

**Patel v Gardens at Forest Hills Owners Corp.**

2019 NY Slip Op 30952(U)

February 20, 2019

Supreme Court, Queens County

Docket Number: 708689/2017

Judge: Marguerite A. Grays

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FILED  
FEB 26 2019  
COUNTY CLERK  
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4  
Justice

\_\_\_\_\_  
JAYENDRA PATEL, GITA PATEL, JITENDRA  
PATEL, XIN QI MEI, ZHAO CHUN,  
XINGXAING PENG, ZHIPING HUANG,  
MICHAEL CHUA, ROSE MARIE CHIN, LEENA  
D'SOUZA, ROHIT SHAH, AND LIAN LIANG.

Index  
Number 708689 2017  
Motion  
Date November 13 2018

Plaintiff(s)  
-against-

Motion  
Cal. Number 53

GARDENS AT FOREST HILLS OWNERS CORP.  
VALHALLA PROPERTIES CORP., SLJ  
PROPERTY MANAGEMENT, LLC, and BELAL  
MOHD.

Motion Seq. No. 2

Defendant(s)

\_\_\_\_\_  
The following papers numbered EF37 to EF122 read on this motion by the  
defendants for, *inter alia*, an Order pursuant to CPLR §3211(a)(3) dismissing the First,  
Second, Third, and Fourth Causes of Action asserted against them.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF37- EF45
Answering Affidavits - Exhibits.....	EF111- EF120
Reply Affidavits.....	EF122
Memorandum of Law .....	EF40

Upon the foregoing papers it is ordered that the branch of the motion which is for an  
Order pursuant to CPLR §3211(a)(3) dismissing the First, Second, Third, and Fourth Causes  
of Action is granted. The branch of the motion which is for an Order pursuant to CPLR  
§3211 (a)(3) dismissing the complaint as brought by plaintiff Jitendra Patel is granted. The  
branch of the motion which is for an Order pursuant to CPLR §3211(a)(7) dismissing the  
Fifth Cause of Action is granted. The branch of the motion which is for an Order pursuant  
to CPLR §3211(a)(3) and (7) dismissing the Sixth Cause of Action is granted. The branch  
of the motion which is for an Order pursuant to CPLR §3211(a)(3) dismissing the Seventh  
Cause of Action is granted. The complaint is dismissed.

## **I. The Allegations of the Complaint**

The complaint alleges the following:

Defendant Gardens at Forest Hills Owners Corp (Gardens) is a cooperative housing corporation with buildings located in Forest Hills, New York having a total of 368 units. The plaintiffs all own shares in the cooperative corporation, with the exception of plaintiff Jitendra Patel, whose wife is a shareholder, and they hold proprietary leases on the apartments that they occupy. Defendant Valhalla Properties Corp. (Valhalla) owns 67 rent-stabilized apartments in the buildings in connection with unsold shares in the cooperative. Defendant Gardens owns defendant Valhalla, whose chief executive officer is defendant Belal Mohd, and the directors of the cooperative corporation also serve as the directors of the subsidiary. Defendant Mohd owns shares in the cooperative corporation, and he serves as its president.

Defendant Mohd, who controls defendant Valhalla, is a licensed real estate agent, and, acting as such, he sells apartments in the cooperative belonging to Valhalla and to other tenant-shareholders. He has earned at least \$1,000,000 in commissions. In the last ten years, Mohd sold at least sixty units in the buildings at a total price of \$10,622,000. Mohd is guilty of conflict of interest in acting as a sales agent while controlling Valhalla and the cooperative. Valhalla may be exercising illegal control over the management of the cooperative, and Mohd may be using his control over Valhalla to maintain his control over the cooperative. Mohd has taken money and property from the corporation without authorization.

The plaintiffs have demanded a list of shareholders from the cooperative, but the cooperative has not adequately responded to this demand. The plaintiffs have also been denied access to the financial records of the cooperative.

On June 15, 2017, the cooperative mailed a notice of annual meeting to the shareholders, but it was not timely sent, shareholders were not informed of its meaning or intent, they were told they had to sign the proxies even though many of them do not read English, and the notice violated state law and the corporate by-laws, There were irregularities pertaining to the election held on June 25, 2017.

## **II. Discussion**

### **A. The Standards**

CPLR §3211 provides in relevant part: “ (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him

on the ground that: \*\*\*3. the party asserting the cause of action has not legal capacity to sue.” (See, *Ocwen Loan Servicing, LLC v. Fitzgerald*, - AD3d-, -NYS3d-, 2019 WL 288069, [2<sup>nd</sup> Dept 2019]). “While capacity and standing are conceptually different \*\*\* they are treated as synonyms for the purposes of applying paragraph 3.” (Higgett, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C3211:13; *Dollinger v Patacki*, 1998 NY Misc LEXIS 787).

CPLR §3211(a)( 7) permits a party to move to dismiss a claim asserted against him for failure to state a cause of action. “ In assessing a motion to dismiss a cause of action pursuant to CPLR §3211(a)(7), where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one \*\*\*” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; *Stinner v. Epstein*, 162 AD3d 819, 820 [2018]).

### **B. The First Cause of Action (Breach of Fiduciary Duty)**

The elements of a cause of action for breach of fiduciary duty are (1)the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (see, *Daly v. Kochanowicz*, 67 AD3d 78 [ 2009] ; *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 AD3d 664 [2008]; *Kurtzman v. Bergstol* 40 AD3d 588 [2007]).

“For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation \*\*\* Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged \*\*\*But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually \*\*\*” (*Abrams v. Donati*, 66 NY2d 951, 953).

The plaintiffs First Cause of Action demands eight items of relief ranging from compensatory damages amounting to \$10,000.000, to an order compelling Mohd to resign from any positions he has with the defendant cooperative corporation and an order nullifying any action taken at the annual meeting held on June 25, 2017. The first cause of action is actually a jumble of causes of action pled in disregard of CPLR §3014 which requires separate causes of action to be separately stated and numbered (see, *Panagouloupoulos v. Ortiz*, 143 AD3d 791 [2016]). A complaint whose allegations confuse a shareholder's derivative and individual rights is dismissible (*Abrams v. Donati*, 66 NY2d 951 [1985];

*Jobson v. Progno*, 100 AD3d 1407 [4<sup>th</sup> Dept 2012]), and the intermingling of derivative claims and individual claims within a cause of action requires their dismissal. (*Barbour v. Knecht*, 296 AD2d 218 [1<sup>st</sup> Dept 2002]; *Baliotti v. Walkes*, 134 AD2d 554 [1987]). The plaintiffs' claim for breach of fiduciary duty involving financial wrongdoing is derivative in nature and may not be brought by the plaintiffs individually. (See, *Barbaro v. Pinelli* 121 AD3d 727 [2014]; *Yudell v. Gilbert*, 99 AD3d 108, 114, [2012] ["plaintiffs' claim for breach of fiduciary duty is derivative, because any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity"]' *Jones v. Citigroup, Inc., supra*).

### **C. The Second Cause of Action (Conversion)**

The second cause of action, which is another jumble of claims, alleges that "Mohd has managed the assets of the Co-Op Corporation without regard to corporate form, and has essentially converted them to his own use. He has treated the assets as his own, and has essentially stolen the properties."

"Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]).

Causes of action alleging a diversion of assets from a corporation cannot be individually brought and must be asserted in a shareholder's derivative suit (see, *Smerling Enterprises, Inc. v. Goldstein*, 184 AD2d 480 1992]).

### **D. The Third Cause of Action (Waste of Corporate Assets)**

"Waste, mismanagement, and interference with the corporation's business are wrongs to the corporation, the remedy for which is a stockholders' derivative action, and not a cause of action in favor of the individual stockholders, even though they may be indirectly damaged because the value of their stock is depreciated." (15 NYJur2d, "Business Relationships" § 1167; see, *Abrams v. Donati, supra*).

### **E. Fourth Cause of Action ( Unjust Enrichment)**

The plaintiffs allege that "[b]y taking unauthorized distributions and improper payments, Mohd has enriched himself at the expense of the corporation." The plaintiffs allege an injury to the corporation, not to themselves as individuals.

A plaintiff should assert a derivative claim to recover for injury to the business entity and a direct claim to recover for injury to himself individually (*Yudell v. Gilbert*, 99 AD3d 108 [2012].) The distinction is made by considering whether the stockholder or corporation suffered the alleged harm and whether the stockholder individually or the corporation would receive the benefit of any recovery or other remedy (*Yudell v. Gilbert, supra*.)

The cause of action for unjust enrichment belongs to the cooperative and may not be asserted by the plaintiffs individually (*see, Dragon Inv. Co. II LLC v. Shanahan*, 49 AD3d 403 [2008]).

#### **F. The Fifth Cause of Action (Inspection of Corporate Books and Records)**

A shareholder has both a statutory right pursuant to BCL §624 and a common-law right to inspect the books and records of a corporation if he seeks the inspection in good faith and for a valid purpose. (*Peterborough Corp. v. Karl Ehmer, Inc.*, 215 AD2d 663 [1995].) The defendants allege that the plaintiffs have admitted in their verified bill of particulars that the only plaintiffs who made a demand to inspect the books and records were Jayendra Patel and Liang Liang and that the only document they requested was the shareholders list with their primary mailing addresses. The defendants allege that they have complied with this demand, and they attached as Exhibit “4” to their notice of motion a list of shareholders with their addresses. The opposition papers do not make clear in what manner the plaintiffs’ existing demand has not been satisfied. The defendants are entitled to the dismissal of the fifth cause of action pursuant to CPLR §3211(a)(7) because no significant dispute exists as to the facts (*see, Hallwood v. Incorporated Village of Old Westbury, supra*).

#### **G. The Sixth Cause of Action (Appointment of a Receiver)**

The Sixth Cause of Action, not a model of good draftsmanship, seems to conflate a cause of action for the judicial dissolution of a corporation with a demand for provisional relief. The Sixth Cause of Action alleges that the defendants “have failed to manage money correctly, “ ”the stockholders are fighting over waste, misconduct [and] misappropriation of funds” and that “[t]his case constitutes an action for dissolution under BCL Article 11, and the Court has the power to appoint a receiver.” BCL § 1105, “ Contents of petition for judicial dissolution,” provides: “A petition for dissolution shall specify the section or sections of this article under which it is authorized and state the reasons why the corporation should be dissolved. It shall be verified by the petitioner or by one of the petitioners.” In the case at bar, the sixth cause of action is deficient because it fails to specify the section or sections of the BCL under which it is brought and because it does not state in adequate detail why dissolution is sought.

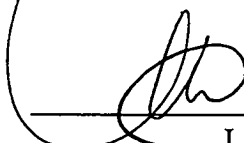
In any event, BCL 1104-a, "Petition for judicial dissolution under special circumstances," provides in relevant part: (a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, \*\*\*\* entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds: (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation" (see, *Twin Bay v. Kasian*, 153 AD3d 998, 1000 [2017]). The plaintiffs do not hold the requisite number of shares, even excluding those shares held by Valhalla, and thus they lack standing to bring the instant action (see, *Twin Bay v. Kasian, supra.*) The Court notes that the petition has not been amended to show that it has been brought by additional shareholders.

**H. The Seventh Cause of Action ( A Special Meeting)**

The Seventh Cause of Action alleges: "Under BCL 603, a special meeting has been demanded by Plaintiffs, and the Defendants have failed and refused to notice and hold such a meeting." BCL 603 "Special meeting for election of directors," provides that under certain circumstances, "holders of ten percent of the votes of the shares entitled to vote in an election of directors may, in writing, demand the call of a special meeting for the election of directors," The plaintiffs do not have standing to assert a cause of action under BCL 603 since they do not hold the requisite number of votes. In any event, the Seventh Cause of Action has been mooted by the election held on January 17, 2019.

Dated:

**FEB 20 2019**

  
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I.S.C.

**FILED**  
**FEB 26 2019**  
**COUNTY CLERK**  
**QUEENS COUNTY**