

Gharai v Board of Mgrs. of the Atelier Condominium
2020 NY Slip Op 30798(U)
March 4, 2020
Supreme Court, New York County
Docket Number: 654306/2019
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

INDEX NO. 654306/2019

LADAN GHARAI, RAYMOND YANG, EUGENIA ELLIOTT

Plaintiff,

MOTION DATE 02/27/2020, 02/27/2020

- v -

MOTION SEQ. NO. 001 002

THE BOARD OF MANAGERS OF THE ATELIER CONDOMINIUM,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 13, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 74

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 71, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

Plaintiffs, unit owners of the Atelier Condominium which is managed by defendant Board of Managers of the Atelier Condominium, bring this action on behalf of themselves and derivatively on behalf of similarly situated unit owners seeking: (1) a declaration that the 2019 Amendment to the Condominium's declaration is void because it violates Real Property Law § 339-v; (2) a declaration that defendant is required to maintain certain books and records regarding the management of the condominium and an injunction directing defendant to provide plaintiffs with access to these books and records; (3) a declaration that the board election held on December 26, 2018 was invalid; and (4) an injunction prohibiting defendant from holding a meeting of unit owners until there is a valid election. Plaintiffs initiated this action by filing a summons with notice on July 28, 2019, and then serving it on defendant via the Secretary of

State on September 30, 2019. On October 18, 2019, defendant served a notice of appearance and demand for complaint pursuant to CPLR 3012. Pursuant to the demand, plaintiffs were required to serve their complaint by November 7, 2019. However, plaintiffs served their complaint late, on November 8, 2019. Defendant now moves pursuant to CPLR 3012 to dismiss plaintiffs' complaint based on the late service of the complaint. Plaintiffs oppose the motion and cross-move to deem the complaint properly served. In addition, plaintiffs move for a preliminary injunction to enjoin defendant from holding any meetings of unit owners until the validity of the 2015 Amendment to the bylaws can be determining and for immediate access to defendant's books and records, including the names of all unit owners.

In considering plaintiffs' application to deem the complaint served under CPLR 3012(d), five factors must be considered: the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any claim. *Emigrant Bank v. Rosabianca*, 156 A.D.3d 468, 472-73 (1st Dep't 2017). Of these five factors, the lack of a potential meritorious claim is the most notable. *Id.* at 474.

In their first cause of action, plaintiffs seek a declaratory judgment that the 2019 Amendment to the condominium's declaration is void because it violates Real Property Law § 339-v, which requires that the terms of at least one third of a condominium's board members expire annually. The sole purpose of the 2019 Amendment to the declaration was to memorialize an amendment to the bylaws which was passed by the board in 2015 but was inadvertently not recorded in the declaration. Affidavit of Ladan Gharai sworn to on December 8, 2019, Exh. 6. The bylaws amendment was passed at a duly noticed annual meeting of the board in 2015. Affidavit of Daniel Neiditch sworn to on December 18, 2019, Exhs. C & D. The unit owners, including the plaintiffs, were then subsequently notified of the amendment's passage by email on

January 4, 2015. Neiditch, Exh. E. In effect, plaintiffs are challenging the bylaws amendment, which was passed in 2015.

Defendant argues that plaintiffs' declaratory judgment claim regarding the bylaws amendment should have been brought via an Article 78 proceeding, which under CPLR 217, has a four month statute of limitations. Although declaratory judgment claims generally get a six year period statute of limitations under CPLR 213(1), if an action for declaratory judgment could have been litigated in a different type of proceeding with a shorter statute of limitations, then that shorter period will apply to the declaratory judgment claim. *See Solnick v. Whalen*, 49 N.Y.2d 224, 229-30 (1980). To determine whether the declaratory judgment claim could have been prosecuted in another form, "the court must examine the substance of the [claim] to identify the relationship out of which the claim arises and the relief sought." *Id.* Only "if no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action will the six year statute of limitations of CPLR 213 be applicable." *Id.*

Here, plaintiffs seek to challenge the board's bylaw amendment which was passed in 2015. Despite their characterization, these type of attacks are considered "challenges to the administrative act of a 'body or officer' that could have been asserted in a CPLR article 78 proceeding and are therefore subject to a four month statute of limitations." *Laker v. Assoc. of Property Owners of Sleepy Hollow Lake, Inc.*, 172 A.D.3d 1660, 1661 (3d Dep't 2019) (challenge to board's adoption of rental policy could be asserted in Article 78 proceeding); *Musey v. 425 E. 86 Apts. Corp.*, 154 A.D.3d 401, 403 (1st Dep't 2017) (challenge to board's enactment of house rules should have been made in an Article 78 proceeding); *Katz v. Third Colony Corp.*, 101 A.D.3d 652, 653 (1st Dep't 2012) (claim challenging the appropriateness of amendments to cooperative's bylaws should have been brought in an Article 78 proceeding).

Thus, plaintiffs' challenge to the 2015 bylaw amendment should have been brought as an article 78 proceeding, and as such, it is time-barred. Further, plaintiffs cannot rely on the inadvertently belated recording of the 2015 bylaw amendment on March 27, 2019 to cure their claim's untimeliness as they were on notice of the bylaw amendment in 2015 and recording delays do not nullify bylaw amendments. *Matter of Reynolds v. Towers on the Park Condo.*, 178 A.D.3d 416, 417 (1st Dep't 2019). Likewise, plaintiffs' challenge to the December 26, 2018 board election is also untimely. *Pomerance v. McGrath*, 124 A.D.3d 481, 484 (1st Dep't 2015). Accordingly, these claims are untimely and therefore lack merit.

In their remaining claims, plaintiffs seek a declaration that they are entitled to certain books and records from the condominium, including the names of other unit owners, and an injunction requiring the board to provide plaintiffs with these documents for inspection. However, plaintiffs have failed to show that they have previously demanded these documents from the board. The only request that was made was by letter dated March 25, 2019, from plaintiffs' attorneys, stating that they represent another law firm which represents certain unidentified unit owners at the condominium. Affirmation of Andrew D. Stern dated December 12, 2019, Exh. 7. No proof of ownership nor even an identification of who these unit owners were was provided to defendant, and as such, the request was rejected. Stern Aff., Exh. 8. Since plaintiffs failed to properly demand these records, their claim for a declaratory judgment and an injunction is premature to the extent they seek access to records under Real Property Law § 339-w. To the extent plaintiffs' claim for books and records is premised under Bus. Corp. L. § 624 or under the common law, the claim fails based on plaintiffs' failure to allege demand futility. *See Trump v. Chen*, 63 A.D.3d 623, 623-24 (1st Dep't 2009). Thus, these claims also lack merit. Accordingly, it is

ORDERED that defendant's motion to dismiss this action for failure to serve a complaint is granted and plaintiffs' cross-motion to deem their complaint served is denied; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction is denied as moot.

3/4/20
DATE

[Signature]
PAUL A. GOETZ, J.S.C.

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