

<b>Scher v Turin Hous. Dev. Fund Co., Inc.</b>
2019 NY Slip Op 31664(U)
June 11, 2019
Supreme Court, New York County
Docket Number: 155267/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 38EFM

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MARK SCHER,

Plaintiff,

- v -

TURIN HOUSING DEVELOPMENT FUND COMPANY, INC.,  
MERCIE WILLIAMS, MAURINE BERLINGS-MINSKY, RONALD  
MISA, JAMES GOLDSTEIN, EVELYN RIVERA, LINDA  
BURSTION,

Defendant.

INDEX NO. 155267/2018

MOTION DATE 03/07/2019,  
N/A

MOTION SEQ. NO. 002, 004

**DECISION AND ORDER**

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HON. LOUIS L. NOCK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 131, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 157, 158, 159, 160

were read on this motion to/for ORDER MAINTAIN CLASS ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion of plaintiff Mark Scher (“Plaintiff”) for class certification (mot. seq. 002) is denied, and the motion of defendants (“Defendants”) Turin Housing Development Fund Co., Inc. (“Turin”), Mercie Williams, Maureen Berlings-Minsky, Ronald Misa, James Goldstein, Evelyn Rivera, and Linda Burstion for summary judgment (mot. seq. 004) is granted, in accord with the following memorandum.

### Background

Turin is a housing corporation that owns a residential cooperative building located at 609 Columbus Avenue, New York, New York (the “Building”), containing 189 units, consisting of 188 shareholder-owned apartments and one apartment designated for use by its superintendent (amended complaint ¶ 12, answer ¶ 12). Plaintiff is a Turin shareholder and the owner of shares allocated to Apartment 18-J of the Building, and is the lessee of that apartment pursuant to an occupancy agreement with Turin (*id.* ¶ 1). The remaining Defendants are members of the Turin board of directors (the “Board”) (*id.* ¶¶ 3-8.)

Turin was incorporated in 1969 as a not-for-profit housing development fund corporation (“HDFC”) (Scher 10/8/2018 aff, exhibit 2), and, thereafter entered into a forty-year regulatory agreement with the Department of Housing and Urban Development that ended in 2012 (amended complaint ¶ 19, answer ¶ 19). Both before and after the expiration of the original regulatory agreement, there was extensive discussion among the Turin shareholders regarding the possibility of Turin entering into a new regulatory agreement with the New York City Department of Housing and Preservation and Development (“HPD”) (amended complaint ¶ 28, answer ¶ 28). On September 9, 2013, the Turin shareholders voted that the Board would not negotiate a new regulatory agreement with HPD (Bierman 10/9/18 aff, Exs. 7, 8).

In May 2018, the Board held two informational meetings of Turin shareholders regarding, once again, the possibility of a new regulatory agreement with HPD. A shareholder vote on whether the Board should enter into a regulatory agreement was scheduled for June 25, 2018. On June 5, 2018, Plaintiff commenced this action on behalf of himself and other similarly situated Turin shareholders, seeking declaratory and injunctive relief permanently barring Defendants from engaging in further negotiations with HPD or entering into a regulatory

agreement with HPD or any other regulatory agency. Concurrent with commencement of the action, Plaintiff moved this court, by order to show cause, for a temporary restraining order and preliminary injunction enjoining Defendants from engaging in further negotiations with HPD, entering into a regulatory agreement with HPD or any other regulatory agency, and from holding a vote of Turin shareholders related to Turin entering into a regulatory agreement with HPD or any other regulatory agency (NYSCEF Doc. Nos. 2-27).

By order dated June 6, 2018, this court, per Hon. Arlene P. Bluth, declined Plaintiff's request for a temporary restraining order and scheduled the motion for a preliminary injunction to otherwise proceed (NYSCEF Doc. No. 49, Arlene P. Bluth, J.S.C.). On June 25, 2018, the Turin shareholders voted to authorize Turin to enter into a new regulatory agreement with HPD (Williams 9/7/2018 aff ¶¶ 4-5). On July 18, 2018, Plaintiff filed an amended complaint (the "Amended Complaint"), adding causes of action related to the June 25, 2018 vote. Defendants answered on August 7, 2018 (the "Answer").

After extensive briefing and oral argument before Justice Bluth, Plaintiff's motion for a preliminary injunction was denied pursuant to a written order and decision dated September 5, 2018 (NYSCEF Doc. No. 88, Arlene P. Bluth, J.S.C.). Upon determination that Plaintiff had "utterly failed to demonstrate a balancing of the equities in his favor," the court rejected Plaintiff's argument that the 2013 vote had permanently ended the Board's ability to negotiate with HPD and held that "[a] single individual who hopes to sell his shares in an *HDFC* for the maximum amount available in the free market does not justify enjoining the Board from taking action on behalf of nearly 200 units, especially when it appears that the shareholders approve" (*id.*). In reaching this conclusion, the court emphasized Turin's status as an *HDFC*, formed explicitly to "provide opportunities for low-income families to own shares in affordable housing

units . . . facilitate homeownership (usually with regulatory oversight) while keeping living costs low for both current and future shareholders,” and to “guarantee access to affordable housing rather than a way to make millions when the units are sold” (*id.*). Plaintiff appealed the September 5, 2018 Order and moved the Appellate Division, First Department, for a stay or a preliminary appellate injunction, pending appeal, enjoining Turin from entering into a regulatory agreement with HPD or imposing the terms of any such agreement on its shareholders, and enjoining defendants from enforcing or acting on the June 25, 2018 shareholder vote (NYSCEF Doc. No. 168). The Appellate Division, First Department denied Plaintiff’s motion by order dated November 27, 2018 (*id.*).

Plaintiff now moves this court pursuant to CPLR 902, 903, and 904(a) to certify and describe the putative class, dispense with notice to the class, and to appoint Plaintiff as class representative (NYSCEF Doc. Nos. 92-124). Plaintiff seeks to define the class as all Turin shareholders who held shares on January 1, 2018, excluding the Defendants, their family members and representatives (plaintiffs mem in support at 3). Conversely, Defendants move for an order, pursuant to CPLR 3212 and New York Business Corporation Law § 626, for summary judgment dismissing the Amended Complaint. In light of the relief sought, this court will address Defendant’s motion for summary judgment before addressing the motion for class certification.

#### Standard of Review

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853). Upon

proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering a summary judgment motion, evidence should be “viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d at 544 [internal citation omitted]).

### Discussion

Defendants move for summary judgment dismissing the Amended Complaint on the grounds that Plaintiff’s claims, although asserted as class claims, are derivative in nature and Plaintiff did not serve a statutorily required demand on the Board before commencing the action.<sup>1</sup> Defendant opposes, emphasizing that “the Complaint specifically asserts the elements for a class action and that the action is being brought as a class action” (plaintiff’s mem in opp at 12, NYSCEF Doc. No. 205). Defendants also move for dismissal and oppose the motion for class certification on the grounds that Plaintiff is not a proper class representative or derivative plaintiff and cannot adequately represent the interests of the Turin shareholders.

Courts have frequently wrestled with the distinction between derivative and direct claims (*Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]), but it is well established that a shareholder has no individual (direct) cause of action for a wrong perpetrated against a corporation (*Abrams v Donti*, 66 NY2d 951, 953 [1985]). Exceptions to this rule “have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any

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<sup>1</sup> Although the parties raised these issues on the prior motion for a preliminary injunction, they were not addressed in the September 5, 2018 decision, and no motion seeking dismissal was pending before the court at that time. The court made its determination on evaluation of the balance of the equities, but noted that “the other elements for a preliminary injunction are closer questions,” and “plaintiff has not shown a probability of success on the merits or that he will suffer irreparable harm.” (NYSCEF Doc. No. 49)

duty owing to the corporation wronged” (*id.*). Under a framework adopted by the Appellate Division, First Department in *Yudell*, in order to distinguish direct from derivative claims, a court should consider “(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 A.D.3d 34, 40 [1st Dept 2014], citing *Yudell*, 99AD3d at 114). Claims asserted on behalf of a purported class of shareholders are subject to the same inquiry (*Broome v ML Media Opportunity Partners*, 273 AD2d 63, 64 [1st Dept 2000]; *Hart v General Motors Corp.*, 129 AD2d 179, 183 n. 2 [1st Dept 1987]).

The Amended Complaint alleges that Defendants’ purported breaches of fiduciary duty have harmed Turin shareholders by “diminish[ing] the value of the shares in Turin,” (amended complaint ¶ 39), reducing “the value and transferability of shares” (*id.* ¶ 41), and causing shareholders “massive financial losses and dramatic reductions in the value and benefit of their shares” (*id.* ¶ 51) and “damages in amounts equal to the differences between the value of the shares without the sale restrictions imposed by the Board and that will be imposed by any regulatory agreement” (*id.* ¶ 78). In short, Plaintiff alleges that Turin shareholders have been harmed by a depreciation in the value of their shares. Whereas New York courts have repeatedly and consistently affirmed that “the lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder” (*Serino*, 123 AD3d at 41), there can be no doubt that Plaintiff’s claims are derivative (*see also Yudell*, 99 AD3d at 114; *O’Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281-282 [1st Dept 2007]; *Hart*, 129 AD2d at 183 n. 2).

Furthermore, any claims that allege harm resulting from “changes, obligations and restrictions” imposed on Turin by a regulatory agreement with HPD (Bierman 10/9/2018 aff ¶¶

6-7) are also derivative because the harm is alleged to be direct to the corporation and indirect to the shareholders (*Ganzi v Ganzi*, 144 AD3d 510, 511 [1st Dept 2016]). Although the rights of shareholders with respect to the apartments they occupy will no doubt be affected by a regulatory agreement with HPD, the rights of all shareholders are equally impacted and Plaintiff does not allege harm to the proposed class members that is independent from the purported harm to the corporation (*see Serino*, 123 AD3d at 40 [“even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand”]), nor can he demonstrate that the purported class “can prevail without showing an injury to the corporation” (*Yudell*, 99 AD3d at 114). Accordingly, Plaintiff’s claims are derivative in nature.

A complaint that confuses shareholder’s derivative claims with individual claims requires dismissal, although leave to replead may be granted where appropriate (*Abrams v Donti*, 66 NY2d 951, 953 [1985]). In this instance, leave to replead is not warranted because Plaintiff is not a proper class representative or derivative plaintiff due to his waiver, in the federal action captioned *Akagi v Turin Housing Development, Co. Inc.*, 13-cv-5258 (SDNY), of claims asserted in that action and in the related actions pending in the New York State Supreme Court, New York County, captioned *Mark Scher, et al. v. Turin Housing Development Fund Company, Inc.*, Index No. 110620/2006 and *Turin Housing Development Fund Co., Inc. v. Douglas Elliman LLC, et al*, Index No. 653847/2016, and because of his extensive history of litigation and personal animus with Turin and various members of the Board (*Hubshman v 1010 Tenants Corp*, citing *Gilbert v Kalikow*, 272 AD2d 63 [1st Dept 2000]), including the action currently pending in the United States District Court for the Southern District of New York, captioned *Scher, et al. v Turin Housing Development Fund, Company, Inc., et al.*, 19-cv-02089 (SDNY).

Accordingly, it is

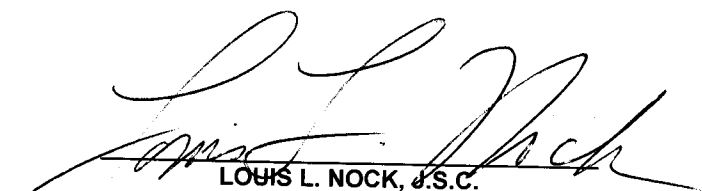
ORDERED that Plaintiff's motion for class certification (mot. seq. 001) is denied; and it is further

ORDERED that Defendant's motion for summary judgment is granted and the Amended Complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER:

6/11/2019  
DATE

  
LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE