

**Cielo Garage Owners Co., LLC v Board of Mgrs. of
the Cielo Condominium**

2019 NY Slip Op 32468(U)

August 20, 2019

Supreme Court, New York County

Docket Number: 651150/2019

Judge: Debra A. James

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publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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CIELO GARAGE OWNERS COMPANY, LLC,

Plaintiff,

INDEX NO. 651150/2019

MOTION DATE 08/20/2019

MOTION SEQ. NO. 001

- v -

BOARD OF MANAGERS OF THE CIELO CONDOMINIUM, SUSAN STROPNICKY, INDIVIDUALLY AND IN HER CAPACITY AS PRESIDENT OF THE BOARD, ARTHUR ASCHER, INDIVIDUALLY AND IN HIS CAPACITY AS BOARD MEMBER, LYNN KEARNEY, INDIVIDUALLY AND IN HER CAPACITY AS SECRETARY OF THE BOARD, PETER KLAUSNER, INDIVIDUALLY AND IN HIS CAPACITY AS BOARD MEMBER, LARRY WEISS, INDIVIDUALLY AND IN HIS CAPACITY AS BOARD MEMBER, and FIRTSERVICE RESIDENTIAL NEW YORK, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss is granted to the extent that the first and sixth causes of action of the complaint are dismissed in their entirety and the second, third, and fourth causes of action of the complaint and the complaint in its entirety are dismissed against the individual defendants only, with costs and disbursements to such defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331, 60 Street, New York, New York, on October 17, 2019, at 9:30 AM.

DECISION

As for the sixth cause of action entitled "Injunction", such fails to state a meritorious claim as such equitable relief is a remedy and not a right and is therefore is meritless as a cause of action. Of course, to the extent that the plaintiff seeks such relief in the wherefor clause of the complaint, in the event plaintiff prevails on a particular cause of action that warrants such relief, such remedy is properly demanded.

A careful and close reading of the allegations of the first cause of action for declaratory judgment demonstrates that plaintiff has an adequate remedy at law, i.e., its cause of action for breach of the Settlement Agreement dated April 2, 2008 and/or of the Contract/By-Laws, the latter of which incorporate by reference the declaratory judgment that was granted in favor of plaintiff in its prior action entitled Cielo Garage Owners Company, LLC v Board of Managers of Cielo Condominium, Index No. 651337/2016 (Bannon, J.). In fact, as plaintiff currently alleges:

Notwithstanding the express provisions of the By-Law as well as Judge Bannon's decision, Defendants refuse to base the calculation of the common charges based on Plaintiff's actual use of the goods and services.

Having an adequate remedy at law, plaintiff's claim for a declaratory judgment cannot stand. Bartley v Walentas, 78 AD2d 310 (1st Dept. 1980).

Plaintiff concedes that with respect to its second and third causes of action for breach of Settlement Agreement and breach of contract, none of the individual defendants are parties to either contract. Plaintiff there does not oppose dismissal of such claims against such individual defendants.

As to the third cause of action for breach of fiduciary duty as to the individual defendants, plaintiff has not alleged that "the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively" (Hersch v One Fifth Avenue Apartment Corp., 163 AD3d 500 [1st Dept. 2018]). Thus, the allegations of the complaint are insufficient in that regard.

However, the claim of breach of fiduciary duty against the board of managers is meritorious, and on this pre-answer motion to dismiss is not refuted by either documentary evidence or the business judgment rule defense. See Perl binder v Board of Managers of 411 Eat 53rd Street Condominium, 65 AD3d 985, 989 (1st Dept. 2009). Likewise, with respect to defendants' contention about the breach of Settlement Agreement and breach of contract causes of action, defendants are not entitled to dismissal pre-joinder of issue. See Perl binder, supra.

Finally, the fifth cause of action interposed only against defendant First Residential is meritorious. "A person knowingly participates in a breach of fiduciary duty only when he or she

provides 'substantial assistance' to the primary violator" (Kaufman v Cohen, 307 AD2d 113, 126 [1st Dept. 2003]), which is precisely what plaintiff alleges in connection with the fifth cause of action of the complaint.

8/20/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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