

**Barbiere v 175 W. 12th St. Condominium**

2020 NY Slip Op 31804(U)

June 10, 2020

Supreme Court, New York County

Docket Number: 653461/2019

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14
Justice
INDEX NO. 653461/2019
MOTION DATE N/A
MOTION SEQ. NO. 002

JANET A. BARBIERE, ELLIOTT M. KROLL,
Plaintiff,

- v -

175 WEST 12TH STREET CONDOMINIUM, CRAIG RAIA,
ARLINE RUBIN, PETER BONNEY, SARAH MURRAY,
ADELE BILDERSEE, DAVID ALANI, WILLIAM WEST,
JONATHAN WEST, MARK PERLBINDER, MARK
FREYBERG, THE FREYBERG LAW GROUP, CHARLES H.
GREENTHAL MANAGEMENT

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27,
28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48
were read on this motion to/for DISMISS/ CROSS-MOTION FOR DISCOVERY .

The motion to dismiss the amended complaint by defendants is denied and the cross-
motion by plaintiffs for discovery is denied.

Background

Plaintiffs bring this case against the condo board for the building in which they live, the
individual board members, the attorney for the condo, his law firm, and the management
company. They claim that they bought two apartments in the building, 18CD and 18B, with the
intention to combine these units into one apartment. Plaintiffs assert numerous problems with
certain actions (and inactions) taken by the condo board, including but not limited to issues with
the renovation of their apartments, delays in construction, new windows, a grill and a fire pit.
Plaintiffs contend that defendants acted in bad faith to deprive all unit owners and plaintiffs of
their rights under the bylaws and violated their fiduciary duties. They complain defendants have

not been transparent about other issues including the maintenance of the building's brick façade and cavity wall and have taken advantage of the fact that about 60 percent of the occupants are renters.

They bring fourteen causes of action against defendants for breach of contract (alteration agreement), negligence, breach of contract, declaratory judgment (liquidated damages), declaratory judgment (gas grill), declaratory and injunctive relief (board elections), injunctive relief declaring the 2019 election of board members null and void, breach of covenant of good faith and fair dealing, breach of fiduciary duty, promissory estoppel, negligent misrepresentation, constructive fraud, inducement to breach of fiduciary duty against Freyberg, aiding and abetting the breach of fiduciary duty against Freyberg, and an accounting.

#### **Defendants' Motion**

Defendants move to dismiss the claims against the individual defendants, including the board members, Freyberg, his law firm and the management group as well as dismissal of the second, fourth, fifth, sixth, seventh, eighth, ninth, tenth eleventh, twelfth and thirteenth causes of action, as well as portions of the third cause of action against the Condo. They seek dismissal of the breach of fiduciary duty claims against the individual board members and Greenthal. They also seek dismissal of "the other claims against the individual board members and Greenthal."

In opposition, plaintiffs point out (footnote 1) that defendants' moving papers did not cite a single reported case to support the contention that the motion should be granted (NYSCEF Doc. No. 34, n1). About an hour after plaintiffs filed their cross-motion and opposition, defendants filed the memorandum of law in support of the motion (NYSCEF Doc. No. 37). Plaintiffs subsequently filed a notice of rejection (NYSCEF Doc. No. 45).

While this Court ordinarily is not interested in deciding motions on technicalities, plaintiffs are correct that defendants' notice of motion was not accompanied by a memo of law and defendants filed this memo of law only after plaintiffs pointed it out in opposition. It would not be fair for the Court to consider that memo of law when making this decision. And, clearly, the affirmation that was timely filed is insufficient to support the motion to dismiss; it only contains conclusory assertions. The Court has no choice but to deny the motion.

### **Cross-Motion**

The Court denies plaintiffs' cross-motion for the names and addresses of all unit owners. In this part, motions seeking discovery cannot be made until after a preliminary conference has been held and, here, no preliminary conference has occurred. While the Court recognizes that this cross-motion was filed when the matter was before a different judge, the fact is that this part sees no reason to rule on a discovery issue before a discovery schedule (the PC order) has been entered into and without any indication that a formal discovery demand was sent to defendants.

Simply because plaintiffs sought this information prior to the commencement of this litigation does not eliminate plaintiffs' obligation to request discovery through the normal process. A demand would allow defendants to respond (and potentially turn information over) and then, if a dispute remained, the Court could resolve the issue via a conference or motion practice. Plaintiffs cannot circumvent this procedure by making a motion before a dispute arises and even before issue is joined.

Moreover, as defendants point out, the notice of cross-motion does not specify what relief is sought. It seeks "an Order (i) denying Defendants' Motion to Dismiss in its entirety; (ii) granting Plaintiffs' Cross-Motion; and (iii) for such other and further relief as this Court may

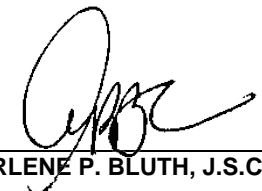
deem just and proper” (NYSCEF Doc. No. 33). That does not satisfy CPLR 2214(a), which requires a notice of motion to state “the relief demanded and the grounds therefor.” Although defendants contend that plaintiffs have requested injunctive relief, the Court does not interpret plaintiffs’ requested relief as anything other than a discovery motion.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied and defendants are directed to answer pursuant to the CPLR and the cross-motion by plaintiffs for discovery is denied.

Conference: September 15, 2020 at 10 a.m. The parties are directed to check the docket and part rules to determine whether the conference will take place virtually. They are also encouraged to e-file a preliminary conference order signed by all parties for the Court’s approval at any time prior to the next conference.

06/10/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

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