs' "coming to the nuisance" herein functions as an absolute legal bar to their claim, or that it somehow forecloses the court from performing the necessary balancing of interests when weighing that claim. In any case, the court rejects defendants' second dismissal argument as unfounded. Therefore, the court finds that so much of defendants' motion as seeks the dismissal of plaintiffs' tenth and eleventh causes of action, pursuant to CPLR 3211 (a) (7), should be denied.

In closing, plaintiffs have requested leave to serve an amended complaint, pursuant to CPLR 3025 (b), in the event that the court grants any portion of defendants' motion. *See* plaintiffs' mem of law at 24-25. However, as defendants correctly point out, that statute requires the party who requests such leave to file a proposed amended pleading along with their motion, and further note that plaintiffs have failed to do so. CPLR 3025 (b); *see* defendants' reply mem of law at 39-40. Therefore, the court denies plaintiffs' request. Accordingly, the court grants defendants' motion in part, and denies it in part, as set forth above.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211 (a) (7), of defendants Philomena Maguire, Thomas Maguire, Belcoo Corp. and Ryan's Cliff Street Corp. is granted solely to the extent that the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and twelfth causes of action of the instant complaint are dismissed, but is denied with respect to the tenth and eleventh causes of action in said complaint; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for plaintiffs.

Dated: New York, New York
February 22, 2018

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.